

COMMENTS COMMENTAIRES

CONSTITUTIONAL LAW—JUVENILE DELINQUENTS ACT CHARACTERIZED AS CRIMINAL LAW LEGISLATION.—The Juvenile Delinquents Act¹ was passed by Parliament in 1908. It has long been assumed that the Act could be supported constitutionally as a valid exercise of the criminal law power, under section 91(27) of the British North America Act.² This assumption was recently challenged in argument before the Supreme Court of Canada in *Attorney-General of British Columbia v. Smith*.³ In the result the highest court has upheld the Act in respect of an important phase of its application.

The *Smith* case arose out of a conviction in Magistrate's Court for driving a motor vehicle at a greater speed than the prescribed limit, an offence under the Motor Vehicle Act of British Columbia.⁴ The respondent Smith, at the time of the offence, was sixteen years of age, a fact that was made known to the presiding Magistrate. The respondent was tried in the usual way pursuant to the provincial Summary Convictions Act.⁵ In the result a conviction and fine in the sum of \$400.00 were entered. The respondent then applied to the Supreme Court of British Columbia for a writ of certiorari to quash the conviction on the ground that the Magistrate had exceeded his jurisdiction in failing to deal with the case in accordance with the federal Juvenile Delinquents Act. And the Attorney General of British Columbia, in response to the motion, called in question the constitutionality of the latter Act.

In the Province of British Columbia the expression "child" in the Juvenile Delinquents Act embraces, "any boy or girl apparently or actually under the age of 18 years".⁶ And the Act

¹ S. C., 1907-8, c. 40, and now R.S.C., 1952, c. 160.

² 1867, 30 & 31 Vict., c. 3, as am.

³ (1968), 65 D.L.R. (2d) 82, (1968), 61 W.W.R. 236.

⁴ R.S.B.C., 1960, c. 253, s. 140.

⁵ R.S.B.C., 1960, c. 373.

⁶ See the proclamation of the Governor in Council in (1950), 84 Canada Gazette (part I), 703 made pursuant to s. 2 (2)(a) of the Juvenile Delinquents Act, *supra*, footnote 1. The prescribed limit in Manitoba and Quebec is the same as in British Columbia, in Alberta it is under eighteen for girls and under sixteen for boys and in the other provinces, except

defines "juvenile delinquent" to mean:⁷

. . . any child who violates any provision of the *Criminal Code* or of any Dominion or provincial statute, or of any by-law or ordinance of any municipality, or who is guilty of sexual immorality or any similar form of vice, or who is liable by reason of any other act to be committed to an industrial school or juvenile reformatory under the provisions of any Dominion or provincial statute;

The commission of any of the acts enumerated in this definition is constituted an offence known as a delinquency by section 3(1) of the Act. That same section provides that a delinquency shall be dealt with in accordance with the provisions of the Act, which prescribe such matters as pre-trial treatment, rules governing the conduct of the trial, forms of penalties that may be imposed and permitted appeals. In cases of delinquency, section 4 gives the Juvenile Court exclusive jurisdiction. In a limited class of case section 39 provides the option to deal with a juvenile under the terms of provincial legislation. However, in the *Smith* case this alternative was held to be available only in respect of juveniles whose questioned actions come within the terms of provincial legislation "intended for the protection or benefit of children", a description which clearly did not fit the British Columbia Motor Vehicle Act.

On the application for a writ of certiorari, the trial judge ordered the writ to issue and quashed Smith's conviction. This judgment was sustained in a three to two decision of the Court of Appeal.⁸

Before the Supreme Court the appellant challenged the constitutional validity of the Juvenile Delinquents Act to the extent that it brings within its scope children who have violated, "any provincial statute, or . . . any by-law or ordinance of any municipality".⁹

The appellant, with the support of the Attorneys General for Ontario and Quebec as intervenants, maintained that the Act as

Newfoundland where the Act is not in force, the limit is under sixteen (*Vide Juvenile Delinquency in Canada* (1965), being a report of the Department of Justice Committee on Juvenile Delinquency, p. 54).

⁷ S. 2(1)(h), *supra*, footnote 1.

⁸ (1966), 53 D.L.R. (2d) 713, (1966), 53 W.W.R. 129, and see an excellent note on this decision in Laskin, *Canadian Constitutional Law* (3rd ed., 1966), pp. 855-858.

⁹ *Supra*, footnote 1. See s. 2(1)(h), set out in full above. The Act also includes within the definition of "juvenile delinquent", "any child . . . who is guilty of sexual immorality or any similar form of vice". These applications, though not directly questioned in the *Smith* case, provide some support for the welfare argument that was also advanced by the appellant and which is considered below.

applied to the above categories of violators exceeds the jurisdiction of Parliament in that, in its true nature and character, it relates to matters exclusively within the jurisdiction of the Provinces, namely the imposition of penalties for the enforcing of provincial laws¹⁰ and the protection and welfare of children.¹¹ The respondent, and the Attorney General of Canada as an intervenant, argued that the Juvenile Delinquents Act is in essence criminal law legislation and accordingly can be sustained as a valid federal enactment under the criminal law power.¹²

Mr. Justice Fauteux, in a unanimous judgment of a seven man court, held the federal Act to be *intra vires* in the challenged portions and in so doing focused particularly on the end, purpose or object which the Act is designed to secure. He found evidence of an essentially criminal law objective in the main operative provisions of the Act, in the original preamble and the general interpretation section.¹³

In summing up the scope of the Act, his Lordship concluded that, "the Act deals with 'juvenile delinquency' in its relation to crime and crime prevention, a human, social and living problem of public interest, in the constituent elements, alleviation and solution of which jurisdictional distinctions of constitutional order are obviously and genuinely deemed by Parliament to be of no moment".¹⁴

This is indeed a surprising statement. It suggests that Parliament was entitled to ignore the distribution under the British North America Act of classes of legislative competence between itself and the provincial legislatures because of the character of the problem dealt with. But this would be destructive of the most basic of principles in our system of government—that legislative supremacy is subordinated to the limitations of an over-riding constitutional document which embodies a federative division of legislative powers. It is suggested, therefore, that the statement must be taken to mean, albeit with a good deal of interpolation, that the problem of juvenile delinquency as dealt with in the federal Act, because of its important and far-reaching implica-

¹⁰ S. 92(15) of the British North America Act, *supra*, footnote 2.

¹¹ Attributed by the courts, as the subject of legislation, to heads 13, 14 and 16 of s. 92 of the British North America Act, *ibid.*, and *Reference re Authority to Perform Functions Vested by the Adoption Act, the Children's Protection Act, the Children of Unmarried Parents Act, the Deserted Wives and Children's Maintenance Act of Ontario*, [1938] S.C.R. 398, [1938] 3 D.L.R. 497 (*Reference re Adoption Act*).

¹² S. 91(27) of the British North America Act, *ibid.*

¹³ S. 38, *supra*, footnote 1.

¹⁴ *Supra*, footnote 3, at pp. 88 (D.L.R.), 242 (W.W.R.).

tions, may properly be given a constitutional value such that it may be characterized as a whole as criminal law though, if various particular elements of the problem were evaluated, these might be considered as falling within provincial heads of jurisdiction. However, even this interpretation cannot be taken very far in the light of long-standing authorities, particularly involving the federal trade and commerce power, which indicate that the practical necessities or inherent logic of a comprehensive base of regulation cannot be taken to enlarge an otherwise limited scope of federal competence.¹⁵

What the Supreme Court judgment fails to do is to give much attention to the subject matter of the Juvenile Delinquents Act as distinct from its object or purpose, so far as these features may be separated. That the latter are not controlling in constitutional assessment is readily apparent from a number of cases holding particular legislation *ultra vires*, but at the same time admitting that the same object, in whole or in part, could be achieved without constitutional impediment through legislation differently framed.¹⁶

What then can be said of the subject matter of the legislation? The cases indicate that resort to the criminal law power is not limited in relation to any supposed class of inherently criminal matters.¹⁷ However it is surely to be expected that, to be constitutionally valid as criminal law, legislation ought, at the least, to manifest an avowal, either explicit or implicit, of an exercise of the criminal law power. The Juvenile Delinquents Act contains language which appears rather to disavow an intention to deal with the subject matter of the Act from a criminal law point of view. Section 3 of the Act, for instance, provides that while a child may be guilty of an offence known as a "delinquency", he is to be treated, "not as an offender, but as one in a condition of delinquency and therefore as one requiring help and guidance and proper supervision". A large part of the Act is concerned with providing in detail for that treatment. And section 38, which the

¹⁵ Consider, for example, *The King v. Eastern Terminal Elevator Co.*, [1925] S.C.R. 434, [1925] 3 D.L.R. 1, especially the judgment of Duff J.

¹⁶ For example, *A.-G. for Ont. v. Reciprocal Insurers*, [1924] A.C. 328, [1924] 1 D.L.R. 789, [1924] 2 W.W.R. 397; *In re Insurance Act of Canada*, [1932] A.C. 41, [1932] 1 D.L.R. 97, [1931] 3 W.W.R. 689; *The King v. Eastern Terminal Elevator Co.*, *ibid.* And compare *P.E.I. Potato Marketing Board v. H. B. Willis, Inc.*, [1952] 2 S.C.R. 392, [1952] 4 D.L.R. 146, with the earlier case of *A.-G. of N.S. v. A.-G. of Can.*, [1951] S.C.R. 31, [1950] 4 D.L.R. 369.

¹⁷ *Proprietary Articles Trade Association v. A.-G. for Can.*, [1931] A.C. 310, at p. 324, [1931] 2 D.L.R. 1, at p. 9, [1931] 1 W.W.R. 552, at p. 560.

Supreme Court relied on as indicative of a criminal law objective, directs that the Act is to be liberally construed and:

. . . so far as practicable every juvenile delinquent shall be treated, not as *criminal*, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance.¹⁸

These declarations are all the more telling when one is considering, as in the *Smith* case, the constitutionality of the Act insofar as its application depends on violations of provincially defined offences which, apart from the Juvenile Delinquents Act, are certainly not of the character of criminal law as that expression is commonly understood.

When one looks for implicit indications in the legislation that it purports to be in relation to criminal law the search is equally in vain. Admittedly criminal law in section 91(27) of the British North America Act is not confined to what was criminal by the law of England or the original Provinces in 1867.¹⁹ Yet, in the absence of clear language indicating the creation of new crimes and criminal procedures, the presence or absence of the traditional characteristics would seem to be a relevant consideration to determine whether the legislation in question may be justified under the criminal law power. In the present case a number of features of the Act indicate that it does not readily fit into accepted conceptions of the criminal law. In the first place the Juvenile Delinquents Act is not a law of general application in terms of territorial operation,²⁰ acts or conduct prescribed²¹ or categories of persons dealt with.²² While one may agree with the Supreme Court that uniformity in criminal law is not, *per se*, a dependable test of con-

¹⁸ *Supra*, footnote 1. Emphasis added.

¹⁹ *Proprietary Articles Trade Association v. A.-G. for Canada*, *supra*, footnote 17, at pp. 324 (A.C.), 9 (D.L.R.), 560 (W.W.R.).

²⁰ While some minor subsections of the Act apply throughout Canada (see s. 41), the bulk of the Act will only come into force by proclamation, which may introduce the provisions of the Act in a local area, a portion of a province or the whole of a province (see ss 42-43). In Newfoundland in fact the Act has no application and the field is covered by part II of the Welfare of Children Act, R.S.N., 1952, c. 60, which is one of the Acts continued in force by the terms of union of that Province with Canada (see art. 18 (1) of the schedule to the British North America Act, 1949, 12-13 Geo. VI, c. 22 (U.K.)).

²¹ See ss 3(1) and 2(1)(h). Because of the inevitable differences in provincial statutes and municipal by-laws in force from place to place in the areas in which the federal Act has been applied, the conduct brought within the Act will vary considerably between municipalities and provinces.

²² See s. 2. The maximum age of the offenders to which the Act applies in fact varies significantly from province to province, see *supra*, footnote 6.

stitutionality,²³ yet when considered with other features of questioned legislation it would seem to be some indication that an Act, not patently dealing with criminal law, is not in fact inherently criminal law. The other features of the Juvenile Delinquents Act that may be catalogued in support of the proposition that it departs in substance from conventional criminal law include the fact that delinquency was not a crime known to the common law but rather a child under seven was conclusively presumed to be incapable of committing a crime,²⁴ and a child of seven years or more and under fourteen years of age was presumed not competent to know the nature and consequences of his conduct and to appreciate that it was wrong and accordingly was not to be convicted of a crime unless the presumption was rebutted.²⁵

Also the ingredient of *meas rea* and the presence of moral turpitude are elements of traditional crime, but are not characteristic of a number of provincial and by-law violations that are within the scope of the Juvenile Delinquents Act. These elements are of course absent in regulatory offences which clearly may be the subject of valid criminal law legislation.²⁶ Once again this criterion of criminal law is not suggested as definitive, but it may be argued that if the criterion is not satisfied by a particular statute it is of persuasive value, in combination with other features, in establishing the character of the statute as other than criminal law.

The power to legislate for the prevention of crime is included within section 91(27) of the British North America Act.²⁷ And the end which the Juvenile Delinquents Act has in view might be so characterized. However, a significant proportion of the conduct caught by the challenged part of the federal Act is but remotely connected with criminal conduct. An isolated jay-walking offence by a juvenile, for example, is not likely to be symptomatic of anti-social behaviour that could lead to a life of crime. In short the net is cast rather more broadly than necessary. Whether this "over-kill" is permissible depends as well on the competing claims of provincial heads of power as on the limits of the criminal law power, both being, however, related questions.

²³ *Supra*, footnote 3, at pp. 89 (D.L.R.), 243 (W.W.R.).

²⁴ *Marsh v. Loader* (1863), 143 E.R. 555. This rule is now embodied in the Criminal Code, S. C., 1953-54, c. 51, s. 12.

²⁵ See *Acadia Coal Co. v. McNeil*, [1927] S.C.R. 497, [1927] 3 D.L.R. 871. This rule is now embodied in s. 13 of the Criminal Code, *ibid*.

²⁶ See *Standard Sausage Co. v. Lee*, [1934] 1 D.L.R. 706, [1934] 1 W.W.R. 81 (B.C.C.A.).

²⁷ *Goodyear Tire and Rubber Co. of Can. Ltd. v. The Queen*, [1956] S.C.R. 303, (1956), 2 D.L.R. (2d) 11.

At the other end of the constitutional spectrum from prevention of crime is welfare, which as a subject of legislation is committed to the Provinces by the combined operation of heads 13, 14 and 16 of section 92 of the British North America Act.²⁸ The distinction between the two matters of legislative concern is seen to be a very fine one when it is recalled that provincial legislation may relate to, "controlling social conditions that have a tendency to encourage vice or crime".²⁹ In the present case the Supreme Court concluded that the Juvenile Delinquents Act, as challenged, was not in relation to the welfare and protection of children but in relation to criminal law.³⁰ One might well question this assessment on the ground that the causal relationship of certain of the prescribed types of conduct to legitimate criminal law objectives is very tenuous, and the relationship to matters of welfare concern more apparent.

A stronger argument that the Juvenile Delinquents Act does not fall within the criminal law power is based on section 92(15) of the British North America Act which gives the Provinces authority to provide for the imposition of punishment by fine, penalty or imprisonment for enforcing any of their otherwise valid laws. The basis of the objection to the Juvenile Delinquents Act founded on this head relates to the inclusion, within the acts constituting a delinquency, of violations of provincial and municipal laws and the concurrent preclusion of the operation of the provincially prescribed penalties³¹ where the violator is a juvenile.

There is perhaps a tendency to minimize the importance of section 92 (15) as a head of legislative power. It does not provide an independent source of validity of particular provincial legislation as the latter must be justified apart from the inclusion within it of sanctions of the type mentioned in section 92 (15). Resort must be had additionally to some other provincial head (or heads) as a source of legislative competence. However, viewed as a necessary limitation on the criminal law power it would seem that section 92 (15) should have an independent operation so as to exclude from the scope of section 91 (27) imposition by Parliament of punishment by fine, penalty of imprisonment as a consequence of the violation of provincially prescribed norms of conduct. It would be a different situation, and one that we do not have in the

²⁸ *Reference re Adoption Act*, *supra*, footnote 11.

²⁹ *Ibid.*, at p. 403 (S.C.R.).

³⁰ *Supra*, footnote 3, at pp. 90 (D.L.R.), 244-245 (W.W.R.).

³¹ Subject to s. 39.

present case, if Parliament re-defined those norms for its own legitimate purposes and established penalties for violation.

Does it matter then that the Juvenile Delinquents Act only provides substitutes for provincially defined penalties in a limited class of case, that is where the violator is a "child", as that term is defined under the federal Act? It would seem not since the substitution in important individual instances may be complete and not simply partial. Consider, for example, a provincial enactment which creates an offence, an element of which is that the offender is, in age, less than or equal to the maximum age of a "child" under the Juvenile Delinquents Act. Such a provision is section 18 (1) of the Ontario Highway Traffic Act³² which provides that, "no person under the age of sixteen years shall drive or operate a motor vehicle or farm tractor on a highway". The penalties, consisting of fines, are set out in sub-section 4 of the same section. To the extent that the Juvenile Delinquents Act purports to incorporate violations of this section, the provincial penalty provisions can have no operation whatsoever.

It is suggested, therefore, that the criminal law power cannot be used to justify the prescription of special penalties for the violation of provincial or municipal laws by juveniles. That the offences when brought under the federal Act are given a new label, that of delinquency, surely does not assist the argument for the validity of the challenged portions of the Act. The prescribed conduct remains in fact that set out in the provincial or municipal provisions.

Finally an alternative argument, not apparently advanced in any of the courts in this case, may be made that the Juvenile Delinquents Act, in incorporating as delinquencies offences by juveniles under provincial or municipal laws in force from time to time, constitutes an unconstitutional delegation of legislative authority. The particular variety of delegation which this legislation involves may be more aptly described as referential incorporation, a legislative device that is normally unobjectionable from a constitutional standpoint.³³

However, in the present case the incorporation does not appear to be confined to provincial or municipal provisions in force at a specific date preceding or at the date of the most recent enact-

³² R.S.O., 1960, c. 172.

³³ See *Re Brinklow*, [1953] O.W.N. 325, at p. 326. (An appeal from this decision was allowed by the Court of Appeal but without reference to this point, see [1953] O.W.N. 325 at p. 327) and *Regina v. Glibbery*, [1963] 1 O.R. 232, 36 D.L.R. (2d) 548 (C.A.). And see Laskin, *op. cit.*, footnote 8, pp. 39-41.

ment of the Juvenile Delinquents Act. Rather the referential incorporation is of an ambulatory variety, a fact which of itself would not seem to give rise to any constitutional objection.³⁴ But in the particular instance of the Juvenile Delinquents Act the situation is complicated by the fact that the referential incorporation has the effect of bringing into play at the same time the doctrine of paramountcy (that is of the federal provisions). Accordingly, depending on what view one takes of the effect of the operation of the doctrine on provincial legislation, the provincial and municipal provisions are simply temporarily overborne³⁵ or provincial competence in relation to the matters dealt with in the federal legislation is suspended.³⁶

If one adopts the latter proposition then in the present case any amendments or additions to provincial and municipal provisions, after initial incorporation, so far as they purport to apply to juveniles will be without a base in any persisting provincial legislative competence.³⁷ The Juvenile Delinquents Act must be taken to have occupied that field.

Amendments or new provisions at the provincial level, to the extent that the federal Act purports to incorporate them, would therefore appear to have no independent legal validity. And it is suggested that this is a condition to the validity of an ambulatory referential incorporation.³⁸ There is an analogy to certain principles of the law relating to wills that is apposite.³⁹ A testator cannot by his will incorporate the terms of a future document which is unattested, and therefore not of independent legal validity.⁴⁰ But a subsequent instrument of a testamentary character, and hence possessing independent legal validity, may be read with an earlier testamentary instrument so that the two instruments are given force as the will of the testator so far as they are not inconsistent.⁴¹

³⁴ *Regina v. Glibbery*, *ibid.*, at pp. 236 (O.R.), 552 (D.L.R.).

³⁵ *G.T.R. v. A.-G. of Can.*, [1907] A.C. 65, at p. 68.

³⁶ *Prov. Sec'y of P.E.I. v. Egan*, [1941] S.C.R. 396, at p. 402, [1941] 3 D.L.R. 305, at p. 309.

³⁷ Except in the case of provincial legislation for the protection or benefit of children, the continuing validity of which is preserved by s. 39 of the Juvenile Delinquents Act, *supra*, footnote 1.

³⁸ See *Regina v. Glibbery*, *supra*, footnote 33, at p. 236 (O.R.) where McGillivray J.A. notes that the power sought to be delegated in that case was of a type in relation to which the province was independently competent, unlike the situation considered in *A.-G. of N.S. v. A.-G. of Can.*, *supra*, footnote 16.

³⁹ The writer is indebted to Professor Paul Freund for suggesting this analogy.

⁴⁰ *In the Goods of Smart*, [1902] P. 238.

⁴¹ *Lemage v. Goodban* (1865), L.R. 1 P. & D. 57.

The objection to the kind of incorporating legislation which the Juvenile Delinquents Act represents is particularly apparent when one considers its application in relation to amendments to a provincial statute creating an offence, an ingredient of which is the minority of the actor. Such an amendment, so long as the age limit is not raised above that of a juvenile under the federal Act, can have no real independent legal validity as a piece of provincial legislation.

The referential incorporation in the Juvenile Delinquents Act is, on the above view, unconstitutional to the extent that it is ambulatory. It involves an attempt to incorporate provincial legislative changes in matters in respect of which the Provinces have lost their competence by the very enactment of the incorporating legislation. As mentioned earlier, this position depends on a particular view of the effect of the operation of the doctrine of paramountcy, a view which has not been by any means universally accepted.

In conclusion, it may be said that there are some very compelling reasons to support the provincial position in the *Smith* case. In the light of the recent federal proposals and provincial counter-proposals for changes in the Juvenile Delinquents Act, to be re-styled the "Children and Young Persons Act", it may be that the rationale of the Supreme Court decision in the *Smith* case will no longer be directly applicable as support for federal delinquency legislation. The judgment's lasting legacy will, no doubt, derive from the broad scope that is given to the federal criminal law power. It is to be hoped, however, that the decision will not preclude subsequent consideration of the problem raised by the concurrent operation of the paramountcy doctrine and referential incorporation which is raised by the *Smith* case, but was not explored in the judgment.

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ADMINISTRATIVE LAW—EVIDENCE—DISCOVERY AGAINST THE CROWN—CROWN PRIVILEGE—JUDICIAL REFORM IN THE HOUSE OF LORDS.—For the past twenty-five years the area of Crown privilege has been dominated by the judgment of Viscount Simon L.C. in *Duncan v. Cammell, Laird and Co. Ltd.*¹ As a result of that case it has been possible for a Minister in charge of a government department successfully to prevent disclosure of documents

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¹ [1942] A.C. 624.

in a civil proceeding if either the contents of documents or the class to which documents belong are such that it would be contrary to the public interest that they be produced in evidence. The recent House of Lords decision in *Conway v. Rimmer*² has made a substantial change in this position, at least as far as the law of England is concerned.

It is proposed here to outline the brief history of Crown privilege in Canada, to discover in what ways, if any, the Canadian practice has differed from the English and to suggest that the decision in *Conway v. Rimmer*³ should be followed in Canada.

No difficulty has been provided by claims of Crown privilege on the grounds that their *contents* are such that it would be against the public interest to produce them. In *Duncan v. Cammell, Laird and Co. Ltd.*⁴ itself the claim related to plans for the design of parts of a submarine. Clearly, in 1942, in wartime, the national security might have been endangered by production of such documents. The problems created by the *Cammell, Laird and Co. Ltd.*⁵ case result from Viscount Simon's discussion of the protection afforded *classes* of documents by a claim of Crown privilege. The courts, he said, would uphold a claim of Crown privilege by a Minister on grounds of public policy if objection to production was taken in proper form. The requirement of proper form would be satisfied if by affidavit (before trial) or by certificate (at the hearing), the Minister affirmed that he had personally seen and considered the documents and that in his opinion their production would be contrary to the public interest. Once the objection had been taken in proper form the court would regard it as conclusive.

In *Murray v. Murray*,⁶ a divorce action, the petitioner wished to have produced records relating to the respondent's treatment for venereal disease. To this end she subpoenaed the officer in charge of keeping such records. The Minister of Health, by affidavit, objected to the production of these records or to the giving of oral evidence relating to them. Such production would be contrary to the public interest. "It is my conviction and belief that if the production of records kept under the Venereal Disease Suppression Act⁷ were required to be made upon subpoena in civil cases that the programme of any department would be gravely hampered and further, that the free flow of information to any said department would be impeded because patients would be less likely to seek assistance from the department and would be less likely to

² [1968] 1 All E.R. 874.

³ *Ibid.*

⁴ *Supra*, footnote 1.

⁵ *Ibid.* ⁶ [1947] 3 D.L.R. 236.

⁷ R.S.B.C., 1936, c. 300.

give confidential information. Any interference with the free flow of information to the department would be injurious to the public welfare and interest."⁸ Wilson J. of the British Columbia Supreme Court accepted this objection as conclusive and felt bound to follow *Duncan v. Cammell, Laird and Co. Ltd.*⁹

In *Weber v. Pawlik*¹⁰ the then Minister of National Revenue, who was not a party to the proceedings, objected to the production of various income tax returns or to the giving of oral evidence as to their contents by a tax officer. The objection was upheld by a majority of the Court of Appeal of British Columbia, with Robertson and Sidney Smith J.A. relying heavily on *Duncan v. Cammell, Laird and Co. Ltd.*¹¹ Sidney Smith J.A. said that *Duncan v. Cammell, Laird and Co. Ltd.* was "a case like the present . . . I think this case should be followed by us here".¹²

Another claim to privilege by the Minister of National Revenue was upheld by the Ontario High Court in *Clemens v. Crown Trust Co.*¹³ The statement of support here for *Duncan v. Cammell, Laird and Co. Ltd.*¹⁴ was stronger than that in *Weber v. Pawlik*.¹⁵ Judson J. expressed himself thus:¹⁶

Duncan v. Cammell, Laird, [1942] A.C. 624 decides this point. The objection of the Minister, on grounds of public policy, to the production of documents is conclusive, and I must give effect to it. I rule in the same way as to any oral evidence about the contents of the documents. The plaintiff cannot compel production of his own income tax returns.

It is submitted that *Weber v. Pawlik*,¹⁷ which was followed in the *Clemens*¹⁸ case was not similar to *Duncan v. Cammell, Laird and Co. Ltd.*¹⁹ In the latter the public interest to be protected was the national security. Production of the documents was not ordered because disclosure of their *contents* would have infringed that interest. Considerations which apply to matters involving the national security are quite different from those involving the proper functioning of the public service, and the national security should in every case be a good ground for privilege.

From this brief study of the Canadian cases before 1954 it is clear that the Canadian courts had upheld claims of privilege in situations entirely unlike that of *Duncan v. Cammell, Laird and*

⁸ *Supra*, footnote 6, at p. 237.

⁹ *Supra*, footnote 1.

¹⁰ [1952] 2 D.L.R. 750, [1952] 5 W.W.R. 49. ¹¹ *Supra*, footnote 1.

¹² *Supra*, footnote 10, at p. 767 (D.L.R.). ¹³ [1952] 3 D.L.R. 508.

¹⁴ *Supra*, footnote 1.

¹⁵ *Supra*, footnote 10.

¹⁶ *Supra*, footnote 13, at p. 509.

¹⁷ *Supra*, footnote 10.

¹⁸ *Supra*, footnote 13.

¹⁹ *Supra*, footnote 1.

*Co. Ltd.*²⁰ but nonetheless had run parallel to the development of the English courts in treating a Minister's objection in proper form as final.

*R. v. Snider*²¹ was decided in the Supreme Court of Canada in 1954. In that case objection was taken by the Minister of National Revenue to the production of income tax returns in a criminal prosecution. The Supreme Court held that production of these documents could be ordered by the court in spite of the Minister's objection. The claim of the Minister was inapplicable to criminal proceedings. However, in view of the general statements made in many of the judgments it was thought that *R. v. Snider*²² substantially altered the law of Crown privilege in civil proceedings. In the *Canadian Bar Review* one writer²³ expressed the hope that *R. v. Snider*²⁴ was "likely to confine within narrower limits than hitherto the power of government departments in Canada to refuse, on the ground of prejudice to the public interest, to allow documents filed with them to be put in evidence in legal proceedings".

The view taken (presumably a view shared by many) was that *R. v. Snider*²⁵ was a step in the right direction. But in the light of subsequent cases it is questionable whether it was anything more than a small step.

In *Reese v. R.*²⁶ the suppliants, who were soldier settlers, sought production of various documents which were in the possession of government officials and departments. These documents related to their claims to certain lands in Alberta. They sought also the production of correspondence between the Commissioner of the Soldier Settlement Board and the Deputy Superintendent General of Indian Affairs. Crown privilege was claimed for those documents.

In a thorough judgment, Cameron J. in the Exchequer Court, decided that all the documents in question belonged to a class, that is interdepartmental memoranda or interdepartmental correspondence, which ought not to be produced in the public interest. The way this decision was arrived at is interesting because of the interpretation given to *R. v. Snider*.²⁷ Thus the learned judge held that the duty of the court was to weigh the public interest in preventing the disclosure of documents against the interests of litigants in having all the evidence adduced. This last interest may

²⁰ *Ibid.* ²¹ [1954] S.C.R. 479.

²² *Ibid.*

²³ Willis (1955), 33 Can. Bar Rev. 1187. ²⁴ *Supra*, footnote 21.

²⁵ *Ibid.* ²⁶ [1955] Ex. C.R. 187, [1955] 3 D.L.R. 691.

²⁷ *Supra*, footnote 21.

be expressed equally well as being a public interest in the administration of justice. Cameron J. felt persuaded by dicta of Rand J. in *R. v. Snider*.²⁸ He quotes:²⁹

Once the nature, general or specific as the case may be, of documents or the reasons against its disclosure, are shown, the question for the Court is whether they might, on any rational view, either as to their content or the fact of their existence, be such that the public interest requires that they should not be revealed; if they are capable of sustaining such an interest, and a minister of the Crown avers its existence, then the courts must accept his decision.

If this interpretation of *R. v. Snider*³⁰ is right it would seem that if the public interest which the Minister invokes could be required "on any rational view" to protect the documents in question the court has a duty simply to weigh that public interest against the public interest in ensuring the administration of justice. The court may not itself look at the documents. And if *Reese v. R.*³¹ is good authority the public interest which opposes disclosure of documents need amount to very little. Cameron J. says:³²

The interest is to be found rather in the fact that public policy requires that such official communications between officers of the state should be completely unreserved. If they were made with the knowledge that they might later be subject to disclosure in the courts, they would in many cases be shorn of that candour, completeness and freedom of expression which is desirable in such matters.

In short, the public interest requires that those giving information to government departments should not refuse or hesitate to give the true facts or omit facts on the ground that [such] disclosure might place them in jeopardy or cause them inconvenience but, in addition, such information might be less candid, complete and free if those giving it were aware that it might subsequently be used as evidence.

This position is very little removed from the English position as it developed after *Duncan v. Cammell, Laird and Co. Ltd.*,³³ and therefore the arguments in favour of reform in England could apply equally well in Canada. *Conway v. Rimmer*³⁴ deserves the attention of Canadian lawyers as much as it is getting the attention of their English counterparts.

The facts of *Conway v. Rimmer*³⁵ are simple. Mr. Conway was

²⁸ *Ibid.*, at p. 485.

³⁰ *Supra*, footnote 21.

²⁹ *Supra*, footnote 26, at p. 194 (Ex. C.R.).

³¹ *Supra*, footnote 26.

³² *Supra*, footnote 26, at p. 197 (Ex. C.R.), and see *Re Lew Fun Chaue*, [1955] 3 D.L.R. 691, where a similar interpretation of *R. v. Snider* is arrived at.

³³ *Supra*, footnote 1.

³⁴ *Supra*, footnote 2.

³⁵ *Ibid.*

a probationary policeman. His action for malicious prosecution came about in this way: he was charged with stealing a torch allegedly belonging to a fellow probationer. He was acquitted on this charge, the jury having stopped the case after hearing the prosecution evidence. The respondent, a superintendent in Mr. Conway's police force, had been instrumental in bringing this charge, and during his investigation of the alleged offense, had suggested to the appellant that he should resign.

Shortly after his acquittal, the appellant was dismissed from the police force. His solicitors issued a writ claiming damages for malicious prosecution. He sought the production of various police reports including a report made by the respondent to his chief constable. The Home Secretary, Mr. Roy Jenkins, swore an affidavit claiming Crown privilege in respect to these reports and this claim was upheld by the judge at first instance and by the Court of Appeal (Lord Denning M.R. dissenting). On appeal to the House of Lords this decision was reversed.

The Law Lords made a thorough review of the cases involving Crown privilege and each decided that *Duncan v. Cammell, Laird and Co. Ltd.*³⁶ should be overruled. A number of grounds were suggested: that that case was decided under a misapprehension about the Scottish law, that Viscount Simon could not have intended to include routine reports under the head of privilege, that his references to classes of documents were *obiter*. Clearly *Duncan v. Cammell, Laird and Co. Ltd.*³⁷ no longer represents the law in England as regards Crown privilege for classes of documents.

*Conway v. Rimmer*³⁸ decides that the Minister's affidavit, made in proper form, is not final and conclusive. The duty of the court is to weigh in the balance "the public interest, as expressed by a Minister, to withhold certain documents or other evidence, and the public interest in the administration of justice. That does not mean that a court would reject a Minister's view: full weight must be given to it in every case, and if the Minister's reasons are of a character which judicial experience is not competent to weigh, then the Minister's view must prevail".³⁹ Lord Morris said: "Some aspects of the public interest are chiefly within the knowledge of some Minister and can best be assessed by him."⁴⁰

But frequently the reasons given by Ministers are not beyond

³⁶ *Supra*, footnote 1.

³⁷ *Ibid.*

³⁸ *Supra*, footnote 2.

³⁹ *Ibid.*, at p. 888, per Lord Reid.

⁴⁰ *Ibid.*, at p. 890, per Lord Morris of Borth-Y-Gest.

the judicial experience. This is particularly true when the reasons are the candour and freedom of communication between civil servants.

The position after *Conway v. Rimmer*⁴¹ is this: that if the court decides, weighing conflicting public interests, that on balance the documents should be produced it would "generally be best"⁴² for the judge to see them before ordering production. If having seen the document, the judge is still of the opinion that it ought to be produced, he will order its production.

The House of Lords has thus returned to the courts the control of Crown privilege which had been lost to them at least since 1942. In England certainly, and most probably in other common law countries, government departments will not now be able to conceal evidence from civil tribunals simply because a Minister fears a lack of candour and completeness in making documents. The test will be whether a Minister's reasons for opposing disclosure are "of such a kind which judicial experience is competent to weigh".

If by producing a particular document no injury is caused to the public interest there is no reason why production should be prevented. *Conway v. Rimmer*⁴³ has given judicial support to this view. It would be very satisfactory if it were given support in Canada.

RICHARD THOMPSON*

* * *

CORPORATIONS—CORPORATE NAME—JURISDICTION OF THE COURT UNDER SECTION 12(3) OF THE CORPORATIONS ACT (ONTARIO).—

The settling of the corporate name is not only one of the initial matters to be considered by a solicitor retained to incorporate a company, but its choice is also an issue of concern and importance for the principals interested in the business the corporation is to carry on. While initially the name of a corporation may not be much more than a distinguishing mark separating one corporate entity from another, a successful business enterprise soon acquires a commercial goodwill with respect to its product or service that the consumer associates with and connects to the corporate name. This connotation soon becomes valuable, and, as Wegenast noted, "the chief value is of course not in the mere right to use the name;"

⁴¹ *Ibid.*

⁴² *Ibid.*, at p. 888, per Lord Reid.

⁴³ *Ibid.*

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but, as in the case of most property, the value is in the right or power of excluding others from the use of it".¹ It is thus of some commercial interest that two recent cases of the Ontario courts have, in effect, altered and restricted the scope of one of the statutory safeguards available to a business enterprise for the protection of the proprietary interest that it acquires in its corporate name by the commercial acceptance of its operations.

Section 12(1) (a) of The Corporations Act² provides that a corporation shall not be given a name that is the same as or similar to the name of a known corporation, partnership, individual or business "if its use would be likely to deceive", except under certain conditions. Sections 12(2) and 12(3) then provide as follows:

If a corporation through inadvertence or otherwise has been or is given a name that is objectionable, the Lieutenant Governor, after he has given notice to the corporation of his intention so to do, may direct the issue of supplementary letters patent changing the name of the corporation to some other name.

A person who feels aggrieved as a result of the giving of a name under subsection 1 or the changing or refusing to change a name under subsection 2 may, upon at least seven days notice to the Provincial Secretary and to such other persons as the court directs, apply to the court for a review of the matter, and the court may make an order changing the name of the corporation to such name as it deems proper or may dismiss the application.

The main factors in the above provisions are the interpretation to be given to the words in section 12(1) (a), "if its use would be likely to deceive", and the extent of the jurisdiction to be exercised by the court under section 12(3). It is the restricted jurisdiction exercised by the Court of Appeal for Ontario in *Re C C Chemicals Ltd.*³ under section 12(3) in defining the words, "if its use would be likely to deceive", and followed by the Ontario High Court of Justice in *Re Office Overload Co. Ltd. and Driver Overload Ltd.*,⁴ that is the subject matter of this comment.

It is generally accepted that the purpose and intent of section 12 is to prevent the likelihood of deception of the public by the use of similar corporate names. In *Re C. Cole & Co. Ltd., Coles Books Stores Ltd. and Cole's Sporting Goods Ltd.*, Schatz J., said:⁵

I am not primarily concerned with the effect on the parties to the dispute, as I consider the relevant section of the Act to be designed solely for the protection and convenience of the public. . . . For the applicant herein it is contended that the principles applicable in a "passing-off"

¹ Canadian Companies (1931), p. 116.

² R.S.O., 1960, c. 71.

³ [1967] 2 O.R. 248.

⁴ [1968] 1 O.R. 292.

⁵ [1965] 1 O.R. 331, at p. 337.

action are the principles upon which I should view the facts in this case. In my opinion this is not in the nature of a passing-off action. This is not a matter of contest between parties . . . the Court must act for the benefit of the public who are likely to be deceived, the grievance of a party being an entirely secondary result.

In *Re C C Chemicals Ltd.*, Kelly J.A., for the Court of Appeal that included Schroeder and Wells J.J.A., said:⁶

What the statute aims at is the prevention, in the public interest, of the use of letters patent to further deception likely to arise from similarity of names.

While the purpose of section 12 is not to provide an alternate method to determine the rights between corporate entities where one of them seeks to take advantage of the goodwill of another by the use of similar names, it follows as a secondary result that if the public is to be protected from the likelihood of deception by the use of similar corporate names, the goodwill that one of the corporations has created and that is associated with its corporate name will be protected. Therefore, the extent of the jurisdiction exercised by the court in protecting the public is of concern to the "person who feels aggrieved" and who moves under section 12(3) for an order changing the name of another corporation, the use of which name by that corporation is likely to deceive the public.

The key issue in an application under section 12(3) is the kind of evidence that the court will hear in order to determine whether a corporate name is so similar to another that the use of the latter is likely to deceive the public. It is on this point that *Re C C Chemicals Ltd.*⁷ and *Re Office Overload Co. Ltd. and Driver Overload Ltd.*⁸ have quietly overruled recent prior decisions of the Court of Appeal for Ontario and restricted the scope of the "review of the matter" on the judicial hearing under section 12(3).

The issue first came before Stewart J., in *Re F. P. Chapple Co. Ltd.*⁹ where an application was brought by Chapples Limited for an order changing the name of The F. P. Chapple Co. Limited. The applicant-objector was incorporated in 1911 and operated a substantial department store business at several locations in north-western Ontario and intended to extend its operations throughout the province. Its annual gross sales exceeded \$7,000,000.00 and it paid about \$180,000.00 per year for advertising. The respondent was incorporated in 1959 and carried on a small department store business at two locations in southern Ontario. Evidence was ten-

⁶ *Supra*, footnote 3, at p. 255.

⁷ *Ibid.*

⁸ *Supra*, footnote 4.

⁹ (1960), 22 D.L.R. (2d) 677 (Ont. H.C.).

dered to show that The F. P. Chapple Co. Limited was using its name and advertising in such a manner as to cause confusion with Chapples Limited. Stewart J., refused to consider this evidence and dismissed the application saying:¹⁰

I am of opinion that I must consider the names themselves and not the manner in which they are in fact used. Considering the two names completely objectively and without regard to the actual user made of them, I do not think that the use of the name "The F. P. Chapple Co. Limited" would be likely to deceive any intelligent person or cause such person to believe that he was dealing with Chapples Ltd. when in fact he was dealing with the F. P. Chapple Co. Ltd.

The applicant, Chapples Limited, appealed to the Court of Appeal composed of Porter C.J.O., Gibson and MacKay J.J.A. The proposition was argued specifically by counsel for the respondent, The F. P. Chapple Co. Limited, that the evidence relating to the manner in which the names of the parties were used and advertised was irrelevant. Porter C.J.O., for the court, disagreed:¹¹

I think that the actual manner of use is relevant, and in this case of considerable weight in showing how the two names readily lend themselves to a use which would likely deceive. I have no doubt that the manner of use would inevitably lead to confusion.

In allowing the appeal and ordering that the name, The F. P. Chapple Co. Limited, be changed, Porter C.J.O., specifically relied on the evidence with respect to the manner in which that name had been used.¹²

In *Re C. Cole & Co. Ltd., Coles Books Stores Ltd. and Cole's Sporting Goods Ltd.*,¹³ Cole's Sporting Goods Limited applied under section 12(3) for a review of the direction of the Provincial Secretary made under section 12(2) to change its name. In this case the evidence disclosed that the objector, C. Cole & Co. Limited and the applicant had co-operated in joint advertising for some twelve to thirteen years. Shatz J. considered as evidence the transcript of the hearing before the Provincial Secretary, which included the testimony of an independent witness from a radio station in respect to alleged confusion of names, and additional affidavit evidence in respect to advertising and places of business. His Lordship, in dismissing the application said:¹⁴

A review of the evidence, together with the many exhibits filed, completely satisfies me that there has been confusion by reason of the similarity of names . . . I fail to see how a member of the public interested in buying "books" could be misled, fraudulently or otherwise,

¹⁰ *Ibid.*, at pp. 679-680.

¹¹ [1960] O.R. 531, at p. 540.

¹² *Ibid.*, at p. 544.

¹³ *Supra*, footnote 5.

¹⁴ *Ibid.*, at pp. 338-339.

by a company having a "sporting goods" name or vice versa. If each company confined itself to advertising and selling the goods as authorized by its charter, there would be little likelihood of confusion and if the scope of the section were confined to the *name itself* and whether the *name* is likely to deceive, quite aside from the manner in which the name is used or advertised, then it would appear that there could be no confusion between the "sporting goods" name and the "book store" name, but notwithstanding this approach to the problem the evidence makes it quite clear to me that the public *has been* misled and confused by the similarity of names.

Schatz J., then specifically quoted the statement of Porter C.J.O., in *Re F. P. Chapple Co. Ltd.* that "the actual manner of use is relevant".¹⁵ It seems clear that had the evidence of the manner of the use of the names and the evidence of actual confusion not been admissible, the judgment of Schatz J., would have been the opposite of that delivered.

Cole's Sporting Goods Limited then appealed to the Court of Appeal composed of Aylesworth, Gibson and Schroeder J.J.A.¹⁶ Schroeder J.A., in delivering the reasons for judgment of the court, dismissed the appeal, and specifically relied on the evidence of confusion. He found that the appellant had used its corporate name in a manner calculated to produce perplexity,¹⁷ and he also quoted, without being "dubitante", the statement of Porter C.J.O., that "the actual manner of use is relevant".¹⁸

It is in the context of this prior view of the scope of the jurisdiction of the court under section 12(3) and the kind of evidence that the court was prepared to admit to determine whether a corporate name was so similar to another that "its use would be likely to deceive" that *Re C C Chemicals Ltd.*¹⁹ must be placed. Without referring to these points in the above cases and without so stating, *Re C C Chemicals Ltd.* implicitly overruled the evidentiary tests formulated by the Court of Appeal in the *Chapple* case and applied by the Court of Appeal in the *Cole* case. In *Re C C Chemicals Ltd.*, Kelly J.A., said that he agreed, with some minor reservations, with the opinion of Schatz J., in the *Cole* case.²⁰ However, the "minor reservations" are of such importance that they remove the very basis upon which the previous cases were decided.

In the *C C Chemicals* case Construction Chemicals Limited, incorporated in 1958, objected to the Provincial Secretary of the name C C Chemicals Limited which was given to a company incorporated in 1961. The Provincial Secretary, after conducting a

¹⁵ *Ibid.*, at p. 339.

¹⁸ *Ibid.*, at p. 248.

¹⁶ [1965] 2 O.R. 243.

¹⁹ *Supra*, footnote 3.

¹⁷ *Ibid.*, at p. 246.

²⁰ *Ibid.*, at p. 254.

hearing under section 12(2), decided that the name C C Chemicals Limited was objectionable and directed the issue of supplementary letters patent to change the name. C C Chemicals Limited then moved for a review of the matter under section 12(3) before Stewart J., who affirmed the direction of the Provincial Secretary. An appeal was then taken to the Court of Appeal which that court allowed, the direction of the Provincial Secretary ordering C C Chemicals to change its name being set aside.

The objector, Construction Chemicals Limited, was engaged in the sale of chemical concrete additives to those engaged in the construction industry, and the major part of the products for which C C Chemicals was incorporated were products having similar qualities and designed to accomplish similar purposes as the products in which Construction Chemicals dealt. Evidence was adduced that there was a marked similarity in the design and colour of the catalogues of both companies, that Construction Chemicals' registered trade mark consisted of two letters "C", and that there were four specific examples of confusion between C C Chemicals and Construction Chemicals.

The reasons for judgment of the Court of Appeal were delivered by Kelly J.A., and he rejected as irrelevant the evidence of the actual use of the corporate names and the evidence tendered to show that the corporate names were so similar that in the circumstances the public would be and in fact had been deceived. Kelly J.A., repudiated, without so stating, the judgment of Porter C.J.O., in the *Chapple* case that "the actual manner of use is relevant". According to the judgment in the *C C Chemicals* case, the only evidence that may be admitted is evidence of the likelihood of deception in existence at the time of the granting of the name by the Provincial Secretary, in other words, at the date of the granting of the letters patent. The court under section 12(3) is limited in its review of the matter to the evidence then in existence upon which the Provincial Secretary had the right to act. Kelly J.A., said:²¹

In my opinion the evidence upon which the Provincial Secretary had the right to act was the evidence which was in existence, though not necessarily known to the Provincial Secretary, at the time he granted the questioned name on the incorporation of the company to which it was given.

Except for the very limited purpose which is referred to later, anything that may take place after the granting of the name is not admis-

²¹ *Ibid.*, at p. 256.

sible evidence on the review by the Court or upon the enquiry made by the Provincial Secretary [under section 12(2)] preliminary to the enforced changing of a name. The relevant evidence on any review by the Court is the evidence which was in existence, which could have been made known to the Provincial Secretary at the date of giving the name. . . .

The only exception that Kelly J.A., would allow to this limited scope of the jurisdiction of the court, the only time when "the actual manner of the use" would be relevant and evidence of consistent deception by the public arising from the use of the corporate name be admissible, would be "for the sole purpose of showing lack of objectivity in the decision of the Provincial Secretary that deception was not likely to occur".²² The objectivity that the Provincial Secretary is to exercise at the date of the granting of the letters patent with respect to the proposed use of the corporate name that he grants is an objectivity relating "to the normal consequences of the use of the proposed name in a legitimate manner assuming the new company intends to conduct its business fairly and not in a manner calculated deliberately to pass off its business as that of another".²³

Since the Provincial Secretary under section 12(2) and the court under section 12(3) are to be limited to evidence in existence at the date of the grant of the letters patent, only the names of the applicant and other corporations, the objects of the applicant and of those corporations, and the class of persons who might ordinarily deal with the applicant and those corporations is the extent of the evidence that may be admissible under either section 12(2) or section 12(3). According to Kelly J.A., with this information:²⁴

The Provincial Secretary must then make a decision as to whether the visual and auditory qualities of the two names are so similar that the use of the proposed name by the corporation to be incorporated is likely to deceive those members of the public who are dealing or may wish to deal with the existing name holder. . . . The principal question must at all times be the similarity of the names themselves.

Applying this "visual and auditory" test, Kelly J.A., simply compared the words "C C Chemicals" to the words "Construction Chemicals", and found no similarity which could be reasonably said to be likely to deceive even an average person. In *Re Office Overload Co. Ltd. v. Driver Overload Ltd.*,²⁵ Hartt J., distilled the new test enunciated by the *C C Chemicals* case into the following:

Is the public likely to be deceived, that is, are the visual and auditory

²² *Ibid.*, at p. 257.

²³ *Ibid.*, at p. 258.

²⁴ *Ibid.*, at p. 259.

²⁵ *Supra*, footnote 4, at p. 293.

qualities of the names of the objecting and proponent corporations so similar that it would be probable that a customer or prospective customer would be induced to deal with a corporation other than the one with whom it was his intention to deal? . . . The matter in the long run must resolve itself into the question arising from the similarity or dissimilarity of the names themselves.

Both the *C C Chemicals* case and the *Office Overload* case attempt to distinguish the prior decisions by stating that where the earlier corporate name contains words which are generic and descriptive, such as "construction" and "chemicals", the ability of that corporation to assert rights to those words and to prevent the use by another corporation of the same words is substantially lessened. This, of course, further waters down the visual and auditory test. But, it is ironical that in support of this proposition the *C C Chemicals* case referred to the House of Lords decision in *Cellular Clothing Co. Ltd. v. Maxton & Murray*,²⁶ which was not only a passing-off case, but one which approved the principle enunciated earlier by the House of Lords in *Reddaway v. Banham*²⁷ that a descriptive word may acquire through use a secondary meaning which distinguishes the source of the product, and which is entitled to protection. It is submitted that it is consistent with the rationale of the *Chapple* and *Cole* cases that the principle of *Reddaway v. Banham* is applicable to help define the words "if its use would be likely to deceive" in section 12(1)(a) in the situation where descriptive words in a corporate name have acquired distinctiveness through use and therefore, on principle, should be entitled to the same protection as an invented or family word in a corporate name. As Wegenast has noted, "by a certain amount of undisturbed use a common English or geographical word or expression may acquire a 'secondary' meaning, so that its use for certain purposes by any one else may amount to a fraud on the public".²⁸

The vast difference in the principles applied in the *Chapple* and *Cole* cases, on the one hand, and in the *C C Chemicals* and *Office Overload* cases, on the other hand, leaves the present state of the scope of the jurisdiction of the Provincial Secretary and of the court under section 12(2) and section 12(3) respectively somewhat uncertain. According to the *C C Chemicals* test, the scope of the jurisdiction of the court is changed from a review based on the practical business facts in existence as of the date of

²⁶ [1899] A.C. 326.

²⁷ [1896] A.C. 199.

²⁸ *Op. cit.*, footnote 1, p. 126.

the application under section 12(3), in which "the actual manner of use is relevant", to a quasi-scientific visual and auditory test, an overlapping of syllables and sounds, supplemented by limited facts in existence as of the date of the grant of the letters patent. The former test is an attempt to adjudicate upon the real life business dispute in issue—Is the public in fact likely to be deceived by the actual manner in which the similar corporate names are and have been used? The *C C Chemicals* test is a withdrawal of the judicial role to a more esoteric and academic level: Are the corporate names so visually and audibly similar that, assuming normal and legitimate business use of the names, the public is likely to be deceived? As the reasons for judgment delivered by Schatz J., in the *Cole* case indicate, each test may, in many situations, lead to different results.

H. G. EMERSON*

* * *

MASTER AND SERVANT—RIGHT TO SUE FOR UNPAID VACATION PAY IN CIVIL COURT—STATUTORY TERM IN CONTRACT OF EMPLOYMENT—CONFLICTING DECISIONS.—Government activity and regulation in the general field of labour relations has increased substantially in the past few years. Apart from trade union legislation, new rights have been given by statute to employees in the form of minimum wages, compensation for injuries sustained in the course of employment, and vacation pay. The latter has been considered in two recent cases, *Vanderhelm v. Best-Bi Food Ltd.*¹ and *John Stewart v. Park Manor Motors Limited*.²

The question presented to the court in each case was this—does an employee have a right to sue his employer in a civil court for unpaid vacation pay or must he resort to the procedure provided by the statute?³ In British Columbia, the Supreme Court held that an employee has no civil cause of action; in Ontario, the Court of Appeal held that he does. It will be the object of this comment to investigate these two decisions to see why each court came to a different conclusion.

The general principle which each court had to consider was this—where a statute creates a right unknown to the common law

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¹ (1968), 65 D.L.R. (2d) 537, 62 W.W.R. 201 (B.C.S.C.).

² (1968), 66 D.L.R. (2d) 143, [1968] 1 O.R. 234 (C.A.).

³ The relevant British Columbia legislation is the Annual and General Holidays Act, R.S.B.C., 1960, c. 11; its Ontario counterpart is The Hours of Work and Vacation with Pay Act, R.S.O., 1960, c. 181, as am.

and also provides a remedy and a method of enforcing such remedy, this procedure is *prima facie* exclusive and must be followed unless it is clearly evident from the statute itself that other methods of enforcement were intended. This principle as so stated is well known to the common law.⁴ Whether or not a plaintiff may resort to the civil courts depends on what the particular statute says. Lord Macnaghten put it this way in *Pasmore*:⁵

Whether the general rule is to prevail or an exception to the general rule is to be admitted must depend on the scope and language of the Act which creates the obligation and on considerations of policy and convenience.

Before a discussion of the merits of each case can be made, the relevant legislation should be reviewed.

Section 2(2) of the Ontario statute states that:⁶

... every employee in an industrial undertaking shall be given a vacation of at least one week with pay.

Since a paid vacation was unknown at common law, the above represents a new right.⁷ Other parts of the Act establish the rate of pay and deal generally with administration. Section 11(2) provides a penalty for a breach of any of the provisions of the Act.⁸

Every employer who contravenes any provision of this Act . . . is guilty of an offence and on summary conviction if no other penalty is provided is liable to a fine of not less than \$25 and not more than \$500.

Of even more interest is section 12:

12(1) In addition to the penalty imposed upon an employer for failure to grant a vacation with pay or pay in lieu thereof to an employee, the magistrate shall order the employer to pay to the Board on behalf of the employee an amount equal to the pay he would have received for such vacation or the amount to which he would be entitled under the regulations.

(2) An order made under subsection 1 may be filed by the Board in a division court . . . and such order thereupon is of the same force and effect as a judgment in the division court.⁹

⁴ *Pasmore v. Oswaldtwistle Urban District Council*, [1898] A.C. 387 (H.L.), at p. 394; *Orpen v. Roberts*, [1925] S.C.R. 364, at p. 370.

⁵ *Ibid.*, at pp. 397-398. See also *Orpen v. Roberts*, *ibid.*, at pp. 369-370.

⁶ *Supra*, footnote 3.

⁷ *Onyschuk v. Duncan Bros. Ltd.*, [1955] 4 D.L.R. 841 (Ont. C.A.), per Roach J.A., at p. 844.

⁸ *Supra*, footnote 3.

⁹ *Ibid.* It should be noted that section 12(1) originally said: "In addition to the penalty imposed on an employer for failure to grant a vacation with pay to an employee, the magistrate *may* order the employer to pay to the employee an amount equal to the pay he would have received for such vacation or the amount to which he would be entitled under the regulations". The essential difference here was the substitution of the mandatory "shall" for the permissive "may".

The British Columbia statute is similar to the Ontario Act. Section 4 creates the right to an annual paid holiday and section 16 creates the offence and provides the procedure for prosecuting an employer and for securing payment to the employee.¹⁰

16(1) A person who

(a) fails to comply with any of the provisions of this Act or of any order or regulation made hereunder; . . . is guilty of an offence and liable, on summary conviction, to a fine. . . .

(2) An employer who is convicted of failure to pay an employee any money that he is required to pay under this Act . . . shall, in addition to the penalty imposed, be ordered to pay to the employee all moneys to which the employee is entitled under this Act. . . .

Section 20 provides that no prosecution under the Act shall be instituted without the written consent of the Minister.

The most significant difference between the two statutes may be found in section 9 of the British Columbia Act which provides that holidays due or accruing due or their equivalent in wages and moneys due and accruing due shall be deemed to be wages payable to employees for work done. The Ontario Act says nothing about wages.

In summary, each Act creates a new right unknown at common law and makes it an offence punishable on summary conviction for non-compliance with its provisions. Furthermore, each Act provides that once an employer has been convicted under the Statute, he must also pay an amount equal to the unpaid vacation pay to, in British Columbia, the employee, and, in Ontario, the Board on behalf of the employee. The question thus arises—is the procedure set out by each Act exclusive or is it merely directory. In other words, is an employee bound to recover his unpaid vacation pay by launching a prosecution against his employer before a magistrate or can he proceed by means of a civil action in a civil court?

In *John Stewart v. Park Manor Motors Ltd.*¹¹ the Ontario Court of Appeal, after carefully considering the scope and intent of the Hours of Work and Vacation with Pay Act, concluded that the procedure outlined in section 12 was not intended to be exclusive and accordingly held that an aggrieved employee could either proceed under the Act or in a civil court.

Schroeder J.A., after considering some of the cases on the matter, set out the following tests:¹²

¹⁰ *Supra*, footnote 3.

¹¹ *Supra*, footnote 2.

¹² *Ibid.*, at pp. 148 (D.L.R.), 239 (O.R.).

An examination of the authorities makes it clear that in the determination of this question it ought to be considered whether the action is brought in respect of the kind of harm which the statute was intended to prevent, if the person bringing the action is one of the class which the statute was designed to protect, and if the special remedy provided by the statute is adequate for the protection of the person injured.

In applying the above tests to the *Park Manor* situation, Schroeder J.A. concluded that the statute did not exclude an employee's right to invoke the jurisdiction of the civil courts. He felt that the statute had the effect of introducing a further term into an employee's contract of employment.¹³

His Lordship then went on to consider whether the statute intended to exclude the jurisdiction of the civil courts. He made the following points:¹⁴

1. If the employer were a natural person and died, the employee would lose all rights because there would be no one the Magistrate could convict since, under the Act, a conviction is a condition precedent to an order for payment.
2. A dismissal of a charge against an employer on technical grounds would also deny a remedy to the employee.
3. Since the offence was punishable on summary conviction, the employee would have to sue within six months or else lose his remedy.

The court felt that the Act was part of a general scheme to improve the lot of workmen and that the Legislature could not have intended to provide a single remedy that could be so precarious.

The court seems to have established a new rule. The traditional method of stating the common law principle was to say that where a right not existing at common law is created by statute and a special and particular remedy for enforcing it is given, *prima facie*, only the statutory remedy is available. There is an initial presumption that the statutory remedy is exclusive. But Schroeder J.A. put the rule this way:¹⁵

The Act plainly creates a statutory contract which should be enforceable in the established Courts in the same manner as any other term of the contract of service unless the statute either expressly or by necessary implication excludes their jurisdiction.

Thus, under the rule as formulated by Schroeder J.A., the initial presumption is that the statutory remedy is *not* exclusive. Perhaps the matter may be rationalized by dividing these new rights into two categories—those which clearly give rise to a contractual relationship and those which do not. In the case of the

¹³ *Ibid.*, at pp. 149 (D.L.R.), 240 (O.R.).

¹⁴ *Ibid.*

¹⁵ *Ibid.*

former, since the new right is referable to and part of a contract, express or implied, the beneficiary of such a right should be able to enforce such a right in a civil court—the traditional forum for doing so. And, by the same token, the recipient of a right which has no contractual characteristics should seek his remedy under the statute unless otherwise stipulated.

The cases dealing with the general principle must be examined to test the validity of the suggested division.

*Waghorn v. Collison*¹⁶ involved an interpretation of section 4 of the Corn Production Act, 1917,¹⁷ which established a minimum wage for certain workers and provided that an employer who breached the Act was subject to a prosecution. Section 4(2) further provided:¹⁸

In any proceedings against an employer under this section, the court may, whether there is a conviction or not, order the employer to pay, in addition to the fine, if any, such sum as appears to the Court to be due to the workman on account of wages, the wages being calculated at the minimum rate; *but the power to order the payment of wages under this provision shall not be in derogation of any right of the workman to recover wages by any other proceeding.*

Bankes L.J. held that the above section did not exclude the jurisdiction of the High Court to entertain a claim for arrears of wages based on the difference between the amount paid and the minimum rate fixed under the Act. It was clear that the procedure outlined in section 4(2) was not intended to be exclusive in that (a) the Magistrate had a discretion to order payment¹⁹ and, more important, (b) the proviso at the end of section 4(2) expressly stated that “other proceedings” were not excluded.

Atkin L.J., after agreeing with Bankes L.J., proposed an alternative solution:²⁰

The true answer to the whole position is this, that the effect of the Act is to introduce a further contractual term into the contract of employment and to provide for payment of the wages, which are deemed by contract, express or implied, or by statute, not to be less than the minimum sum.

His Lordship felt that section 4(2) of the Act gave a workman an additional, not an exclusive, right to collect a minimum wage which itself was a new right. Younger L.J. said that the statutory wages had become equivalent to a workman's conventional wages.

*Sharp v. Public Administrator*²¹ also concerned minimum wages.

¹⁶ (1922), 91 L.J.K.B. 735 (C.A.). ¹⁷ 7 & 8 Geo. 5, c. 46 (U.K.).

¹⁸ *Ibid.*, italics mine. ¹⁹ By virtue of the use of the permissive “may”.

²⁰ *Supra*, footnote 16, at p. 738. ²¹ [1944] 3 D.L.R. 391 (Alta S.C.).

The Alberta Female Minimum Wage Act²² established a minimum wage and also provided that every agreement by an employee to work for less than the established minimum wage was deemed to include the minimum wage. In other words, the statute introduced a compulsory term into every contract of employment. By section 11(1), an employer who failed to pay at least the minimum wage could be fined and also ordered to pay the employee an amount equal to the difference between the minimum wage and the wages actually paid. The court held that because a minimum wage was incorporated into the contract of employment, an employee could sue in contract for any unpaid wages. The court could see nothing in the statute to exclude a civil action.

Did the Act create a new right unknown at common law? Munroe J. in the *Vanderhelm* case discussed *Sharp* and suggested that the statute merely affirmed the common law liability to pay wages and therefore created no new liability.²³ But I submit an employee did not, at common law, have a right to a minimum wage. The Act did create a new right.

In *Orpen v. Roberts*,²⁴ a provincial statute²⁵ authorized a municipality to enact a by-law prescribing the minimum distance a new building could be located from the street line. The statute empowered the municipality to restrain offenders as well as punish them by means of fines. The purpose of the legislation was to ensure that, *inter alia*, adjoining landowners would not be prejudicially affected by any new buildings. This is a classic example of the problem and, it is submitted, one in which no contractual relationship between the parties (that is builders and adjoining landowners) is created.

In this case, the defendant was about to construct a building in contravention of a by-law passed pursuant to the Act. The plaintiff, a private citizen and adjoining landowner, applied to the court for an injunction to prevent the defendant from so proceeding. In an unanimous decision, the Supreme Court of Canada held that the legislation did not create for the benefit of individuals rights enforceable by civil action. The court applied the *prima facie* rule and held that the penalties and remedies prescribed by the Consolidated Municipal Act were exclusive and that it was up to the municipality alone to prevent a builder from contravening the by-law.

²² R.S.A., 1942, c. 283.

²³ *Supra*, footnote 1, at pp. 539 (D.L.R.), 204 (W.W.R.).

²⁴ *Supra*, footnote 4.

²⁵ The Consolidated Municipal Act, R.S.O., 1914, c. 192.

*Fry v. Schwartz*²⁶ and *Blevins v. Walker Stores*²⁷ concerned the Reinstatement in Civil Employment Act²⁸ which required an employer to rehire former employees who had been called into the armed services. If an employer failed to reinstate an eligible person, he could be prosecuted, fined, and ordered to pay, on a specified scale, compensation to the employee. In each of the above cases an employee sued his employer in a civil court for the statutory compensation and in each case it was held that the Act did not create a statutory contract between the employer and employee. No employee could demand reinstatement. Since a definite compensation was established—one which did not necessarily bear any relationship to the traditional common law concept of damages—it was held that the statute did not envisage a civil cause of action.

*Clarke v. Clear and May Company Limited*²⁹ concerned the Annual Holidays Act of Saskatchewan³⁰ which provided for paid vacations in a manner similar to both the Ontario and British Columbia Acts. Section 19 set out a remedy similar to that in section 12 of the Ontario Act. Friesen D.C.J. held that the provisions were identical in principle to those contained in the Reinstatement in Civil Employment Act and that the remedy set out in section 19 was exclusive. He was of the opinion that there was no contractual relationship between an employer and employee insofar as vacation pay was concerned. He concluded that the Act was penal and that there could be no civil cause of action.

In *Tomkinson v. The Toronto Motor Car Limited*,³¹ Forsyth Div. Ct.J. said this about the Hours of Work and Vacation with Pay Act of Ontario:³²

I also think that as the Act has provided a summary method of carrying out the intent of the Act, this procedure alone is available to an employee.

The above cases may be divided into two groups—those which found a statutory contract³³ and those which did not.³⁴ The two cases which dealt with the question of vacation pay³⁵ held that

²⁶ [1951] 2 D.L.R. 198 (N.S.S.C.).

²⁷ [1952] 2 D.L.R. 143 (Ont. H.C.).

²⁸ S.C., 1946, c. 63. ²⁹ (1959), 28 W.W.R. 673 (Sask. D.C.).

³⁰ R.S.S., 1953, c. 261, as am.

³¹ May 22nd, 1953 (Div. Ct.). Unreported. ³² *Supra*, footnote 3.

³³ *I.e. Waghorn v. Collison*, *supra*, footnote 16; *Sharp v. Public Administrator*, *supra*, footnote 21.

³⁴ *Orpen v. Roberts*, *supra*, footnote 4; *Fry v. Schwartz*, *supra*, footnote 26; *Blevins v. Walker Stores*, *supra*, footnote 27.

³⁵ *Clarke v. Clear & May Co. Ltd.*, *supra*, footnote 29 and *Tomkinson v. Toronto Motor Car Limited*, *supra*, footnote 31.

no contractual relationship arose and that the remedy and method of enforcing such remedy outlined in the statute were exclusive. It is my submission that these two cases were incorrectly decided. They were heard in inferior courts and have little or no binding effect.

The Ontario Court of Appeal, in following *Waghorn v. Colli-son*,³⁶ had two alternative courses of action open to it.

1. It could have followed the line of reasoning employed by *Bankes L.J.* If this alternative had been selected, it is submitted that the court would have had to hold that a civil action was not available to an employee for two reasons. First, the *Corn Production Act*³⁷ explicitly stated that a workman could recover wages "by any other proceeding", whereas the Ontario Act has no such provision. Second, the Ontario Act originally provided that a magistrate "may" order the employer to pay an amount equal to the unpaid holiday pay. However, by virtue of an amendment,³⁸ the permissive "may" was replaced by the mandatory "shall" with the result that a magistrate must order a convicted employer to pay the employee his unpaid vacation pay. This amendment could be regarded as a declaration by the Legislature that the summary procedure provided by the Act was the only one available to an employee.

The above arguments are not conclusive of the matter, but they would make it difficult for a court to hold that a civil proceeding was contemplated under the Hours of Work and Vacation with Pay Act.

2. In the alternative, the court could have followed the line of reasoning employed by *Atkin and Younger L.J.J.*³⁹ and in corporate a statutory term into the contract of employment. By following this course, the court was able to bypass the difficulties inherent in the first one.

The Supreme Court of British Columbia adopted, generally, the first alternative, whereas the Ontario Court of Appeal adopted the second.

In *Vanderhelm*, *Munroe J.* felt that the Act was designed to give an employee the right to an annual paid holiday and that, because the consent of the Minister was required to institute proceedings, the object and scheme of the Act was primarily to enforce compliance upon employers.

³⁶ *Supra*, footnote 16.

³⁸ S. O., 1961-62, c. 58, s. 31.

³⁷ *Supra*, footnote 17.

³⁹ *Supra*, footnote 20.

Having examined the object and provisions of the Statute as a whole, I am of the opinion that the remedies provided by the Statute are intended to be the whole remedies available. . . .⁴⁰

This approach is too narrow and technical in view of the fact that an employee could, in some circumstances, be denied his unpaid vacation pay through no fault of his own.⁴¹ Furthermore, one wonders why the Supreme Court of British Columbia did not take advantage of the contract theory inasmuch as the Annual and General Holidays Act stated that unpaid vacation pay was deemed to be wages. The Ontario Court of Appeal, on the other hand, did not fall into the trap of automatically applying a technical rule of the common law. Instead, it approached the problem with an open mind and viewed the situation in the widest possible sense.

From the foregoing it is my submission that the general rule outlined in *Pasmore v. Oswaldtwistle*⁴² must be redefined and divided into the two categories suggested above. My suggested reformulation of the rule would be as follows:

Where a statute creates a right unknown to the common law and also provides a remedy and a method of enforcing such remedy, one of two situations may arise;

(a) if the statute either expressly or impliedly creates a contractual relationship between the parties, then the right so created is *prima facie* enforceable in the established courts in the same manner as any other contractual right unless the statute either expressly or by necessary implication excludes their jurisdiction.⁴³

(b) if the statute does not give rise to a contractual relationship, then, *prima facie*, only the statutory remedy is available unless the statute either expressly or by necessary implication indicates that other methods of enforcement are available.⁴⁴

GORDON E. THOMPSON*

⁴⁰ *Supra*, footnote 1, at p. 204.

⁴¹ E.g. death of employer; dismissal of charge on purely technical grounds; short prescription period, as discussed, *supra*.

⁴² *Supra*, footnote 4.

⁴³ Of course the statutory remedy is also available.

⁴⁴ Since the writing of this comment, the Hours of Work and Vacations with Pay Act, hereinafter referred to as the "old Act", *supra*, footnote 3, has been repealed and replaced by The Employment Standards Act, 1968, Bill 130, assented to June 13th, 1968 (not yet proclaimed) hereinafter referred to as the "new Act".

Part VI of the new Act deals with vacation pay. Section 21 requires that an employee be given a paid vacation and section 23 establishes the minimum amount an employee must be paid. Section 3 of the new Act states that the Act applies notwithstanding any agreement or waiver to the contrary. An interesting aspect of the new Act is the new machinery established, *inter alia*, for the recovery of unpaid vacation pay.

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NEGLIGENCE—COUNSEL—WHETHER ACTION FOR NEGLIGENCE LIES AGAINST COUNSEL IN CONDUCT OF ACTION—CONSIDERATIONS OF PUBLIC POLICY—APPLICATION OF RECENT DECISION OF HOUSE OF LORDS TO CANADIAN LAW.—In the early hours of one morning in April, 1959, Norbert Fred Rondel went to a house in

Section 28(1) states: "Where an employer has failed to pay an employee . . . (c) any vacation pay to which the employee is entitled under Part VI, the Director *may* determine the difference between the amount paid to the employee and the amount to which the employee is entitled." (*Italics mine*)

Section 28(2) says: "The Director shall notify an employer of any determination made under subsection 1 and *may* require the employer to pay to him in trust unpaid . . . vacation pay, not exceeding \$1,000 owing to an employee as determined under subsection 1." (*Italics mine*)

The employer may appeal a determination to the Minister of Labour. If he is unsuccessful, or if he does not appeal, then, by section 28(5), the Director must pay to the employee all moneys collected on his behalf.

There are obvious limitations to this remedy. There is a \$1,000.00 ceiling; the Director alone decides whether or not to make a determination; if he decides not to make a determination, an employee cannot appeal such decision (whereas an employer is given the right to appeal a determination, once made).

Even if the Director does make a determination, he is not obliged to demand that the employer pay him in trust the unpaid vacation pay. It is apparent that this new remedy is rather precarious.

Part XI of the new Act deals with enforcement. Section 36(1) says that every person who fails to comply with any order, direction or requirement under the Act or regulations or who contravenes any provision of the Act or regulations for which no penalty is provided (*e.g.* Part VI), is guilty of an offence and liable to a fine.

Section 36(3) is somewhat similar to section 12(1) of the old Act: "Where an employer is convicted of an offence including the failure to pay . . . vacation pay in accordance with this Act, the Magistrate making the conviction shall, in addition to any other penalty, assess the amount of . . . vacation pay so unpaid in respect of the employee and shall order the employer to pay the amount so assessed to the Director who shall collect and distribute to the employee the amount so ordered to be paid."

Section 38(4) says that an order made under subsection 3 may be filed in a division court for enforcement.

If an employee fails to persuade the Director both to make a determination under section 28(2) and to collect any unpaid vacation pay under section 28(3), he may proceed under section 36 by laying an information against his employer. If a conviction is obtained, the Magistrate will order the employer to make the necessary payment as provided by section 36(3).

The question thus arises—in view of the enactment of the Employment Standards Act, 1968—does an employee still have the right to sue for unpaid vacation pay in a civil court?

It is my submission that he does. The court in the *Park Manor* case, *supra*, footnote 2, was strongly influenced by the fact that the remedy available under section 12 of the old Act was inadequate. It would seem that the remedies under sections 28 and 36 are, insofar as an aggrieved employee is concerned, just as inadequate. The Director alone may refuse to make a determination under section 28 and the same arguments employed by the Ontario Court of Appeal in the *Park Manor* case apply equally to the remedy outlined in section 36 of the new Act.

It is my submission that the new Act does not preclude a civil action for the recovery of unpaid vacation pay.

West London, on the instructions (as he was later to allege) of its landlord. A dance was in progress inside the house. The door-keeper of the house was a man by the name of Manning. For reasons far from clear, a fight ensued between Rondel and Manning. Manning emerged from the fight with nine stitches in a severely injured left hand and with the lobe of his right ear missing. Rondel emerged from the fracas physically unscathed, but charged with two counts of causing grievous bodily harm with intent and assault occasioning bodily harm.

When Rondel was arraigned at the Old Bailey a month later, he was advised that he could instruct any of the counsel present in court to appear on his behalf. Rondel chose a barrister named Worsley, a choice which both would later have considerable cause to regret. Worsley agreed to act, was paid a fee of £2 4s. 6d. for his services, and thereupon accepted a brief which was destined to be as calamitous for him as it would be unpropitious for Rondel, and which would lend both their names to a leading case that would only conclude in the House of Lords over eight years later.

The trial was conducted on the following day. Rondel and another witness were called to testify for the defence. He was convicted on the first charge and sentenced to eighteen months' imprisonment. No verdict was taken on the second and less serious charge. Rondel's application to the Court of Criminal Appeal for leave to appeal from his conviction was refused, and he served the sentence which had been imposed upon him.

In 1965, almost six years after his conviction, Rondel issued a writ claiming damages against Worsley on the ground that he had negligently conducted the defence at the trial. The negligence consisted of Worsley's alleged failure to adduce evidence, both by way of cross-examination of the Crown's witnesses and by calling witnesses proposed to him by Rondel, that the wound to Manning's hand could not, as urged by the prosecution, have been caused by a knife or similar weapon (Rondel, a professional wrestler, claimed to be proficient in judo and karate, and considered this suggestion as a reflection on his prowess; he was distressed with counsel's inability to establish his contention that he "tore [Manning's] hand in half and bit part of his ear off"), and that Rondel had attended at the premises in his capacity as employee of the landlord. Apparently not even Rondel believed that this evidence would have altered the result, for he admitted in the subsequent proceedings that he did not suggest that he would have been acquitted had Worsley conducted the case as he now urged.

Having, however, become thus disenchanted with the legal profession, Rondel prepared his own statement of claim in his action against Worsley. It was practically unintelligible and, on Worsley's application, the Master struck it out and dismissed the action with costs. On appeal, Mr. Justice Lawton permitted the filing of an amended statement of claim, but affirmed the Master's order on the ground that no matter how artfully the statement of claim might be framed, an action did not lie against a barrister for negligence in connexion with the conduct of a client's case in court.¹ This order was affirmed on appeal to the Court of Appeal, in which all three members of the court agreed that no such action lay.² Leave to appeal to the House of Lords was granted, and the appeal, which took seven days to argue, was unanimously dismissed.³

It will have been noted that all of the judges who heard the case agreed, without dissent, that a client could not sue a barrister for negligence in his conduct of an action. There had, moreover, been no recorded case in which a barrister had ever been held liable for negligence in such circumstances.⁴ The law had been so laid down as far back as 1791, in a case⁵ which Lord Kenyon C.J., stated he believed was the first and he hoped "would be the last of the kind".⁶ Why, then, was a claim that was as "clearly devoid of merit as it [was] of any prospect of success"⁷ carried to the highest court in England for determination? The answer lies in the exceptional implications of such a principle. In an age when tort liability is being expanded in response to considerations of social policy, liability for professional negligence is the rule⁸ and, since a barrister falls *prima facie* within the general principle,⁹ his immunity from liability constitutes a unique and significant exception. It therefore fell to the House of Lords to explore the reasons underlying this long-standing immunity and to determine whether they justified its retention in modern law.

¹ [1967] 1 Q.B. 443, at pp. 470-471, [1966] 1 All E.R. 467, at p. 480.

² [1967] 1 Q.B. 443, [1966] 3 All E.R. 657, per Lord Denning M.R., at pp. 506 (Q.B.), 668 (All E.R.); per Danckwerts L.J., at pp. 514 (Q.B.), 672 (All E.R.); per Salmon L.J., at pp. 526 (Q.B.), 680 (All E.R.).

³ [1967] 3 All E.R. 993.

⁴ *Ibid.*, per Lord Morris of Borth-Y-Gest, at p. 1006, and per Lord Pearce, at p. 1018.

⁵ *Fell v. Brown* (1791), Peake 131.

⁶ *Ibid.*, at p. 132.

⁷ *Supra*, footnote 2, per Salmon L.J., at pp. 516 (Q.B.), 674 (All E.R.).

⁸ *Cf. Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, [1964] A.C. 465, [1963] 2 All E.R. 575 (H.L.).

⁹ *Supra*, footnote 3, per Lord Upjohn, at p. 1033.

Historically, the courts had based this immunity on two grounds: the inability of the English barrister to sue for his fees; and considerations of public policy. The first ground finds expression in *Halsbury* in the following words:¹⁰

The principle which prevents a barrister from suing the client for his fees, *i.e.*, the mutual incapacity of counsel and client to contract with reference to the services of counsel, also prevents the client from suing counsel.

However, while the barrister's inability to sue for his fees was accepted by all of the members of the House of Lords who participated in the *Rondel* decision to be settled law,¹¹ they expressed the view that this was not in itself sufficient to absolve a barrister of a duty to use reasonable care in conducting his client's case. As Lord Pearce pointed out:¹²

. . . I see no reason to doubt that when retained a barrister owes a duty to exercise due and reasonable care and skill. In this respect he is, in my opinion, in the same position as the members of other professions. The duty is owed, quite irrespective of contract, and quite irrespective of the receipt of any reward or honorarium. It is owed when the work is undertaken which he is instructed to do.

Thus, until their disability to sue for professional fees was removed by statute in 1858, physicians shared the same disability as barristers, and yet decisions long before that date had established their liability to patients for failure to exercise professional care and skill.¹³ Their lordships therefore concluded, as had the courts below, that the foundation of the barrister's immunity from liability for negligence in the conduct of an action lay not in the absence of a contractual relationship or in his inability to sue for fees,¹⁴ but could only be rested, if at all, on grounds of public policy.

As indicated, the House of Lords found that this immunity had been established and settled law for almost two centuries,¹⁵ and

¹⁰ *Halsbury's Laws of England* (3rd ed., 1953), Vol. 3, p. 46, para. 66.

¹¹ *Supra*, footnote 3, per Lord Reid, at p. 1001; Lord Morris of Borth-Y-Gest, at p. 1004; Lord Pearce, at p. 1020; Lord Upjohn, at pp. 1030-1031; and Lord Pearson, at p. 1037.

¹² *Ibid.*, at p. 1009; *cf.* the observations to the same effect of Salmon L.J., in the Court of Appeal, *supra*, footnote 2, at pp. 523-524 (Q.B.), 678 (All E.R.): "It seems to me unthinkable that a barrister should not consider that he undertakes responsibility to his client to use reasonable care. I have no doubt that all barristers accept such a responsibility. . . . The duty to take care is as well recognized as it is scrupulously observed."

¹³ *Ibid.*, per Lord Morris, at p. 1004, and per Lord Upjohn, at pp. 1032-1033.

¹⁴ See, for example, per Lord Reid, *ibid.*, at p. 1001, and per Lord Pearce, *ibid.*, at p. 1021.

¹⁵ *Ibid.*, per Lord Morris, at p. 1006; Lord Pearce at pp. 1018-1019; and Lord Pearson, at p. 1037.

their lordships had therefore to consider whether the public interest required that it be preserved. The social dilemma posed by this problem was stated by Lord Reid in the following words:¹⁶

Is it in the public interest that barristers and advocates should be protected against such actions? Like so many questions which raise the public interest, a decision one way will cause hardships to individuals while a decision the other way will involve disadvantage to the public interest. On the one hand, if the existing rule of immunity continues there will be cases, rare though they may be, where a client who has suffered loss through the negligence of his counsel will be deprived of a remedy. So the issue appears to me to be whether the abolition of the rule would probably be attended by such disadvantage to the public interest as to make its retention clearly justifiable.

In the result, their lordships concluded that the true rationale for counsel's historical immunity from suit for professional negligence was founded on considerations of public interest, and that those considerations further required the retention of the immunity.¹⁷ The thoroughness with which the policy considerations were examined makes extensive reproduction impractical, but they may be summarized as follows:

(a) as an officer of the court concerned in the administration of justice, the barrister has a duty to the court, to the standards of his profession, and to the public, which duty may in appropriate circumstances override his duty to his client;¹⁸

(b) in the interests of the administration of justice, the barrister is entitled to the same immunity which the law has granted to witnesses, judges, jurors, newspapers and the litigants themselves arising out of their conduct during the course of litigation;¹⁹

(c) immunity is essential so that counsel may in their judgment separate the wheat from the chaff and avoid prolonging trials unnecessarily by bogging down in irrelevant details with the "sole purpose [of assuring] the client that no stone has been left unturned, so that he may not follow a defeat by instituting an action for negligence against his counsel";²⁰

(d) the court must be able to place implicit trust in the

¹⁶ *Ibid.*, per Lord Reid, at p. 998.

¹⁷ *Ibid.*, per Lord Reid, at pp. 998 and 1000; Lord Morris, at pp. 1011 and 1012; Lord Pearce, at pp. 1021 and 1030; Lord Upjohn, at p. 1035; and Lord Pearson, at pp. 1038 and 1041.

¹⁸ *Ibid.*, per Lord Reid, at p. 998; Lord Morris, at p. 1011; Lord Pearce, at p. 1027; Lord Upjohn, at p. 1034; and Lord Pearson, at p. 1040.

¹⁹ *Ibid.*, per Lord Pearce, at pp. 1025-1026 and 1028; and Lord Upjohn, at p. 1035.

²⁰ *Ibid.*, per Lord Pearce, at pp. 1027-1028; cf. per Lord Reid, at p. 999.

integrity of counsel and to rely upon counsel to consider his responsibility to the court in the presentation of the case;²¹

(e) removal of the immunity would permit the complete retrial of concluded actions, with attendant problems of differing standards of proof and of the range of admissible evidence;²² and

(f) the barrister is bound, with minor exceptions, to provide his services to any litigant who applies, and cannot pick and choose his clients, and should not be inhibited from so doing by potential exposure to suit.²³

Thus, typical of the conclusions of the Law Lords are the words of Lord Upjohn:²⁴

If the threat of an action is there counsel would be quite unable to give his whole impartial, unfettered, and above all, uninhibited consideration to the case from moment to moment, and without that the administration of justice would be gravely hampered. So that in litigation it seems to me quite plain that immunity from action is essential in the interests of the administration of justice as a whole on the ground of public policy. Regrettable though it may be if in any case counsel does commit an actionable wrong (but for the immunity) the client who suffers must do so without requite in the public interest. I am quite unable to agree with the argument of counsel for the appellant that this immunity is any new ground of public policy. It is all part and parcel of the long-established general policy that judges, witnesses and counsel must be immune from actions arising out of their conduct during the course of litigation in the public interest.

In strict law, all that the House of Lords was required to determine upon the facts of the case before it was the extent of the immunity from action afforded to a *barrister* in the conduct of a lawsuit before the court. The reasons for judgment, however, extended the barrister's immunity to work done while litigation is pending and to the drawing of pleadings,²⁵ and also to the work carried out by a *solicitor* in conducting litigation *qua* advocate which, had counsel been engaged, would have been conducted by him. While this latter question did not arise for decision in the instant case, it was the object of comment by every court which heard the matter. Lawton J., felt that any advocate, barrister or solicitor, appearing for a client before a court of law enjoyed protection from suit.²⁶ Although affirming the result in the Court

²¹ *Ibid.*, per Lord Pearce, at p. 1027, and Lord Upjohn, at p. 1034.

²² *Ibid.*, per Lord Reid, at p. 1000; and Lord Morris at p. 1012.

²³ *Ibid.*, per Lord Pearce, at p. 1029; Lord Upjohn, at p. 1033; and Lord Pearson, at p. 1040.

²⁴ *Ibid.*, at p. 1035.

²⁵ *Ibid.*, per Lord Reid, at p. 1001; and Lord Upjohn, at p. 1036.

²⁶ *Supra*, footnote 1, at pp. 470-471 (Q.B.), 480 (All E.R.). Lawton J.,

of Appeal, Lord Denning M.R.²⁷ and Danckwerts L.J.²⁸ expressly disagreed and declared that the immunity did not extend to a solicitor acting as advocate. Salmon L.J., was not convinced that Mr. Justice Lawton's view was wrong and expressed no opinion.²⁹ In the House of Lords, Lord Reid,³⁰ Lord Pearce³¹ and Lord Upjohn³² all agreed with the judge of first instance that the public interest required that solicitors, when performing the function of counsel in a court of law, enjoyed the same privilege as barristers. Lord Morris, who expressed no firm view, leaned in the same direction.³³ Lord Pearson chose to defer the question until a case arose where the problem was raised squarely for decision.³⁴

The problem of the immunity of the solicitor acting as advocate arose, of course, because in England (unlike as in Canada) the professions of barrister and solicitor are separate and distinct, and while the solicitor's relationship with the client is contractual, the barrister's is not. For this reason, the majority of the Court of Appeal had declared that no assistance could be derived on the issue of immunity from Commonwealth and American authorities, since those cases had been "decided in countries where there is fusion of the two branches of the legal profession".³⁵ As noted, however, all but one of the members of the House of Lords felt that immunity from liability for negligence extended equally to barristers and solicitors in the conduct of a cause; and since they rested such immunity not on contract or inability to sue for fees, but on considerations of public policy and the due administration of justice, it is appropriate to consider the extent to which Canadian law is affected by the *Rondel* decision notwithstanding our union of the professions of barrister and solicitor.

The leading case in Ontario on the subject is *Leslie v. Ball*,³⁶ a decision of the Upper Canada Court of Queen's Bench. The

deliberately adopted the word "advocate", and concluded: "I have set out at length why I adjudge that advocates cannot be sued for negligence in and about the conduct of their clients' cases in court, and have used the word 'advocate', not 'barrister', because in my judgment the immunity from suit arises from the part which an advocate plays in the administration of justice, not from membership of an Inn of Court."

²⁷ *Supra*, footnote 2, at pp. 504 (Q.B.), 666-667 (All E.R.).

²⁸ *Ibid.*, at pp. 510-511, and 513 (Q.B.), 670 and 672 (All E.R.).

²⁹ *Ibid.*, at pp. 520 (Q.B.), 676 (All E.R.).

³⁰ *Supra*, footnote 3, at p. 1001.

³¹ *Ibid.*, at p. 1024.

³² *Ibid.*, at p. 1035.

³³ *Ibid.*, at pp. 1008-1009.

³⁴ *Ibid.*, at pp. 1041-1042.

³⁵ *Supra*, footnote 2, per Salmon L.J., at pp. 520 (Q.B.), 676 (All E.R.); cf. per Lord Denning M.R., at pp. 505 (Q.B.), 667 (All E.R.).

³⁶ (1863), 22 U.C.Q.B. 512.

defendant, an attorney, had been engaged by the plaintiff to conduct an action against one Platt. In his defence to this action, Platt pleaded a set-off on a promissory note made by the plaintiff. By way of reply, the attorney denied that the plaintiff had made such a note, whereas in fact he had made it but had paid it prior to the commencement of the action. The jury allowed Platt's set-off against the plaintiff's claim, and the plaintiff then brought action against his attorney, alleging that he had not used "due or proper care, skill or diligence in and about the prosecuting or conducting the said action . . . contrary to his duty as such attorney".³⁷ Specifically, the plaintiff alleged three grounds of negligence, of which the only ground material to the decision was that the defendant had not instructed counsel to act for the plaintiff at the trial, but had acted as counsel himself, and in so acting had failed either to apply to amend the plea which denied the making of the note or to call evidence that the note had been paid, although the necessary witnesses were present in court at the trial.

The case reached the Court of Queen's Bench on a question of pleading. To this allegation, the defendant had pleaded that, as a barrister in Upper Canada, he was authorized to act as counsel in the trial of causes and that the plaintiff had not at any time objected to his so acting; and demurred to the allegation that he should have applied for an amendment or offered to produce evidence that the note had been paid on the ground that counsel could not be liable for his conduct at trial. The effect of this demurrer was to admit the omissions charged against him. The plaintiff demurred to this plea on the ground that it provided no answer to his cause of action, and was awarded judgment on demurrer. The defendant appealed to the Court of Queen's Bench, which dismissed the appeal.

Hagarty J., upheld the judgment by applying the principle of the solicitor's liability for failing properly to instruct counsel:³⁸

The peculiar position of the profession in Canada, where the attorney may be and often is the counsel for a party in the suit, leaves this case with little illustration from English authority. I think, however, we are safe in holding that if the same gentleman act in both characters, he in no way evades or diminishes any liability properly attachable to him as such attorney. It is conceded that omitting properly to instruct counsel is a good ground of action. If a Canadian attorney, having full knowledge of certain material facts, or the existence of material evidence, uses his privilege of acting as counsel himself, and wholly omits urging such facts or calling such evidence, I think he

³⁷ *Ibid.*, at p. 513.

³⁸ *Ibid.*, at pp. 515-516.

cannot complain if he be treated exactly as if he had omitted properly to instruct counsel.

Adam Wilson J., however, went even further:³⁹

In England, no doubt, an action will not lie against a counsel for any neglect or mistake in a cause, so long as he has acted *bona fide*, because his services are gratuitously rendered, and no action can be maintained by him for any compensation. The whole law is very elaborately discussed in *Swinfen v. Lord Chelmsford*, (5 H. & N. 890).

In this province, however, [counsel may sue for fees, and] it may follow, as a consequence to the right of counsel to demand payment, that counsel are here on an entirely different footing to what they are in England, where their fees are not enforceable of right.

The joinder of the two professions of attorney or solicitor and barrister may, while they are united, be a sufficient reason for the distinction here, for it certainly must be in many cases, as the one now in court illustrates, an exceedingly difficult matter to separate the responsibility between the two professions exercised by and combined in the one person—to say where the responsibility of the attorney ends and that of the counsel might be supposed to begin; and therefore it may, while this united exercise of the two degrees or branches of the law exists, be better for the client that the attorney and counsel, while making a two-fold profit in each of these capacities, should not be held to have a responsibility in but one of these characters, and a total exemption from accountability in the other, and perhaps the most profitable of them, and in which he might not have been employed at all if it had not been for his qualification and practice as an attorney.

I am not, therefore, prepared to say that a counsel in this country, even although he is not the attorney also, is exempt from liability to his client for such negligence on his part of the conduct of the case as would make the attorney liable for negligence in his particular portion of it. But I think there is no doubt that a counsel who is also the attorney in the case is certainly liable for his neglect as counsel, in the like manner and to the same extent as an attorney is.

But in the *Rondel* case, Lord Reid said precisely the opposite:⁴⁰

Finally, I must deal with a powerful argument for the appellant to the effect that, if it is unnecessary to protect solicitors by giving them immunity from action by their clients, it cannot be necessary to protect barristers in that way. I would turn the argument the other way: if it is in the public interest to protect counsel, what good reason is there for withholding similar protection from solicitors? This matter has never been fully considered. As I have already stated, there have been very few cases in which the question could have been raised; and hitherto, in England at least, cases conducted by solicitors have generally been of comparatively minor importance. There are differences between the position of barristers and solicitors; not all the arguments

³⁹ *Ibid.*, at pp. 518-519.

⁴⁰ *Supra*, footnote 3, at p. 1001. Cf. the comments to the same effect of Lawton J., reproduced *supra*, footnote 26.

which I have adduced apply to solicitors. But the case for immunity of counsel appears to me to be so strong that I would find it difficult to regard those differences as sufficient to justify a different rule for solicitors. I have already shown that solicitors have the same absolute privilege as counsel when conducting a case. So my present view is that the public interest does require that a solicitor should not be liable to be sued for negligence in carrying out work in litigation which would have been carried out by counsel if counsel had been engaged in the case.

As has been pointed out, the liability of the solicitor acting as advocate was not before the House, and any comments on that subject are strictly *obiter*. In addition, not all of the policy considerations reckoned by their lordships⁴¹ apply to the Canadian situation. From the viewpoint of strict legal theory, therefore, there are reasons to distinguish the *Rondel* case when the matter again arises for decision in Canada;⁴² but, as a decision of the House of Lords, it can safely be predicted to have at least considerable persuasive effect upon Canadian courts. Furthermore, the authority of *Leslie v. Ball*⁴³ has been weakened in two respects: first, the grounds relied upon by Adam Wilson J., in his reasons for judgment, have been discredited by *Rondel* in rejecting counsel's incapacity to sue for fees as a relevant consideration. Thus, Mr. Justice Lawton expressly criticized that portion of Adam Wilson J.'s reasons for judgment quoted above⁴⁴ saying that "it was, and is, bad law to say that a man is not liable for negligence in doing a service because he has not charged for doing it"⁴⁵; and secondly, nowhere in the reported reasons for judgment in *Leslie v. Ball* is any consideration given to the grounds of public policy which were successfully urged before the House as providing the foundation for the immunity of the lawyer *qua* advocate.

Is *Rondel v. Worsley* likely to be applied in Canada, notwithstanding *Leslie v. Ball*, in a case in which the appropriate factual situation is raised? The Privy Council has in a recent case⁴⁶ established the principle that a decision of the House of Lords⁴⁷ need

⁴¹ *Supra*, footnotes 18 to 23.

⁴² And thus finesse the neat legal question as to the extent to which decisions of the House of Lords are binding upon Canadian courts: see *Robins v. National Trust Co.*, [1927] A.C. 515 (P.C.); Lederman (1952), 30 Can. Bar Rev. 1083; Kennedy (1952), 30 Can. Bar Rev. 1085; MacGuigan, Precedent and Policy in the Supreme Court (1967), 45 Can. Bar Rev. 627, especially at pp. 638-647.

⁴³ *Supra*, footnote 36.

⁴⁴ *Supra*, footnote 39.

⁴⁵ *Supra*, footnote 1, at pp. 467 (Q.B.), 478 (All E.R.).

⁴⁶ *Australian Consolidated Press Limited v. Uren*, [1967] 3 All E.R. 523.

⁴⁷ In that case, *Rookes v. Barnard*, [1964] A.C. 1129, [1964] 1 All E.R. 367.

not be applied in a Commonwealth country⁴⁸ where the law has been differently settled⁴⁹ in a legal sphere decided on policy considerations which have been fashioned by judicial opinion in that country, at least where that law cannot be said to have developed by processes of faulty reasoning or misconception.⁵⁰ But, even accepting this principle, it will not have escaped the reader's attention that substantially all of the considerations of public interest which the members of the House of Lords found so compelling are equally appropriate to the realities of Canadian litigation. In the writer's view, therefore, it is not unlikely that, when a Canadian Rondel and a Canadian Worsley have the mutual misfortune to combine, our courts may well extend the immunity from action which the House of Lords saw fit to bestow upon Worsley to his hapless Canadian counterpart.

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TORTS—NERVOUS SHOCK—RELATION TO NOMINATE TORTS.—

Nervous shock is a way in which a plaintiff may be injured. Like the infliction of cuts, burns or bruises it is a sort of personal physical injury. "Nervous shock" is not a magical term, it is simply a description.

The difficulty with nervous shock is simply that it is not quite certain when it has been suffered by a plaintiff. The result is that a person may either exaggerate the extent of the damage or fabricate its existence altogether. This fact encouraged Johnson J.A. to notice that a "compensation neurosis" was "a condition frequently associated with pending claims for damages".¹ This problem, however, is the only real problem that nervous shock produces for the law of torts.

The most important difficulty we face today is the exaggeration of a claim to have suffered nervous shock, and not the problem of the completely spurious claim. The possibility of a false claim being brought has given rise to a large number of legal tests to determine whether there was a duty owed to this particular plain-

⁴⁸ In that case, Australia.

⁴⁹ In that case, the awarding of exemplary damages in libel actions.

⁵⁰ *Supra*, footnote 46, per Lord Morris, at p. 538.

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¹ In *Pollard v. Makarchuk* (1959), 16 D.L.R. (2d) 225 (Alta S.C.), at p. 227.

tiff not to cause him nervous shock, and also to other tests which determine whether the damage was too remote or not. Many of these tests have already been discarded and it is only a matter of time before they will all disappear. On principle, there is no reason why nervous shock cases should not be approached on the same basis as any other negligence case. We should be more concerned about the cases which give scope for exaggeration of the nervous shock suffered. Such cases present problems, not for the duty of care or remoteness, but for questions of quantum of damage. The plaintiff should only be compensated to the extent that he has actually suffered. However, since it seems to be easy to feign the symptoms of nervous shock it can never be categorically stated that the plaintiff is having a rest cure at the expense of the defendant.

It appears from the cases that nervous shock can be recovered in any situation in which other types of personal injuries could be recovered. The most common torts giving rise to recovery for nervous shock are the torts of negligence and the intentional infliction of nervous shock. There is, however, no reason why damages for nervous shock should not be recovered as the result of an action for assault, battery or false imprisonment provided all the necessary conditions of those torts are fulfilled. If one can recover damages for pneumonia or a broken arm sustained as a result of one of those torts there is no real reason why one should not recover for nervous shock. Indeed, it has been suggested that nervous shock may be the subject of redress where it is the consequence of a breach of contract.²

Different rules govern recovery in different torts and some torts are not available to give redress to personal injuries. However, if the rules of any particular tort are complied with (and it is available for personal injuries) there is no reason why it should not be available for the solace of intangible personal injuries as much as for tangible personal injuries.

Unfortunately, the words recently expressed by Chief Justice Culliton seem to deny the simple proposition that nervous shock is just another type of damage. The Saskatchewan Court of Appeal recently reversed the decision of Mr. Justice Sirois, and denied a mother recovery for the nervous shock and attendant neurasthenia

² Lord Denning M.R. in *Cook v. Swinfen*, [1967] 1 W.L.R. 457, at p. 461 said: "In these circumstances I think that, just as in the law of tort, so also in the law of contract, damages can be recovered for nervous shock or anxiety state if it is a reasonably foreseeable consequence."

she suffered as a result of hearing that two of her children had been killed and another seriously injured. The court in *Abramzik v. Brenner*³ denied that a duty of care was owed by the defendant to the mother. The court had to determine whether a normal person in the position of the defendant could reasonably foresee that the plaintiff would suffer nervous shock. This is a difficult question of mixed fact and law.

It is suggested that Culliton C.J.S. went a little too far when he stated that, "in my opinion the authoritative view is that nervous shock, other than that flowing from a physical injury suffered by a claimant as a result of a negligent act, is a substantive tort".⁴ It is suggested that the rules relating to nervous shock are extra rules tacked on to the tort of negligence when this sort of damage is claimed. They are so appended to ensure the genuineness of the claim and cannot exist as a self sufficient cohesive body of rules. Thus, it is submitted that there does not exist a tort entitled "nervous shock".

If Chief Justice Culliton's words were not intended to indicate that the recovery for nervous shock, other than that flowing from a physical injury suffered by a claimant as a result of a negligent act, is a separate head of tort liability it is difficult to see what else he may have meant. It may be that the court intended to convey the impression that a separate duty of care must have been owed to the plaintiff mother in the case. It is fairly clear that the children were killed in breach of a duty of care owed to them, but this does not assist their mother in showing the independent duty that was owed to her by the defendant. It is axiomatic that for success in negligence a duty of care must be owed to the plaintiff. A nervous shock case is no different in that respect. If this simple and well-substantiated point was all the court had in mind, it is respectfully suggested that appropriately simple language could have been employed to express it.

The Saskatchewan Court of Appeal also perpetuated the idea that damages for nervous shock are not recoverable in the absence of contemporaneous physical impact or physical manifestations resulting from the nervous shock. It seems clear that this requirement will be dispensed with at some point in the future. Its retention is now often attributed to the inability of medical science to predicate the genuineness of any particular claim. There is some medical opinion to the effect that any shock of a prolonged char-

³ (1968), 65 D.L.R. (2d) 651.

⁴ *Ibid.*, at p. 654.

acter produces changes in the nerves of a physical character.⁵ Thus, it may be said that it is impossible to draw a distinction between physical and nervous consequences of emotion. The true distinction is between that nervous shock which can be proved and that which cannot.

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⁵ See Havard, *Reasonable Foresight of Nervous Shock* (1956), 19 Mod. L. Rev. 478, and Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli* (1944), 30 Va. L. Rev. 193.

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