

COMMENTS

COMMENTAIRES

TORTS—ILLEGALITY OF PLAINTIFF'S CONDUCT AS A DEFENCE.—Few would quarrel with the proposition that a man who murders his wealthy aunt should not be allowed to receive the proceeds of her life insurance as beneficiary,¹ or that two robbers who disagree over the division of the spoils should not be allowed to settle their dispute in a court of law.² It was to deal with flagrant abuses like these that English courts developed the principle expressed in the maxim: *ex turpi causa non oritur actio*—no right of action arises from a base cause.

Over the years, this principle has frequently been applied in the fields of insurance and contract law, but its relevance to the law of tort has always been a matter of doubt. There have been suggestions in some cases that if the injuries of a plaintiff in a tort case can be attributed in whole or in part to his own unlawful conduct, as where an injured passenger and his drunken driver are involved in a joint drinking spree,³ or a patron of illegal gambling premises is injured by their dangerous condition,⁴ he should be denied a right of compensation. However, these suggestions have seldom constituted the *ratio decidendi* of the cases,⁵ and many

¹ See *Lundy v. Lundy* (1895), 24 S.C.R. 650.

² *Everet v. Williams*, an early eighteenth century case, reported in (1893), 9 L.Q.R. 197.

³ See reasons for judgment of Adamson C.J., in *Joubert v. Toronto General Trusts Corporation*, [1955] 3 D.L.R. 685 (Man. C.A.). The majority of the court decided the case on other grounds. See also the reasons for judgment of Sidney Smith J.A., in *Miller v. Decker*, [1955] 4 D.L.R. 92 (B.C.C.A.). The majority of the court, and the Supreme Court of Canada on appeal (1957), 9 D.L.R. (2d), both decided the case on other grounds. In *Schwindt v. Giesbrecht* (1958), 13 D.L.R. (2d) 770, Egbert J., of the Alberta Supreme Court, expressed a similar opinion, *obiter dictum*.

⁴ *Danluk v. Birkner*, [1946] 3 D.L.R. 172 (Ont. C.A.). On appeal, the Supreme Court of Canada upheld the result, but expressly stated that its decision was not based on the lower court's reasons relating to the *ex turpi causa* defence: [1947] 3 D.L.R. 337.

⁵ An early line of Canadian decisions, such as *Etter v. Saskatoon* (1916), 39 D.L.R. 1 (Sask. S.C. *en banc*), to the effect that failure to hold an automobile licence precludes the driver from suing for injuries caused by someone else's negligence was overruled by the Supreme Court of Canada in *Vancouver v. Burchill*, [1932] 4 D.L.R. 200. Another line of cases, involving failure to take the precautions prescribed by statute when driving heavy machinery over municipal bridges, and refusing to allow the owners

prominent tort scholars and other authorities have refused to regard the *ex turpi causa* defence as appropriate to tort law.⁶

Mr. Justice Hunt of the Manitoba Court of Queen's Bench was responsible, in the recent case of *Ridgeway v. Hillhorst*,⁷ for what seems to have been the first clear-cut and uncontradicted application of the defence in Canada. The plaintiff, who was a passenger in the defendant's automobile, encouraged the defendant to race with another vehicle. While doing so, the defendant drove on the wrong side of the road, and collided with an approaching vehicle. The plaintiff was injured, but his action against the defendant was dismissed by Mr. Justice Hunt, on the sole ground that the plaintiff was an accessory to the crime of dangerous driving, and was therefore precluded from recovering by the *ex turpi causa* principle. Now, in *Rondos v. Wawrin*,⁸ the Manitoba Court of Appeal has again applied the doctrine, this time to deny recovery to a fourteen year old boy injured while a passenger in an automobile he knew to have been stolen by the driver whose negligence caused his injuries.

Since the courts appear to be in the process of introducing the *ex turpi causa* principle to tort law, this seems an appropriate time to ask whether the principle is a sound one.

A widely approved pronouncement by Mr. Justice Macdonald of the Nova Scotia Supreme Court asserted that "there are . . .

of the machinery to sue the municipalities for damage suffered when the bridges collapsed, was upheld by the Supreme Court in *Goodison v. McNab* (1910), 44 S.C.R. 187. It is important to note, however, that the latter case applied only to the special situation where the sole proximate cause of the accident was the plaintiff's failure to take the necessary precautions (the bridge in question being safe if used in the manner specified), and provides no support for cases like *Marion v. Montcalm* (1915), 34 W.L.R. 683 (Man. C.A.) and *Sercombe v. Vaughan* (1919), 45 O.L.R. 142 (Ont. C.A.), where the illegality did not cause the accident, and which are clearly inconsistent with the Supreme Court's reasoning in *Vancouver v. Burchill*.

⁶ See Cronkite, Effect of the Violation of a Statute by the Plaintiff in a Tort Action (1929), 7 Can. Bar Rev. 67; editorial note to *Danluk v. Birkner & Cassey*, [1946] 3 D.L.R. 172 (undoubtedly by Dean C. A. Wright); Glanville Williams (1954), 17 Mod. L. Rev. 365; Fleming, Law of Torts (3rd ed., 1965), p. 250, note 14; dictum of Lord Porter in *National Coal Board v. England*, [1954] A.C. 403, at p. 419; and, so far as automobile accidents are concerned, reasons for judgment of Macdonald J., (with whom the majority of the Nova Scotia Supreme Court concurred) in *Foster v. Morton* (1956), 4 D.L.R. (2d) 269, at p. 281. The statement in the latter case was followed by Ilesley C.J., of the same court, in *Atwell v. Gertridge* (1958), 12 D.L.R. (2d) 669, and approved by Abbott J., of the Supreme Court of Canada (dissenting, but not on this point) in *Miller v. Decker*, *supra*, footnote 3, at p. 10.

⁷ (1967), 61 D.L.R. (2d) 398. He relied on the views of Adamson C.J., in the *Joubert* case, *supra*, footnote 3, and Sidney Smith J.A., in the *Miller* case, *supra*, footnote 3, but cited no further authority.

⁸ (1968), 66 D.L.R. (2d) 272 (Man. Q.B.). An appeal to the Supreme Court of Canada is likely.

weighty reasons why in principle this doctrine of illegality should not afford a general defence to civil actions of negligence arising out of automobile accidents . . .",⁹ but the only reason his Lordship mentioned was the fact that very many types of conduct are prohibited in Canada (the implication apparently being that to apply the principle to all prohibited acts would be unfair, and to limit it to certain restricted categories of act might be unworkable).¹⁰ Other reasons are not difficult to find, however. One is that the *ex turpi causa* principle creates a form of double jeopardy. Criminal law stipulates the penalties that are to be applied against those who engage in prohibited conduct, but if the *ex turpi causa* principle is used, it imposes an additional penalty on those who are unlucky enough to be injured while so engaged.¹¹ This additional penalty, inability to sue the tortfeasor for damages, has no relation to the turpitude of the conduct; another offender, whose conduct is every bit as wrongful, will escape this penalty simply because he happens not to have been injured.¹² An even more compelling argument for refusing to apply the *ex turpi causa* defence to tort cases is the fact that to do so would be inconsistent with the trend of recent developments in this area of law. In earlier times, there was no need to raise this defence, because two other available defences led to the same result. By establishing either that the plaintiff was guilty of some degree of contributory negligence (however small), or that he had consented to the risk, the defendant could escape tort liability entirely. Because it was regarded as unjust that a small degree of contributory negligence should entirely deny an injured person compensation, legislation was eventually passed in every Canadian province and many other parts of the common law world providing for an apportionment of liability in such circumstances. And, for similar reasons, the consent defence has been restricted judicially, by a variety of means, to the extent that it is now seldom employed to defeat tort claims.¹³ To allow another

⁹ *Foster v. Morton*, *supra*, footnote 6, at p. 281.

¹⁰ But see the discussion *infra*, at footnote 22.

¹¹ I am indebted to Mr. Keith Turner, counsel for the plaintiff in the *Rondos* case, for pointing out that where, as in that case, a juvenile is involved, the *ex turpi causa* defence could impose a penalty in circumstances where the law prevents direct criminal liability.

¹² I acknowledge that the same argument could be made concerning whether a person who fails to observe a statutory duty should be made civilly as well as criminally liable for injuries resulting to others. However, I believe that the situations are distinguishable, because there an innocent injured party is involved, whereas the persons involved in the *ex turpi causa* situation are all culpable to some extent.

¹³ In *Lehnert v. Stein* (1963), 36 D.L.R. (2d) 159, [1963] S.C.R. 38, Cartwright J., adopted, for the Supreme Court of Canada, the following

absolute defence to be introduced, via the *ex turpi causa* principle, would be to reverse the trend of recent tort history.

It is also possible to make policy-based arguments in support of applying the defence of illegality to tort law, but I do not find any of them convincing. It could be contended, for example, that the *ex turpi causa* principle is beneficial because it discourages criminal conduct,¹⁴ but the deterrent effect of tort law is questionable at best,¹⁵ and, in any event, a strong countervailing argument could be made to the effect that the principle *encourages* the criminal conduct of the plaintiff's negligent accomplices, by immunizing them from civil liability to the plaintiff.¹⁶ It might also be argued that insurance costs could be reduced by introduction of the illegality defence, but it is very unlikely that enough cases would be involved to have any significant effect. Moreover, the uncompensated losses would have to be borne by someone, and every alternative to imposing liability on the defendant and his insurer (such as requiring the injured party and his family, or the general public¹⁷ to pay, for example) seems less satisfactory.

It is difficult, therefore, to disagree with the many writers who urge that as a matter of *policy* the defence of illegality should have no place in tort law. The next problem is to decide what *legal* obstacles may be raised to prevent the adoption of the defence by Canadian courts. Fortunately, several lines of attack are open, enabling the courts either to restrict the operation of the principle

statement by Glanville Williams: ". . . the scope of the defence has been progressively curtailed since the end of the last century, so that at the present day, it is allowed only when there is a positive agreement waiving the right of action . . . the defence of volens does not apply where as a result of a mental process the plaintiff decides to take a chance, but there is nothing in his conduct to show a waiver of the right of action communicated to the other party. To constitute a defence, there must have been an express or implied bargain between the parties whereby the plaintiff gave up his right of action for negligence." *Joint Torts and Contributory Negligence* (1953), p. 308.

¹⁴ "The operator of a common betting house would soon discontinue his nefarious business if the patronage of all his customers ceased. It is their patronage which sustains him in that business. They participate with him in its operations." Per Roach J.A., in *Danluk v. Birkner*, *supra*, footnote 4, at p. 178.

¹⁵ See the excellent discussion in Ison, *The Forensic Lottery* (1967), p. 81 *et seq.*

¹⁶ The plaintiff in *Miller v. Decker*, *supra*, footnote 3, in his appeal to the Supreme Court of Canada, at p. 7, tried to turn the tables in this way, by arguing that the defendant should be precluded from raising the consent defence, because *he* was involved in a criminal act. Kellock J., rejected this argument on the ground that the statute in question was not one to which public policy called for the *ex turpi causa* defence to attach.

¹⁷ "Participation in crime should not compel an injured man to seek redress from public funds rather than from a wrongdoer": editorial note to *Danluk v. Birkner*, *op. cit.*, footnote 6.

to a narrow scope (like the consent defence) or merely to treat it as a reason for apportioning liability between the plaintiff and defendant (like contributory negligence).

Courts that do not wish to go so far as to deny the principle any scope as an absolute defence in tort may, nevertheless, control the extent of its operation by a wide variety of devices. These fall into three categories.

First, it may be that the defence can only be raised where the defendant is able to prove the illegality beyond a reasonable doubt, rather than on a mere preponderance of probabilities.¹⁸

Next is the approach of limiting the category of prohibited acts to which the *ex turpi causa* defence applies. The problem here is to establish a satisfactory basis for classification. The historic distinction between felonies and misdemeanors has been rejected,¹⁹ and many of the other criteria that have been suggested (such as excluding statutes relating to automobiles,²⁰ or imposing constructive or vicarious liability)²¹ are open to obvious objections. One method does hold promise, however: to restrict the operation of the principle to those statutes which expressly or by clear implication provide that their breach will put an end to civil liability.²²

¹⁸ Per Macdonald J., in *Foster v. Morton*, *supra*, footnote 6, at p. 281, and Bastin J., in *Rondos v. Wawrin*, *supra*, footnote 8.

¹⁹ *Lundy v. Lundy*, *supra*, footnote 1.

²⁰ Per Macdonald J., in *Foster v. Morton*, *supra*, footnote 6, at p. 281.

²¹ Per Macdonald J., *ibid.*; per Lord Porter in *National Coal Board v. England*, *supra*, footnote 6, at p. 419; and per Ilsley C.J., in *Atwell v. Gertridge*, *supra*, footnote 6.

²² Fleming, *op. cit.*, footnote 6, p. 251, points out that this approach has been taken in Australia. A somewhat similar technique was employed by Cohen L.J., in *Cakebread v. Hopping*, [1947] K.B. 641, at p. 654: "The maxim *ex turpi causa* is based on public policy, and it seems to me plain on the facts of this case that public policy, far from requiring that this action shall be dismissed, requires that it shall be entertained and decided on its merits. The Factories Act makes it plain that such a defence as that put forward here would be inconsistent with the intention of Parliament." (Quoted with approval by Lord Porter in *National Coal Board v. England*, *supra*, footnote 6, at p. 419.)

In Canada the same approach seems to have been followed by Kellock J., in *Miller v. Decker*, *supra*, footnote 3, at p. 7, in rejecting the argument by the plaintiff that the defendant could not raise the consent defence because he was engaged in illegal activity: "There is a substantial difference between the breach of such statutory provisions as those laying down safety requirements in factories for the protection of persons employed therein, and a breach of such statutory provisions as (automobile speed limits and prohibitions against dangerous driving).

Such statutes as the *Factory Acts* were enacted to create an absolute duty on the employer to protect his employees by the installation of the safeguards called for by the enactments, breach of which duty would give to an injured employee a cause of action against which even the express consent of the employee to dispense with the statutory requirements could afford no defence. On the other hand, statutes of the character of those here in question were not enacted from any such standpoint or with any

The beauty of this approach is that the same technique is employed to determine the analogous question of whether breach of a statutory duty by the *defendant* creates civil liability to the plaintiff. The danger, of course, to some minds, is the wide discretion given to the court in determining when the *ex turpi causa* defence does and does not apply.

Finally, the most frequently used device to defeat the defence is a finding that the illegality of which the plaintiff was guilty was not causally relevant to the injury of which he complains (or, to be more accurate, that the illegality was not a *proximate* cause of the injury).²³ Here too, however, the court has a wide discretion, as can be seen by examining a few hypothetical situations. Lord Asquith suggested, in the leading English case, that if one burglar had his watch stolen by another while driving toward the scene of an intended burglary, the illegality of his own conduct would be no defence to an action for conversion, because "the theft is wholly unconnected with the burglary"; but that if one burglar injured the other through negligence trying to blow up a safe during the course of the burglary, the defence would be available.²⁴ Even at these extremes, the situation is not without doubt (in the first illustration, for example, there is *some* causal connexion, since the plaintiff would not have been in the car to have his pocket picked if he had not taken part in the criminal scheme), and in less clear-cut circumstances it could be very difficult to predict whether the court would find that the illegality was sufficiently proximate to the injury to preclude recovery.²⁵

In many jurisdictions the difficulties inherent in the partial restraints on the illegality defence can be avoided altogether by interpreting the contributory negligence apportionment legislation as embracing illegal as well as negligent conduct by the plaintiff. The House of Lords adopted this approach in *National Coal*

such object. Accordingly, there is no public policy attaching to their breach which would provide any basis for giving effect to such a contention as that put forward by the appellant in the case at bar."

The same approach is to be found in the Supreme Court's judgment in *Vancouver v. Burchill*, *supra*, footnote 5, at p. 203.

²³ In *Rondos v. Wawrin*, *supra*, footnote 8, for example, the trial judge, Bastin J., of the Manitoba Court of Queen's Bench held that a passenger's illegal conduct in knowingly riding in a stolen car was too remote to affect the driver's liability for injuring the passenger by careless driving. See also *Walker v. B.C. Electric*, [1926] 1 D.L.R. 1162 (B.C.C.A.) where plaintiff's lack of a driving licence was held not to bar his action.

²⁴ *National Coal Board v. England*, *supra*, footnote 6, at pp. 428-429.

²⁵ Fleming, *op. cit.*, footnote 6, p. 250, points, for example, to conflicting Australian cases on whether the *ex turpi causa* defence would apply where the injury was caused to one of the criminals by another through careless driving on the way to the scene of a planned crime.

Board v. England, where the plaintiff's breach of statute resulted in a mere apportionment of liability because the Law Reform (Contributory Negligence) Act, 1945²⁶ refers to the plaintiff's "fault", and defines fault to include "breach of statutory duty or other act or omission which gives rise to a liability in tort".²⁷ Although the contributory negligence legislation in force in Canada differs somewhat from the English Act, most of it is open to similar interpretation. The Ontario Act,²⁸ for example, refers throughout to "fault or negligence", and although there is no statutory definition of "fault" given, it is clearly capable of the broad construction accorded to it in England. The Uniform Contributory Negligence Act, in force in seven provinces,²⁹ uses only the term "fault", and does not define it, but again the courts are free to interpret it to include criminal conduct if they choose to do so. In Manitoba, where the *Ridgeway*³⁰ and *Rondos*³¹ cases were decided, it would not be quite so easy for a court to arrive at the same result, because the relevant statute³² refers only to the "negligence" of the plaintiff, but it would, nevertheless, be possible to do so. Negligent conduct is that which can reasonably be foreseen to involve an unreasonable risk of harm, and an act which falls into that category is no less "negligent" because it happens as well to be intentional or criminal.³³ Therefore, I submit, illegal acts by the plaintiff which increase the foreseeable risk of harm, should be regarded as "contributory negligence", and subject to the apportionment legislation, even in Manitoba.

Even if a court felt unable so to interpret the apportionment legislation, there would still be another method open whereby it could avoid applying the *ex turpi causa* defence in tort cases. Dean C. A. Wright contended that the principle has no relevance in a tort context because:

Any analogy to the contract of insurance cases may be misleading. In those cases, a plaintiff guilty of unlawful conduct is usually seeking some benefit or advantage which the courts deny him. In a negligence

²⁶ 8 & 9 Geo. 6, c. 28. ²⁷ *Supra*, footnote 6, at p. 419.

²⁸ The Negligence Act, R.S.O., 1960, c. 261.

²⁹ See, for example, The Alberta Contributory Negligence Act, R.S.A., 1955, c. 56.

³⁰ *Supra*, footnote 7. ³¹ *Supra*, footnote 8.

³² The Tort Feasors and Contributory Negligence Act, R.S.M., 1954, c. 266.

³³ As to whether intentional conduct may be treated as negligence, see Millner, *Negligence in Modern Law* (1967), p. 174: "A duty of care can be breached deliberately as well as negligently and harm which would be actionable if negligently caused is *a fortiori* actionable if purposively caused. The paradox of 'intentional negligence' is purely verbal."

The same reasoning applies to the element of illegality.

case, he seeks merely to be restored to his condition or situation as it was before the operation of the defendant's negligence.³⁴

The *ex turpi causa* defence is appropriate, in other words, only where the plaintiff is trying to *profit* by his illegality, not where he is simply claiming compensation for a wrong done to him while engaged in illegal conduct.

Mr. Justice Bastin, who was the trial judge in the *Rondos* case rejected the *ex turpi causa* defence for several reasons.³⁵ In addition to distinguishing the *Ridgeway* case on the facts, he left little doubt that he was uneasy about applying the defence to negligence cases at all. It is hoped that the foregoing demonstrates that Mr. Justice Bastin's reluctance was entirely warranted. There is no justification, either in policy or in law, for introducing the *ex turpi causa* defence to the law of tort.

DALE GIBSON*

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ABRAMZIK v. BRENNER AGAIN—THE TEST FOR NERVOUS SHOCK LAID DOWN—THE TEST NOT APPLIED.—In his recent comment¹ on *Abramzik v. Brenner*² Professor J. Williams pointed out that "‘Nervous Shock’ is not a magical term, it is simply a description".³ He indicated that once the courts accepted this self-evident fact there would be an end to the bedevilling problems created by devising special rules to cope with the "false" category of nervous shock. Professor Williams suggested "that nervous shock . . . be recovered in any situation in which other types of personal injuries would be recovered".⁴ Hence, the argument runs, if one seeks to recover for nervous shock which was negligently inflicted, one has to establish the same criteria necessary for the recovery of damages for other physical injuries. The learned writer therefore expressed dissatisfaction with the Saskatchewan Court of Appeal's judgment because it was there stated that "nervous shock . . . is a substantive tort".⁵

³⁴Editorial note to *Danluk v. Birkner*, *op. cit.*, footnote 6. See also Fleming, *op. cit.*, footnote 6, p. 250, n. 14: "‘*Ex turpi causa non oritur actio*’ is a maxim whose sole legitimate function is to deny a plaintiff legal aid for accomplishing an illegal object, like enforcing a contract." Cronkite, *op. cit.*, footnote 6, at pp. 69-70, makes the same argument in somewhat different terms.

³⁵*Supra*, footnote 8.

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¹(1968), 46 Can. Bar Rev. 515. ²(1968), 65 D.L.R. (2d) 651.

³*Ibid.*, at p. 515. ⁴*Ibid.*, at p. 516. ⁵*Ibid.*, at p. 654.

Three points will be sought to be made in this comment:

- (1) that the Saskatchewan court was well aware that nervous shock was just another form of physical injury, and also that it ought to be recoverable under the rubric of various nominate torts which permit personal injuries to be compensated;
- (2) that the Saskatchewan court nonetheless formulated a special test for fixing liability in nervous shock and that this test in fact is no different to the one that Professor Williams would have us apply. However, the Saskatchewan court, rather than relying on general principles, derived the said rule from an examination of the authorities. This analysis, it is respectfully submitted, did not unequivocally lead to the test laid down;
- (3) that the Saskatchewan court having enunciated a test which seemed to promise a step forward, misapplied it, creating doubts about the test it wishes to prevail.

The first point is relatively easy to make. After all the *Abramzik v. Brenner* judgment recited that:

While it was once contended that nervous shock was a form of personal injury for which damage could not be recovered, this would not now appear to be correct. I think it may now be said that *nervous shock is a form of personal injury for which damages may or may not be recoverable*. Whether damages are recoverable depends upon the circumstances in each case.⁶

To support this view, reliance was placed on an oft-cited passage from Lord MacMillan's judgment in *Hay or Bourhill v. Young*⁷ which included this sentence:

The distinction between mental shock and bodily injury was never a scientific one, for mental shock is presumably in all cases the result of, or at least accompanied by, some physical disturbance in the sufferer's system.⁸

Thus it can hardly be thought that in *Abramzik v. Brenner* the court was ignorant of the validity of including nervous shock in the larger category of personal injury. But it is true that the Saskatchewan court did not use this knowledge to satisfy Professor Williams' aim, namely, to get rid of the special rules controlling the area of nervous shock. Rather, the court took the stance that nervous shock, being a personal injury and like other personal injury actionable under various tort headings, was to be recognized

⁶ *Ibid.*, at p. 653. Emphasis added.

⁷ [1943] A.C. 92. ⁸ *Ibid.*, at p. 103.

as a separate substantive tort. The court knew, of course, that this pronouncement was far from unchallengeable.

Legal writers and commentators have expressed contrary views, but in my opinion the authoritative view is that nervous shock . . . is a substantive tort.⁹

This bold approach permits the inference that the Saskatchewan court must have considered it essential that there be a set of special criteria to cover the area of nervous shock.

This brings us to the second point. Is the doctrine put forward by Professor Williams meaningfully different from the "special" rule eventually laid down in *Abramzik v. Brenner*? Let us test Professor Williams' suggested approach by applying it to *Abramzik v. Brenner*. The facts there were that the defendant was driving the plaintiff's children to church. As she came to a railway crossing she failed to hear the warning bells or see the caution light, nor did she see a freight car approaching although she should have had an unimpaired view of it. The resulting collision ended with two of the plaintiff's children being killed in the crash. A third was taken to hospital, seriously injured. The plaintiff's husband came upon this scene and immediately went home to break the news to his wife. She suffered considerable emotional disturbance (described by the trial court as a "nervous breakdown") accompanied by physical debilitation. There was no question but that the defendant driver had been grossly negligent and had therefore breached the duty she owed her gratuitous passengers. The plaintiff brought an action for damages arising out of the nervous shock she had suffered.

Professor Williams would hold that if this fact situation would have permitted the plaintiff to succeed in a personal injury action, she should have, *ipso facto*, succeeded in the present action where nervous shock was the damage sought to redressed. With respect, this formulation would not help a court very much. Surely before an answer can be given, one would have to know what the criteria for success in a physical injury case must be. Is one of these criteria a requirement that before a duty of care is found to exist, the defendant's conduct and the actual damage inflicted must (prior to the accident) have been foreseeably connected? It is here submitted that such nexus must always be found, not only when the remoteness question comes into play, but also when the duty-concept is invoked.¹⁰ This is also implicit in Professor Williams'

⁹ *Supra*, footnote 2, at p. 654.

¹⁰ The point is too well-established to be debatable. See, Glanville Williams, *The Risk Principle* (1961), 77 L.Q. Rev. 179. Also it is implicit in

approach, for if it were not his test would produce some strange results. Thus, if the learned author refuted the theory that the actual damage inflicted must be considered in determining the existence of a duty of care he would have had no option but to agree with the result reached in *Abramzik v. Brenner* since it was clearly unforeseeable that Mrs. Abramzik was likely to suffer some physical-impact injury (as opposed to nervous disorder). For example, could it convincingly be argued that the plaintiff should have recovered for a wrenched back she suffered as she jumped out of her chair in her wish to get to the scene of the accident? It is fair to assume that Professor Williams wished the special character of nervous shock (and hence the special rules) to be ignored in order that recovery for such injury would be more common. Failure to take the special nature of the damage into account might have the opposite result.

Naturally it will be argued on behalf of Professor Williams' approach, that, because he means physical injury to include nervous shock, in order to recover in a situation like Mrs. Abramzik all that must be foreseen is physical injury of any kind, that, is injury by impact or injury by shock. This would avoid the potential restriction of recovery suggested by the wrenched back example, but immediately points to the fact that even in the application of Professor Williams' theory the nature of the damage inflicted is a meaningful factor in determining whether a duty of care exists or not.¹¹ And, of course this is exactly the consideration that was uppermost in the Saskatchewan court's mind when it laid down the "duty test" for nervous shock cases as follows:

... the plaintiff, to succeed in a claim of damages arising from nervous shock, must prove that the defendant ought, as a reasonable man, to

all the cases restricting recovery for economic loss, see *e.g. Hedley Byrne and Co. Ltd. v. Heller and Partners Ltd.*, [1964] A.C. 465, where the duty with respect to economic loss is specifically laid down for this purpose.

¹¹ The argument that a special category of nervous shock ought to be retained may be reinforced in another way. If it is not retained, injuries like a wrenched back in the circumstances of *Abramzik v. Brenner* would be recoverable, because *some* physical injury (nervous shock) was foreseeable. No view is here expressed on whether this is desirable or not, but it is submitted that such a result would satisfy neither community expectations, nor fashionable risk principle theories. On the other hand it could be argued that Professor Williams does more than the Saskatchewan court because nervous shock might be recoverable even though not foreseeable, as long as other physical injury would have been recoverable. Although the point is not clear, Professor Williams probably would not emphasize such a rule. Further, it would add nothing to the old established rule (see *infra*) that nervous shock is recoverable if the plaintiff was within the physical impact zone.

have foreseen nervous shock (as opposed to other physical injury) as a result of his conduct.¹²

Having seen that this test can also be arrived at by probing into the Williams' theory, one would have thought that it was so basic that the formula must always have pervaded the case law. The Saskatchewan court claimed this to be so, but one of the more unfortunate aspects of this case was that the analysis undertaken by the court to make this point did not irrevocably do so.

Culliton C.J.S., delivering the judgment of the court, commenced of course by stating that the test that the court adhered to had always been the same. Therefore he claimed that when Kennedy J. said (that to be actionable): "The shock, where it operates through the mind, must be a shock which arises from a reasonable fear of immediate personal injury to oneself",¹³ he was really putting the same kind of duty-question that the Saskatchewan Court of Appeal wished to postulate. Culliton C.J.S. recognized that the "Kennedy" duty seemed to be owed to only a very restricted group of people, but he claimed this had been alleviated by Bankes L.J. in *Hambrook v. Stokes Brothers*, where His Lordship widened the duty to encompass people who feared for the physical well-being of their near relatives. Bankes L.J. did not say that the duty could extend further than this, but it is true that neither did he say it could not.¹⁴ So far, so good. But the Saskatchewan court still had to overcome its biggest hurdle. This was presented by the House of Lords decision in *Hay or Bourhill v. Young*.

Culliton C.J.S. pointed out that the headnote of the official report of that case was misleading. It was there suggested that the duty was not to inflict personal injury, and that no recovery was possible unless the plaintiff might have been physically injured. This is contrary to the test eventually enunciated by the Saskatchewan court and was therefore not accepted by it. The Court of Appeal cited several passages from *Bourhill v. Young* to negate the ratio suggested by the headnote.¹⁵ Having thus dealt with the

¹² *Supra*, footnote 2, at p. 657. The judgment stated this to be the correct interpretation of *Bourhill v. Young*, *supra*, footnote 7, and was thus the test that the Saskatchewan court accepted as authoritative.

¹³ *Dulieu v. White & Sons*, [1901] 1 K.B. 669, at p. 675.

¹⁴ [1925] 1 K.B. 141, at p. 151.

¹⁵ The passages quoted were from the speeches of Lord Porter, (*supra*, footnote 7, at p. 119) Lord Thankerton (*ibid.*, at p. 98) and Lord Russell of Killoween (*ibid.*, at p. 102). It will be noted that the headnote spoke of "physical injury". This clearly did not include nervous shock as such; any examination of the speeches will reveal this. Indeed, it was because of this that the Saskatchewan court tried so hard to re-read the headnote.

case itself, further substantiation for the Saskatchewan court's reading of it was thought to be found in Denning L.J.'s famous judgment in *King v. Phillips*.¹⁶

Let us look at these arguments in more detail. The first thing that may be noted is that Bankes L.J.'s formulation of the test in *Hambrook v. Stokes*, eagerly pounced on in *Abramzik v. Brenner*, probably formed no part of the ratio of the case. As Atkin L.J. pointed out in his judgment in *Hambrook*, there was really no question but that a duty had been owed to the plaintiff, because the defendant had conceded this in the pleadings.¹⁷ Further, Bankes L.J. was careful to emphasize that to recover the plaintiff must have become afraid as a result of his own observations of the imminent danger.¹⁸ This implies a pre-requisite of physical proximity suggested by the headnote in *Bourhill*.

Secondly, it is submitted that the passages selected from *Bourhill v. Young* by Culliton C.J.S. do not clearly establish that the headnote was a misrepresentation of the content of the judgments. It is true that Lord Porter, cited by the Saskatchewan Court of Appeal, held the view that the relevant duty-question was the foreseeability of nervous shock. But he and Lord Wright formed only one wing of the House of Lords decision. The other wing was formed by Lords Thankerton, Russell and MacMillan. They in turn, contrary to what is suggested in *Abramzik v. Brenner*, held the view that the plaintiff must have been within the zone of foreseeable physical impact in order that recovery in nervous shock might be granted.¹⁹ Interestingly enough, the passage quoted by Culliton C.J.S. from Lord Thankerton's judgment seems to be just as strongly against the Saskatchewan theory as it is for it.²⁰

Of course, as has already been seen, the Saskatchewan decision did not just rely on the three passages from *Bourhill v. Young* to prove that foreseeability of nervous shock was the critical test laid down in that case. Great weight was also placed on

¹⁶ [1953] 1 Q.B. 429. ¹⁷ *Supra*, footnote 14, at p. 156.

¹⁸ *Ibid.*, at p. 152.

¹⁹ For a similar reading of the the case see Fleming, *An Introduction to the Law of Torts* (1967). At p. 53 the learned author considered that the speeches suggested "that what must have been foreseeable was the plaintiff's sustaining personal injury (with barely veiled hints that this postulated his presence within the danger, *i.e.* impact, zone) rather than his being exposed to the risk of mental distress".

²⁰ *Supra*, footnote 7, at p. 98. The quoted passage reads: "If, then, the test of proximity or remoteness is to be applied, I am of opinion that such a test involves that the injury must be within that which the cyclist ought to have reasonably contemplated as the area of potential danger which would arise as the result of his negligence, and the question in the present case is whether the appellants was within that area."

Denning L.J.'s *King v. Phillips* judgment. Now Lord Denning had said:

Every driver can and should foresee that, if he drives negligently, he may injure somebody in the vicinity in some way or other; and he must be responsible for all the injuries which he does in fact cause by his negligence to anyone in the vicinity, whether they are wounds or shocks, unless they are too remote in law to be recovered.²¹

That is, His Lordship was saying that it was nonsensical to make the duty question depend on the kind of damage that occurred—a direct rebuff of the view held by the Saskatchewan court that nervous shock ought to be treated as a substantive, separate tort. Lord Denning did hold, however, that *Bourhill v. Young* must have been decided (apparently even if their Lordships were unaware of it) on the basis that no duty to avoid nervous shock to the fishwife existed. Lord Denning thought that this must be so because it was clear that the plaintiff would have recovered if she had suffered physical injury. That is, she was owed a duty, but not *the* duty not to be inflicted with nervous shock and as a result of this she had failed in her action. This is convincing on its face and the Saskatchewan court's approval of the argument can be readily understood. But one would have hoped that a closer examination of Denning L.J.'s judgment might have been made. After all, His Lordship, having stated that the plaintiff in *King v. Phillips* was owed a duty of care, came to the conclusion that although there had been a breach of the duty, nervous shock was *too remote* an injury to permit recovery. In light of the fact that the *Re Polemis*²² direct consequences theory still prevailed, this holding surely threw some doubt on whether Denning L.J.'s theory of what *Bourhill v. Young* held was effectively different to the one set out in the headnote. In addition, reliance on Lord Denning's judgment by the Saskatchewan court ought to be treated with some reservation because the other two judges in *King v. Phillips* found that a duty of care did not exist, and did not even adopt Denning L.J.'s arguments in principle.²³

²¹ *Supra*, footnote 16, at p. 440.

²² *Re Polemis and Furness, Withy & Co. Ltd.*, [1921] 3 K.B. 560. If there was a breach of a duty of care, all direct damage was recoverable. This formula was impliedly rejected by the Saskatchewan Court of Appeal when it distinguished *Schneider v. Eisovitch*, [1960] 2 Q.B. 430 in order to justify its conclusion; *supra*, footnote 2, at pp. 657-658.

²³ Singleton L.J. accepted the trial judge's finding of fact, but did hint that Lord Denning's argument had some appeal for him. Hodson L.J. felt himself bound by the reading of *Bourhill v. Young* which Lord Denning criticized so much. Both judges found that no duty was owed to the hapless mother. There is some irony too in the fact that it should be Lord

All this carping about the inadequacy of the analysis of cases in *Abramzik v. Brenner* is perhaps unimportant. After all, although it was not cited in the Saskatchewan case, the Privy Council²⁴ has rendered the same reading of *Bourhill v. Young* as the one adopted in the principal case. Let us, therefore, for the purposes of further discussion, accept the Saskatchewan interpretation as a good one in law because it could have been rested on persuasive authority. The question that next arises is whether it will inevitably lead to desirable results.

The answer to this seems a simple "Yes". The "headnote test" of *Bourhill v. Young* was very restrictive. For a plaintiff to have to establish that he was within the physical impact area would deny recovery to many deserving plaintiffs. A classic example is the one presented by the unhappy mother who came upon the body of her child, killed by the negligence of the defendant, and who failed to recover.²⁵ Yet this severe limitation can be forgiven if it is remembered that the *Re Polemis* theory would perhaps have allowed recovery to many undeserving plaintiffs if the duty question was merely one of whether the plaintiff belonged to a class of people who were likely to be affected in some way by the defendant's conduct. Naturally as medical science developed, and the courts gradually began to lose their scepticism of medical opinions, a call for liberation came in the nervous shock area. It was equally natural that Lord Denning would be the first to venture forth on the path of liberation. Since then the *Wagon Mound* cases have been decided and many of the earlier objections to a loosening of the bonds in the nervous shock area seem to have been overcome.²⁶ Hence the Saskatchewan Court of Appeal's apparent determination to go along with this trend is to be acclaimed. However, it is felt that only polite applause rather than a standing ovation is warranted, for although the theme of this comment has

Denning of all people who should strive so hard to separate between duty and remoteness questions. The very same learned judge has said: "The three questions, duty, causation, and remoteness, run continually into one another. It seems that they are simply three different ways of looking at one and the same question which is this; Is the consequence fairly to be regarded as within the risk created by the negligence?" *Roe v. The Ministry of Health*, [1954] 2 Q.B. 66, at p. 85.

²⁴ See *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd. (Wagon Mound No. 1)*, [1961] A.C. 388, at p. 426.

²⁵ *Chester v. Waverley Corporation* (1939), 62 C.L.R. 1.

²⁶ Although it has been argued that the second *Wagon Mound* case, *Overseas Tankship (U.K.) Ltd. v. The Miller Steamship Co. Pty. Ltd. and Another*, [1966] 3 W.L.R. 498, ought to be read as restoring the *Re Polemis* position. See J. C. Smith (1967), 45 Can. Bar Rev. 336 and H. J. Glasbeek—*Wagon Mound II—Re Polemis Revived; Nuisance Revised* (1967), 5 Western Ont. L. Rev. 192.

been that Professor Williams might have been somewhat harsh when he suggested that the court had adopted a bad approach for nervous shock cases, in as much as the court's formula should attain the very results the learned author deems desirable, it must be conceded that the handling by the court of its own test was very disappointing.

We have, therefore, come to the third point: the utilisation of the formula which the Court of Appeal went to so much trouble to establish. The kernel of the problem is that the plaintiff did not recover. The court having posed the question whether it was reasonably foreseeable that a mother being told of the death of her children would suffer nervous shock, held that there was no duty. The judgment did not dwell on this aspect of the decision at all. Indeed all of the reasoning involved is to be found in this single sentence:

In the present case I am satisfied the plaintiff Ursula Abramzik did not prove that the shock which she experienced, resulting in her illness was due which the defendant Julie Brenner ought, as a reasonable person, to have foreseen as a result of her conduct.²⁷

If the Saskatchewan Court of Appeal claims that it truly faced the question whether it could be foreseen that the plaintiff might suffer emotional disturbance, surely it must have taken "a gloomy view of human nature"²⁸ to come to a negative answer. It is submitted that *nothing* could have been more readily foreseen than that nervous shock would be suffered by *this* plaintiff.

Now it is always terribly difficult to question a court's finding of fact, but this result was especially amazing because the Saskatchewan court cited *Boardman v. Sanderson*²⁹ with approval. There, a father who heard his injured son cry out, recovered damages for the resulting shock he suffered. The plaintiff had neither been in physical danger, nor had he seen the accident. Therefore one would have thought that the plaintiff in *Abramzik v. Brenner* should also have succeeded. It is true that the facts are distinguishable from *Abramzik v. Brenner* in that in *Boardman* the father's presence on the premises where the accident occurred was known to the defendant. But this distinction has no merit because the whole brunt of the argument in *Abramzik v. Brenner* is that it is not necessary for the defendant to foresee that the plaintiff is in physical danger, and therefore, it is not necessary to know

²⁷ *Supra*, footnote 2, at p. 658.

²⁸ See A. L. Goodhart, *The Shock Cases and Area of Risk* (1953), 16 *Mod. L. Rev.* 14, at p. 25.

²⁹ [1964] 1 W.L.R. 1317.

where he is. A more important distinction is to be found in the fact that in *Boardman*, the plaintiff, unlike Mrs. Abramzik, suffered shock through the agency of his own unaided senses. If it is to be inferred that *Abramzik v. Brenner* would have had a different result if the plaintiff had observed the accident, then a real question arises as to whether the court is laying down a test which is in effect significantly different from the "physical-risk-duty" concept it claimed to be wrongfully attributed to *Bourhill v. Young*. After all, if the plaintiff must suffer shock as a result of an assault upon his own unaided senses, it is clear that he must be within the vicinity of the accident at the time it occurs. This does not necessarily mean that the plaintiff is required to be within the physical impact area, but it is hard to imagine a situation where he will not be.³⁰ This requirement of immediacy and proximity that seems to be built into the *Abramzik* decision is especially eye-catching because the Court of Appeal had used the *Wilkinson v. Downton* cases to illustrate the validity of postulating the existence of a separate tort of mental harm in certain circumstances. That line of cases, of course, establishes that these circumstances do not include contemporaneity or physical proximity.

Thus, having groped for a test which would modernize the law of nervous shock, the Saskatchewan court seemingly rejected the logical implementation of it. It is hoped that the formulated test (despite the criticism of the analysis of the cases) will be accepted and that in future courts will apply it in such a way as to give rein to its full scope. This will have the salutary effect of more adequately satisfying community expectations. In addition like cases will be capable of like treatment:—nervous shock, whether inflicted intentionally or negligently, will be recoverable in the same kinds of circumstances.³¹

H. J. GLASBEEK*

* * *

³⁰ See for instance Fleming, *The Law of Torts* (3rd ed., 1965), p. 159, where he suggests that if a splinter had hit the plaintiff in *King v. Phillips*, she would have recovered, even though she was eighty yards away. That is, as a duty with respect to physical injury is easily established, it will be easy to argue that anyone who is within sight or hearing of accident is within the danger area.

³¹ This rationalization would come none too soon as the courts have already been tempted to permit recovery for the negligent infliction of emotional harm by pretending that they were merely applying the rules governing intentional infliction of mental injury, e.g. *Bielitski v. Obadiak* (1922), 15 Sask. L.R. 153, 65 D.L.R. 627.

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STATUTORY PROVISION FOR THE ENLARGEMENT OF LIMITATION PERIODS—MANITOBA.—In 1967 the Legislature of Manitoba enacted sweeping amendments to The Limitation of Actions Act.¹ *Inter alia*, the amendments accomplished two objectives. First of all, The Limitation of Actions Act now contains a comprehensive exposition of all limitation periods concerning the commencement of actions; the Act spells out the limitation periods in detail in regard to the commencement of all actions except those contained in statutes listed in a schedule to the Act. Second of all, The Limitation of Actions Act now delegates to the court the power to enlarge limitation periods in cases involving latent “facts of a decisive character”; this power is embodied in section 11A which provides as follows:

11A. (1) No enactment limiting the time for beginning actions affords a defence to an action to which this section applies in so far as the action relates to, or is founded on, a cause of action in respect of which

(a) it is proved to the satisfaction of the court that the material facts relating to that cause of action were, or included, facts of a decisive character which were at all times outside the knowledge, actual or constructive, of the plaintiff until a date which

(i) either was after the end of the limitation period fixed in respect of that cause of action, or was not earlier than twelve months before the end of that period, and

(ii) in either case, was a date not earlier than twelve months before the date on which the action was begun;

and

(b) the court has, whether before or after the beginning of the action, granted leave for the purposes of this section.

(2) This section applies to any action in which

(a) damages are claimed for negligence, nuisance, or breach of duty (whether the duty exists by virtue of a contract or of a provision in, or made under, a statute or independently of any contract or any such provision); and

(b) the damages claimed by the plaintiff arise out of injuries to the person of the plaintiff or any other person.

(3) Nothing in this section excludes or otherwise affects

(a) any defence that, in any action to which this section applies, may be available by virtue of

(i) any enactment other than an enactment imposing a period of limitation on the bringing of an action, or

(ii) any rule of law or equity; or

(b) the operation of any enactment or rule of law or equity

¹R.S.M., 1954, c. 145, as am. The 1967 amendments are contained in S.M., 1966-67, c. 32 (bill 62).

that, apart from this section, would enable such an action to be brought after the end of the limitation period herein fixed in respect of the cause of action on which that action is founded.²

As well in 1967, the Legislature of Manitoba enacted An Act for the Relief of Dorothy J. Ungar³ which dealt with a limitation period enlargement problem for which to date no provision has been made in The Limitation of Actions Act and with which the Legislature of Manitoba has grappled since 1963; the Ungar Act manifests the reception that a majority of the members of the Legislature gave during the period 1963-1967 to petitions via private bills for the enlargement of statutory limitation periods by persons who, apparently through error or dilation on the part of their solicitors, have failed to launch actions in time. The Ungar Act permitted the petitioner to apply to the Court of Queen's Bench and provided that that court "having regard to the real question in controversy, the very right and justice of the matter and all the circumstances of the case, may in its discretion enlarge" the limitation period in question. There is an interesting history to the delegation of this type of power to the Court of Queen's Bench with which I propose to deal in the remainder of this comment.

In 1963, the Legislature of Manitoba was faced for the first time with such private bills;⁴ indeed, in 1963 the Legislature had

² See also ss 11B-F. It would appear that the inspiration for this delegation of power came from The Limitation Act 1963, 11 & 12 Eliz. 2, c. 47, s. 1 (U.K.). No other province in Canada has enacted such a provision. Another problem, especially in connexion with cases involving latent facts of a decisive character, is the assessment of damages; it would seem that the determination of liability and the assessment of damages might well be separated. This matter is being studied presently in England by The Committee on Personal Injuries Litigation under the chairmanship of Lord Justice Winn. The Committee's report is due to be published by the Lord Chancellor's Office at the end of July 1968.

³ S.M., 1966-67, c. 105 (bill 36).

⁴ However, on at least six occasions the Legislature of Manitoba had allowed individuals to file late claims with the Workmen's Compensation Board—see S.M., 1948, c. 68, S.M., 1949, c. 3, S.M., 1950, 1st Sess., c. 32, S.M., 1953, c. 16, S.M., 1958, 1st Sess., c. 44 and S.M., 1958, 2nd Sess., c. 2. Unfortunately, whatever debate took place during the passage of all but the last of these Acts (there was no debate of S.M., 1958, 2nd Sess., c. 2 during its passage) is recorded only in newspaper reports of the day; a verbatim record of the debates and proceedings of the Legislative Assembly of Manitoba was only commenced with the 1st Session of the 25th Legislature in 1958. The necessity for private bills to obtain enlargements of the time period in which to file such claims was obviated by the passage of S.M., 1959, c. 73, s. 30 of which provided as follows:

"The [Workmen's Compensation] Act is amended by adding thereto, immediately after section 80, the following section:

80A. Where in the opinion of the board, an injustice would result unless an enlargement of the time prescribed by any section of this Act or by any regulation for the making of any application, the taking of any proceedings, or the doing of any other act, is granted, the board

to deal with three such private bills.⁵ Although the three bills were passed only after significant amendments had been made to them in Committee of the Whole on agreement reached in the Private Bills Committee,⁶ no significant debate on the bills took place in the Legislature; opposition was recorded only in connexion with one of the bills.⁷ According to the preambles of the bills as originally introduced, the failure to commence two of the actions in question was due to alleged error on the part of the solicitors acting for the petitioners; the other action in question had not been launched because of the alleged latent nature of the injuries involved.

In 1964, two private bills were introduced requesting permission to apply to the Court of Queen's Bench for the enlargement of limitation periods. Neither of these private bills dealt with a situation involving alleged solicitor's error. In connexion with one of these bills,⁸ which involved a claim for compensation for lands expropriated, the expropriators voiced their concurrence with the enlargement being sought and consequently the bill passed all three readings without any debate in the Legislature.⁹

The other private bill¹⁰ requested permission to apply to the

may enlarge the time so prescribed; and the enlargement may be granted either before or after the expiration of the time prescribed in this Act or any regulation".

⁵ An Act for the Relief of Clifford Junghans, Henry Junghans, Albert Chezick and Harvey Chezick, S.M., 1963, c. 130 (bill 27); An Act for the Relief of Leslie Lidstone and Lucienne Marie Lidstone, S.M., 1963, c. 131 (bill 14); An Act for the Relief of Mytro Mandybura, S.M., 1963, c. 132 (bill 52).

⁶ Bills 14 and 52 originally were worded in such a manner as to permit the petitioner to bring the action in question notwithstanding the passage of the limitation period in question. They were amended to conform to the wording of bill 27 which simply permitted an application to the Court of Queen's Bench and provided this court with a discretionary power to enlarge the limitation period in question. Amendments were also made to the preambles of all three bills deleting statements of facts or matters of evidence which the Legislature thought ought to be decided by the court. Finally, bill 27 was amended so as to delete a clause which would have made the decision of the Court of Queen's Bench unappealable—see Legislative Assembly of Manitoba, Debates and Proceedings (hereinafter referred to as "Debates and Proceedings") (1963), vol. 2, pp. 1599-1601.

⁷ The vote on third reading of bill 14 was 49-3; two members made short statements in opposition to the bill primarily on the basis of the length of time (five years) which had passed since the cause of action in question had arisen—see Debates and Proceedings (1963), vol. 2, p. 1602. The length of time involved in the other two bills was three years.

⁸ An Act for the Relief of Cyril Alvin Henry, Service Station Operator, Joseph Allen Bryant, Merchant, and Frances Adelaide Bryant, his wife, all of the City of St. James, in Manitoba, S.M., 1964, c. 87 (bill 64).

⁹ An explanatory statement was made in connexion with bill 64—see Debates and Proceedings (1964), vol. 2, p. 1080.

¹⁰ An Act for the Relief of Helen Radclyffe and Edward Radclyffe (1964, bill 80).

Court of Queen's Bench for an enlargement of a limitation period to enable the launching of an action for damages against two surgeons, who in 1944 allegedly had left a sponge in one of the petitioners which had not caused any disability until after a similar operation in 1959. The passage of this bill was terminated in Committee of the Whole prior to third reading; nonetheless, it stimulated an ample debate¹¹ on the whole subject of statutorily enlarging limitation periods of general application at the behest of individuals to the possible detriment of the public in general. The issues involved in all such petitions or requests, which presumably had escaped the members of the Legislature in 1963, were apparently obvious enough in this bill. Although it may be a hazardous exercise, I shall attempt to digest some of the more cogent points of view expressed by the members who took part in the debates.

Dealing first with the views expressed against the passage of such legislation, the main argument was, of course, to the effect that firm and certain statutory limitation periods were essential to obviate the chaotic conditions which a lack of such precise limitation periods providing for clear finality of liability would engender. Not only are limitation periods necessary because of the fact that evidence and witnesses sooner or later disappear and that memories become eroded with the passage of time, but as well, because of the fact that the reserve funds of insurance companies are geared to certain and firm limitation periods; arbitrary changes of limitation periods for the benefit of individuals will automatically require adjustments in rates to account not only for such occurrences but also to provide for such possible changes in the future—all of which is to the detriment of insurees at large. Concern was expressed regarding the length of the lapse of time in this particular case and regarding the effect that the passage of the bill would have on the medical profession; that is to say, that evidence in regard to the 1944 operation was virtually non-existent, and that members of the medical profession in the future by necessity would be undesirably preoccupied with taking steps contractually to protect themselves rather than with the welfare of their patients. One speaker maintained that such bills ought to be passed only upon the establishment to the satisfaction of the Legislature of a *prima facie* case; however, it was pointed out that

¹¹ On the two occasions when the bill was debated in the Legislature, on second reading and in Committee of the Whole, a total of twenty-three members spoke—see Debates and Proceedings (1964), vol. 2, pp. 1801, 1204-1210, 1696-1703 and 1986-1993.

such a prerequisite would involve the Legislature in a type of determination which it was not competent to make. It was also pointed out that, insofar as the Legislative Counsel of Manitoba could determine, no such bills had ever been presented, let alone passed, in any other legislature in Canada.¹² In general, those who spoke against the bill cautioned the Legislature to keep such bills in their proper perspective, that is the benefit of the individual to the detriment of the public at large, and emphasized the rationale behind the establishment of certain and firm statutory limitation periods.

Those who spoke in favour of such bills did so for reasons not only of a humanitarian nature. It was noted that the principle of commencing the running of a limitation period from a point in time subsequent to the happening of the event upon which a cause of action is based is already accepted in The Limitation of Actions Act,¹³ and that, therefore, bills requesting an enlargement of a limitation period to enable the launching of an action which could not have been launched earlier, due to the latent nature of crucial facts, were not really creating any precedents. One speaker denied that the passage of the bill would create a precedent for on its facts the case in question was an exceptional one and the statutory limitation period would still be in existence; in addition, this speaker emphasized the number of hurdles which it is necessary to negotiate successfully in order to secure the passage of any bill and which make the passage of any bill no easy matter, and that the Legislature is the legitimate last resort for people who can not obtain the relief they seek from any other quarter, and that a subsequent Legislature would be in no way under any compulsion to accommodate any such petitions in the future. It was also argued that in passing such a bill the Legislature was not actually enlarging the limitation period in question but rather simply permitting an application to be made to the Court of Queen's Bench which would decide the matter.

Two speakers suggested the establishment of funds by the Province and the medical profession itself to take care of such situations without the necessity of enlarging limitation periods. Several speakers suggested that The Limitation of Actions Act be amended to enable the courts to enlarge limitation periods in such cases without the necessity of legislative intervention.¹⁴

¹² Debates and Proceedings (1964), vol. 2, p. 1699.

¹³ See ss 4, 6, 18 and 29(1).

¹⁴ One speaker was under the impression that such an amendment was imminent and that therefore this petition might as well be granted.

While a majority of the members were willing to grant the bill second reading in order to enable both parties involved in the matter to make further presentations to the members in the Law Amendments Committee, the ill fate of the bill was evident when the motion to report on the bill and send it on to Committee of the Whole for third reading was carried by only one vote.¹⁵ Upon the resolution of the Legislative Assembly into Committee of the Whole on April 15th, 1964 to consider bill 80 and after the reading of bill 80 section by section, it was moved that the bill be not reported. As indicated earlier this motion carried, thirty-nine to thirteen, thus killing the bill.¹⁶

No such bills were introduced in the Legislature in 1965, however in 1966 the Legislature had to contend with three of them; two of the bills came up for second reading on the same night and only minutes apart. Curiously, one of the bills was defeated on second reading,¹⁷ while the other bill received second reading after a brief debate;¹⁸ both bills involved alleged error on the part of solicitors.

In total, twelve members spoke in debate on the second bill prior to its second and third readings.¹⁹ The member who introduced the bill stressed that he was moved by humanitarianism and not emotionalism. He agreed with another member who re-iterated the call made in 1964 for a review of The Limitation of Actions Act with a view to centralizing the many and scattered limitation periods and providing the courts with the power to enlarge limitation periods in certain circumstances; until such a review had been completed the Legislature ought to be prepared to deal with such petitions. Another member stated that, since the Legislative Assembly was the highest court in Manitoba, it ought not to shrink from entertaining such petitions when no other relief was available

¹⁵ See *The Winnipeg Tribune*, Swab Case Bill Alive By One Vote (April 15th, 1964).

¹⁶ Interestingly, the vote in Law Amendments Committee had been 20-19.

¹⁷ An Act for the Relief of Dorothy J. Ungar (1966, bill 42). There was no debate—only a brief introductory statement by the member who had introduced the bill in which he stated that the bill was similar in situation and language to the three 1963 bills and that the evidence was still available—see *Debates and Proceedings* (1966), vol. 2, pp. 1960-1961. The vote was 16-21.

¹⁸ An Act for the Relief of Tjitske Medgyes, Feikje Bosma and Tina Stuve, S. M., 1966, c. 98, (bill 120). The vote was 21-17; the reason for the two different results was that four members who voted against granting bill 42 second reading and one member who had not voted on bill 42 voted in favour of granting bill 120 second reading.

¹⁹ *Debates and Proceedings* (1966), vol. 2, pp. 1962-1964 and 2177-2183.

to the petitioner. Another member pointed out that, while he was in favour of such enlargements when the failure to launch the action in question was due to the latent nature of material facts, he could not support a bill where alleged solicitor's error was at the base of the failure to launch the action in question, for in effect the petitioner was not without a remedy, namely suing the solicitor concerned. Other members who spoke in opposition to the bill re-iterated what they had said in the debate on bill 80 in 1964, namely that such enlargements benefit the individual to the detriment of the public at large, that such enlargements seriously erode the certainty and finality of limitation periods which are the objects of The Limitation of Actions Act, and that the entertainment and passage of such bills were unique on Manitoba's part. The bill passed third reading on a vote of thirty-one to thirteen.

The third such bill to be presented to the Legislature in 1966 was a reincarnation of bill 80 which had been killed in Committee of the Whole prior to third reading in 1964.²⁰ This bill was withdrawn prior to second reading as a result of a settlement of the matter having been reached. Two members did have a chance to speak in debate on the bill before it was withdrawn.²¹ The member who introduced the bill pointed to legislation of the Legislature of Manitoba and of the Parliament of the United Kingdom which provided for enlargements in such cases.²² He also suggested, possibly in anticipation of the arguments of those who would fear the possible damage that the passage of the bill might bring to the reputations of the doctors in question, that, if the courts had been given the power to enlarge limitation periods in such cases as the one in question, the matter probably would have been settled to the benefit of the petitioners and without damage to the doctors in question. The other member who had an opportunity to speak on the bill expressed his concern with the fact that, because the preamble of the bill did not allege but rather stated that the petitioners had suffered damages as a result of a particular operation in 1944, the bill in effect, rather than granting permission to the petitioners to apply to the Court of Queen's Bench for an enlargement of the limitation period in question, simply directed the court to assess the damages. This member also was concerned

²⁰ An Act for the Relief of Helen Radclyffe and Edward Radclyffe (1966, bill 43).

²¹ Debates and Proceedings (1966), vol. 1, pp. 1175-1177 and vol. 2, pp. 1552-1556.

²² The pieces of legislation to which reference was made were those cited in footnotes 2 and 4, *supra*. The member might also have pointed to The Testators' Family Maintenance Act, R.S.M., 1954, c. 264, s. 15(2).

with the length of the lapse of time involved; and finally, he complained that in his opinion in the past the Court of Queen's Bench had not dealt with applications arising out of such bills substantially, but rather the court had treated such bills as directives from the Legislature that an enlargement ought to be granted.

The next such bill to be placed before the Legislature was the Ungar bill to which reference was earlier made. This was, of course, the second attempt at the passage of such a bill on behalf of Mrs. Ungar. The member who introduced this attempt pointed out that a large number of members had been absent at the time of the defeat of the first attempt. A total of sixteen members spoke in the debates on second reading of the bill and in Committee of the Whole prior to third reading.²³

A number of the speakers indicated or exhibited a general sense of frustration with the continuing annual appearance of such bills and three members in particular re-echoed the call for suitable amendments to The Limitation of Actions Act to empower the courts to deal with such petitions. Two other members restated the complaint lodged during the debate on bill 43 in 1966 to the effect that the Court of Queen's Bench in effect had been rubber stamping the apparent blessing of the Legislature on the petitioner seeking the enlargement of the limitation period in question which was not the intention of the Legislature at all.²⁴ In response to this complaint, an express section regarding the purpose and intention of the Act was inserted into the Ungar bill.²⁵

In opposition to the bill, the traditional stand was taken in favour of certain and firm limitation periods despite the occasional hardships which occur therefrom; the plea was made again for the members of the Legislature to consider the matter and vote on it with their heads rather than their hearts. As well, it was pointed out that the Legislature of Manitoba "is the only Legislature of record where these bills see the light of day".²⁶

²³ Debates and Proceedings (1966-1967), vol. 1, pp. 1559-1567 and vol. 2, pp. 3093-3094.

²⁴ The reader can judge for himself by referring to the two reported decisions on the applications arising out of the five bills which had been passed, namely *Junghans et al. v. Lutman* (1963), 44 W.W.R. 691, aff'd 46 W.W.R. 210 (allowed enlargement) and *Medgyes et al. v. Nyznik* (1966), 59 W.W.R. 89, aff'd 59 W.W.R. 320 (refused enlargement). In connexion with the other three applications, the decisions of which were not reported, the results were as follows, *Lidstone*, 1963, bill 14 (refused enlargement), *Mandybura*, 1963, bill 52 (allowed enlargement), and *Bryant*, 1964, bill 64 (allowed enlargement—it ought to be recalled, however, that there was general concurrence with the enlargement being sought).

²⁵ Debates and Proceedings (1966-1967), vol. 2, pp. 3093-3094.

²⁶ Debates and Proceedings (1966-1967), vol. 1, p. 1564; see also vol. 2, p. 3094.

The bill apparently passed the Law Amendments Committee by only one vote;²⁷ however, in Committee of the Whole a motion that the bill be not reported was defeated twenty-three to seventeen and the bill passed third reading without debate by a vote of thirty to twenty-two.²⁸

In general, there was a fair amount of fluidity in the voting patterns of the individual members in connexion with the nine bills introduced during the period 1963-1967; this can be seen from the various divisions which were recorded in detail and from the fact that in at least two instances a member who had on a previous occasion indicated opposition to such bills later found himself actually introducing such a bill or *vice versa*. Nonetheless, according to the recorded divisions and the expressed opinions of various members during the debates, the members, on their approach to these bills, can be divided roughly into three groups. On the one hand, there were those who steadfastly stood on what they conceived to be the principles behind the original statutory enactment of limitation periods and the irreparable damage which occurs if in sympathy to the hardship involved exceptions are made on behalf of individuals. On the other hand, there were those who apparently were moved solely by the humanitarian aspects involved, especially where it was a question of latent material facts as opposed to alleged solicitor's error, particularly where no suit had been launched against the solicitor. In addition, in the middle and probably forming the largest group, there were those who were unhappy with The Limitation of Actions Act and who, therefore, were willing to support such bills for humanitarian reasons or in order to force a review of the Act. This group was unhappy with the Act in that it did not provide the reader with a comprehensive list of all limitation periods and it did not provide any solution of the hardship cases where for one substantial reason or another an action had not been launched in time; the solutions favoured by the members of this group included the establishment of a fund or the delegation of a discretionary power to the courts to enlarge limitation periods. To some extent, this group was successful, although the 1966-1967 amendments to The Limitation of Actions Act do not provide any means for obtaining an enlargement of a limitation period where the failure to launch the action in question is entirely due to error on the part of a solicitor.²⁹ Presumably,

²⁷ Debates and Proceedings (1966-1967), vol. 2, p. 3094.

²⁸ A subsequent application was successful—see *Ungar v. Niagara Fire Ins. Co.* (1967), 61 W.W.R. 559, aff'd 61 W.W.R. 640.

²⁹ This was pointed out in vain by one member—see Debates and Pro-

recourse is still available through the Legislature and it will be interesting to observe the treatment which any such petitions will receive in the future.³⁰

CAMERON HARVEY*

* * *

CRIMINAL LAW—SENTENCING—WHITE COLLAR CRIME—FACTORS TO BE TAKEN INTO ACCOUNT—THE RELEVANCE OF RETRIBUTION.—Once or twice per year, a Canadian court hands down a decision in which there is an extensive discussion of the problem of sentencing. The annual case is no mere ten line dismissal of the appeal saying "We do not feel that the sentence is out of proportion to those imposed for similar offences . . .". In the past there have been cases¹ in which some provincial court of appeal pontificates on punishment, delivers homilies on the aims of the criminal law and expounds conventional wisdom on the vices of criminals and the virtues of prisons.

*Regina v. Hinch and Salanski*² is the most interesting sentencing case reported since the plight of Toronto's arsonist Robert Roberts received considerable public and professional attention. The de-

ceedings (1966-1967), vol. 2, pp. 2761-2762. This member suggested that the courts be given a general power upon application to enlarge limitation periods in cases of hardship; such a provision would overcome the present situation in which the composition of the Legislature from time to time and possibly the political power of the sponsor of the bill can be determinative.

³⁰ Recently, the Second Session of the 28th Legislature gave an inkling of its present disposition to such petitions in the treatment it gave to An Act for the Relief of Jacob A. Johnson and Donelda M. Johnson (1968, bill 64); presumably due to solicitor's error, the statement of claim in connexion with a particular action on the part of the petitioners, which had been commenced in time, had not been served within the time specified therefor under the governing Rules made pursuant to The Queen's Bench Act, R.S.M., 1954, c. 52. Generally speaking, the object of the bill was to attempt to obtain an enlargement of the time for serving the statement of claim. The bill received second reading after a very brief debate consisting of three speakers, who expressed opposition, but were willing to allow the bill to go to committee where more complete explanations could be made in support of or in opposition to it by the parties involved (see Debates and Proceedings (1968), pp. 1876-1877); the bill was allowed to die in committee and was not reported.

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¹ E.g. *Regina v. Roberts* (1963), 39 C.R. 1 (Ont.); *Regina v. Holden* (1962), 40 W.W.R. 571 (B.C.C.A.); *Regina v. Heck* (1963), 41 W.W.R. 629 (B.C.C.A.); *Regina v. Jones* (1956), 115 C.C.C. 273 (Ont. C.A.); *Regina v. Allen* (1954), 108 C.C.C. 102 (Sask. C.A.); *Regina v. Willaert* (1953), 105 C.C.C. 172 (Ont. C.A.).

² (1968), 62 W.W.R. 205 (B.C.C.A.).

bate in *Roberts*³ concerned the struggle between law and psychiatry; the protection of the public from a dangerous pyromaniac *versus* the therapeutic need to release him when cured even if this cure was achieved in a relatively short time. The result was, at best, a stalemate. In *Hinch and Salanski*, the struggle is much more complicated. The case can be examined on many levels; it shows the peculiar qualities of white collar crime, the fate of middle-class criminals, the "politics" of small-town justice and the predilections of Court of Appeal judges faced with deciding an appeal against sentence.

Hinch and Salanski were convicted of conspiring to obtain money by false pretences. The evidence shows that it is very likely that they could also have been convicted of the completed crime of obtaining money by false pretences; the report does not state whether such a charge was laid or withdrawn. The Crown appealed the sentence imposed.

The respondents were businessmen. They were principals in a limited company and were associated in three partnerships. All of these enterprises were connected with the construction industry. A third party played a crucial role in the circumstances of the case. Mead was an employee of the British Columbia Hydro and Power Authority. His official title was assistant land supervisor and in that capacity, he was responsible for letting out contracts and checking invoices presented by contractors. Mead told Hinch that contracts with British Columbia Hydro would be available and, in due course, such contracts were let to the respondents. At this stage there is no evidence that either Mead or the respondents had done anything illegal. Mead then informed the respondents, however, that, if Hinch and Salanski wanted more contracts, Mead "wanted to be paid or receive a kick-back".⁴ This British Columbia Hydro employee described to the respondents a system whereby his "reward" could be bestowed without expense to the contractors. Hinch and Salanski agreed and the plan was put into operation. Along with legitimate bills for work actually done, the respondents submitted on their own bill-heads spurious accounts for work which had never been done, for work already paid for and by simply submitting inflated accounts. In his official capacity, Mead approved payment of these fake bills. When the respondents received the British Columbia Hydro cheques, they forwarded the proceeds of the falsifications to Mead's bank account in Alberta. The frauds continued for eight months before being discovered and

³ *Supra*, footnote 1.

⁴ *Supra*, footnote 2, at p. 214.

amounted to \$21,937.00. On being discovered, Mead committed suicide, the respondents were charged with conspiracy and British Columbia Hydro instituted a civil suit against Hinch and Salanski for the recovery of the money wrongfully obtained.

The reader is asked to consider two questions: What sentence would the courts be likely to give in those circumstances and, secondly, what sentence should have been imposed? To make this guessing game appear fairer (and closer to the data available to the sentencing magistrate) some background information should be provided. Neither man had any previous convictions. Hinch was fifty years of age. Salanski was forty. Although neither was described as a "pillar" of their particular religious organisations, both were described by that classic term "a family man". In addition, Salanski was a member of a service club. What is the mystique of being a "family man"? Would a bachelor or a divorcee be less trustworthy, more capable of wickedness, less susceptible to reformation or more likely to have criminal tendencies? These pieces of folk-lore or conventional wisdom which appear so regularly in pre-sentence reports and the remarks of sentencing magistrates have no intrinsic value in assessing punishment but they seem to have a Pavlovian effect on sentencers. More nonsense is talked by lawyers speaking to mitigation of punishment than at most other times. At least many remarks made by lawyers appear to be nonsensical but frequently they seem to have some effect. References to church attendance, good "clean" habits (whatever they might be) and love of parents or wife and children (or *vice versa*) seem to have magical effects on magistrates. Conventions appear to have been established in this sentencing and mitigation process although these criteria have no discernible legal or sociological validity. In addition to the references to parenthood, religious and living habits, is it true that a man represented by a lawyer will be dealt with more leniently than an unrepresented man who remains silent on the *allocatur*? In Toronto, there used to be lawyers who were well known in the magistrates' courts for applying for adjournments or speaking to sentence for a fee of approximately fifty dollars. On one occasion such a lawyer, who had been paid this sum of money, was at a loss to say anything in his client's favour, so he simply announced to the judge that "My client has lived in Toronto all his life". That was the end of the plea in mitigation. Did the magistrate take that factor into account when handing out sentence? Did the magistrate automatically adjust sentence when he realised that the accused had paid for his law-

yer's services and therefore the financial outlay should be taken into account? (Perhaps it was wise of the founders of the Ontario legal aid scheme to attempt to conceal the status of the scheme's clients from the trial judges.)

The respondents, who had many prominent citizens of their hometown supporting them by letters to the court, were each sentenced to one month in jail and a \$2,000.00 fine. Is this a proper sentence? The question is not whether it is an adequate sentence because that suggests that the time spent in jail should be longer and that is not necessarily true.

The Crown appealed on the basis that the sentence was inadequate because of the seriousness of the offence and the "magnitude of the amounts received and the period of time that the accused was (*sic*) involved in the conspiracy".⁵

With respect, there are few instances of remarks on sentence which seem as one-sided as those made by the magistrate. Although criticism of sentencing is, of course, much easier than administering that delicate part of the administration of justice, the remarks of the magistrate do not appear to reflect that judicial quality one expects from the bench. Admittedly, a mere law report does not allow the critic to make a completely accurate evaluation; for instance, we do not know the emotional climate of the community where the offence was committed or the compassion felt for the accused persons. Moreover a two to one majority of the British Columbia Court of Appeal, agreed with the magistrate and saw little to quarrel with in his remarks. This attitude seems strange in a court which has taken such a stringent view of the habitual criminal laws in recent years.⁶

The magistrate's remarks are worth quoting at some length. He said:⁷

This is certainly different from the usual type of case that I have, where there is a definite knowledgeable wrong-doing that can be attributed to the accused person without hesitation.

⁵ *Ibid.*, at p. 215.

⁶ It might be more accurate to say that the administration of criminal justice in British Columbia is preoccupied with Part XXI of the Criminal Code, S.C., 1953-54, c. 51 as am. *E.g.*, *Regina v. Buckingham*, [1965] 2 C.C.C. 229 (B.C.C.A.); *Regina v. Swontek*, [1965] 1. C.C.C. 242 (B.C.C.A.); *Regina v. Ball* (1965), 56 W.W.R. 313 (B.C.C.A.); *Regina v. MacNeill* (1965), 53 W.W.R. 244 (B.C.C.A.); *Regina v. Jones*, [1966] 2 C.C.C. 370 (B.C.C.A.); *Regina v. Morgan*, [1966] 2 C.C.C. 390 (B.C.C.A.); *Regina v. Smith*, [1967] 3 C.C.C. 265 (B.C.C.A.); *Paton v. Regina* (1968), 63 W.W.R. 713 (S.C.C.). But compare *Regina v. Jeffries*, [1965] 1 C.C.C. 247 (B.C.C.A.); *Regina v. Sparrow*, [1966] 4 C.C.C. 137 (B.C.C.A.); *Regina v. Channing* (1965), 52 W.W.R. 99 (B.C.C.A.).

⁷ *Supra*, footnote 2, at p. 207.

This statement is remarkable when the respondents had pleaded guilty and stood before the magistrate for sentence on an offence to which *mens rea* is applied and which carried a maximum penalty of ten years' imprisonment. The statement is clearly wrong both in fact and law. A good argument could be made for degrees of "blameworthiness" or "guilt" but our present Criminal Code is not sufficiently sophisticated to embrace such notions. In any event, the facts of this case hardly leave the impression that we are here dealing with two criminals who were the innocent dupes of a rogue who totally hoodwinked them. Yet this is the impression which the magistrate gives of the case because he continued by saying:⁸

I see two men of the age of these two, of previously unblemished record, married, families, with no gain except the right to work.

Of course, we could suggest to the magistrate that when bank robbers start out in their trade, they have exactly the same outlook as he attributes to Hinch and Salanski, if, by "right to work", he means the natural desire to support their wives and families.

The magistrate went on to say that the respondents are "faced with a civil suit, and are the victims of a most unprecedented skill in deception and daring".⁹

This rather weighted version of the facts continued:

I must keep in mind the terrific loss of pride that each of these previously unblemished charactered people have suffered already, at the hands of somebody who was unconscionable and in a position of great trust, wielding a great club.¹⁰

There is, of course, some truth in this statement. The unvarnished facts suggest that the respondents would have had little chance of receiving the contracts if Mead had not decided in their favour. On the other hand, they share a common trait with other criminals in that they yielded to the temptation to take an easy way out rather than find other work or, perhaps, expose the dishonesty of Mead. One would imagine that Mr. Salanski's service club may have instilled some such civic duty in his mind.

Finally, the magistrate concluded his remarks in mitigation by saying:¹¹

I wonder much—how much they have lost through their weaknesses in not being able to, and not having the immediate strength to see what is right.

These compassionate statements contain worthy sentiments in a criminal process which now purports to be dedicated to the re-

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

habilitative ideal but the "losses" referred to by the magistrate appear a trifle intangible when one remembers that Messrs. Hinch and Salanski presumably made a profit from their contracting operations. The size of their profits is not mentioned in any of the judgments; this is a curious omission to which further reference will be made.

The British Columbia Court of Appeal, per Norris J.A. considered that the magistrate's remarks, which have been quoted at length were "unfortunately (and too broadly) worded"¹² but that there was no error in law or fact. The majority of the Court of Appeal found little difficulty in understanding the magistrate's point of view. Norris J.A. believed that in the reference to "without hesitation" (in the first paragraph quoted) which seemed to refer to a surprising lack of *mens rea*, the magistrate meant that the case was an unusual one. This explanation is, with respect, mystifying. In another paragraph, not quoted above, the magistrate had made reference to "no personal gain" but Norris J.A., in his role as judicial interpreter, believed that this should "undoubtedly" be read in the light of the earlier reference to "no gain except the right to work".¹³

The illogicality of the magistrate's remarks is best illustrated by a paragraph which appears to have been added as an afterthought. This paragraph contradicts everything which the magistrate seemed to have said about lack of *mens rea*, the victimised position of Hinch and Salanski and the need for a light penalty which was in fact imposed. In this passage, the magistrate had said:¹⁴

On the other hand, was not what unquestionably occurred a serious crime against all of the people of this country? They entered into a common design, an agreement, to do something unlawful, and unlawful to their knowledge, as to call for a penalty up to fourteen years.

This qualifying statement by the magistrate is so inconsistent as to make nonsense of what went before.

Therefore, Norris J.A. (with Branca J.A. concurring), after considering the various facets of punishment, decided that the Crown appeal should fail. In making this decision, the learned appellate judge said:¹⁵

Any conviction and sentence of imprisonment, apart from the fines imposed, would be almost totally destructive of these respondents in

¹² *Ibid.*, at p. 208.

¹³ *Ibid.*

¹⁴ *Ibid.*, at p. 207. The reference to fourteen years was erroneous; the maximum is ten years.

¹⁵ *Ibid.*, at p. 212.

the small community. It is likely that the learned magistrate had under consideration what might be called the side effects of the conviction and sentence such as restrictions on travel and emigration to another country and the limitation on future employment. The conviction and sentence are on the records of the respondents for life. All these matters the learned magistrate doubtless had in mind, and, . . . it cannot be said that the learned magistrate imposed an inordinately low sentence and was clearly wrong.

There would be much to recommend this statement if it reflected a consistently lenient policy of the trial and appellate courts of Canada. Norris J.A. also struck a realistic note when he suggested that a month in jail and a \$2,000.00 fine may appear inadequate in a large urban centre while the same sentence in a rural community may have a very different effect because, in the latter, "associations are close, and community, social and religious status is judged more severely".¹⁶

Another reason stated for dismissing the appeal has less validity. Norris J.A. observed "in passing" that the respondents had each served their month in jail and were "endeavouring to rehabilitate themselves for some months".¹⁷ To re-arrest them and return them to jail because of an alleged mistake of the magistrate "would add unduly to their punishment and would savour of harassment, a result which, with respect, we should not bring about unless we are under compulsion to do because of particularly outrageous circumstances resulting in a clear miscarriage of justice, which I do not think is the case here".¹⁸

Norris J.A. also discussed the irrelevancy of retribution (which will be examined more fully below) and this is certainly a salutary attitude toward sentencing.

Looking at the majority judgment as a whole, there are very few tangible criticisms which one could make except to impugn the rather superficial examination of the simplistic and inconsistent statements of the magistrate. An argument can be made that any comment on sentencing policy is irrelevant because it is so individualized that precedents and policy are of very limited use. Such an attitude is debatable and certainly is so in cases where an appeal court lays down such fundamental principles as the British Columbia Court of Appeal set forth in *Regina v. Hinch and Salanski*. There seems to be no jurisprudence on the advisability (or ethics) of applying rules of *stare decisis* to sentencing cases. Why should the rule of precedent not apply in these circumstances? At least loose rules of precedent seem to apply to cases under

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*, at pp. 212-213.

sections 695 (dangerous sexual offender) and 661 (habitual criminal) of the Criminal Code. If it can be applied to such crucial cases involving permanent incarceration, (or loss of freedom) then it should apply to the no less important decisions relating to first offenders, and other identifiable types of offences or offenders. This should certainly be the case if we are seeking, however vainly, a viable rationale for the criminal process. Of course, sentencing has always been described as a very special, exacting and emotionally demanding task which judges approach with great trepidation and some misgiving. The problem of sentencing is aggravated by the individualisation of the rehabilitative ideal which places a premium on the more positive qualities of the individual offender so that justice can be done while attempting to salvage an asocial citizen. Judges may feel confined by binding precedent when the essence of sentencing is not equality of treatment, but uniformity in approaching the problems. Perhaps there is another dimension to this problem. Court decisions may not have a lasting and binding role because penal practices change. No one suggests that penal administrators and criminologists should dictate to the courts but, in practice, penologists may resent a system which takes no account of new knowledge or changes in penal policy. A jurisprudence of decisions has developed in cases relating to habitual criminals and sexual psychopaths. Anyone who has made even a cursory examination of these decisions would be struck by the analytical quality of the interpretation of sections 659 and 661 of the Criminal Code. This black letter approach has not resulted in a cohesive legal policy and, moreover, there is almost a total disdain for penal or criminological considerations. Perhaps the interpretation of these sections (particularly by the British Columbia Court of Appeal) does not offer much encouragement to those who would like to avoid decisions such as in *Hinch and Salanski* by establishing some coherent policy.

The decision in *Hinch and Salanski* is disquieting. First, this dissatisfaction is due to the inconsistency of the courts which is implicit in the present judgment. This is not to suggest that there should be uniformity of sentences; it does imply, however, that the court in the case under review has applied criteria (which may be most worthwhile) which it is not willing to apply to all cases. If we take into account the strong familial connexions of our two building contractors (who also happen to be cheats), then why not listen to the pleas of a tearful wife who legitimately

claims that the judge, in sending her husband to jail for months or years, is robbing her of a loving husband, her children of a devoted and dutiful parent and her home of an efficient breadwinner? If a pre-sentence report attempts to show that a convicted person is most contrite and has been punished enough by the mere formalistic appearance in court, then why incarcerate him for a number of years? If a priest, as character witness, tells the sentencing judge, that a term in a reformatory would do his eighteen year old parishioner more harm than good and that the church will watch over him, why persist in sentencing him to prison? If a prisoner is as much a victim as a participant in a crime, why should the court refuse to take notice of this fact and made pious and self-defeating statements about the need to set an example and to deter the weak-willed criminal from accepting the advice of rogues on future occasions? If judges persist (as they frequently do) in applying a quantitative measure to punishment so that a \$20,000.00 theft is at least five times as bad as a \$2,000.00 defalcation, then how can the sentence in *Hinch and Salanski* be justified?

None of these illustrations and rhetorical questions is exaggerated. If one could be assured that the decision in the present case was the first faint glimmer of a new light on crime and its punishment, then one could have hope but the simple fact is that the hope is unjustified. Since the British Columbia Court of Appeal decided *Hinch and Salanski*, they have no doubt dismissed appeals against much stiffer sentences and have upheld findings of habitual criminality on technical legal grounds. A random glance at any Toronto newspaper shows, for instance, that accused persons, with previously unblemished characters, have been sentenced to much more than one month in jail for liquor, drug and sexual offences.

An alternative explanation must be sought. One of the most obvious is that the decision in *Hinch and Salanski* is based largely on socio-economic grounds. This explanation, even if without merit, hardly needed to be expressed in the crude language of the sentencing magistrate.

On this basis, among others, it is therefore rather ludicrous for Norris J.A. to suggest that retribution is not a factor in sentencing and "not in accord with the present day concept of the purposes of the criminal law".¹⁹ The judge's statement takes on added irony when he suggests that applying vengeance "involves a loss of that

¹⁹ *Ibid.*, at p. 210.

objectivity which is essential to the exercise of the judicial process".²⁰

This is not to suggest that retribution should be a factor or that the dissenting appellate judge was correct in suggesting a sentence of eighteen months. As much as one may be inclined to believe that white collar crime by "respectable" businessmen may be as much (if not more) of a danger to our society as bank robbery, imprisonment is probably no solution. Secondly, the categorization of the rationale of punishment (into deterrence, reformation, protection of society and retribution) is not useful and largely meaningless. Thirdly, punishment in the form of imprisonment serves very little purpose in any event and would serve no good in the case of these middle aged, middle class entrepreneurs. It would make much more sense if, regardless of its direct punitive effect, the Crown demanded, and obtained an order which fined our two criminals \$100,000.00 each or debarred them from any future government contracts (although this may be an automatic effect in any event). Perhaps the practice adopted in the United States in anti-trust cases could be applied to the criminal process so that our dishonest businessman was forced to pay "triple damages" in effect—say, three times the bribe paid or three times the profit made through the illegal transaction. **These suggestions are attempts to break down the present artificial line between civil and criminal legal matters. Although such a breakdown may not be satisfactory in some areas, such as murder or rape, it may be the best solution in those where the major damage is economic.** This may be the solution for two reasons. If we are serious in our belief that retribution has no part to play in the criminal law, then we should make the obvious obeisance to the new penal enlightenment. Secondly, economic "punishment" may have the greatest deterrent effect. Thirdly, there seems to be some confusion in our free enterprise society because we cannot decide what is (or should be) criminal in the economic field. We need some effective means of expressing community disapproval if, indeed, that is our intention. Perhaps it would be better to fight financial problems with a monetary weapon. This notion of compensation rather than punishment could spread to such "crimes" as those involving criminal negligence or "unlawful act"—involuntary homicide. Many of the defendants to these charges are able to pay and should be forced to do so. Most of them do not have "guilty" minds. In fact, many of our businessmen, and tax-

²⁰ *Ibid.*, at p. 209.

payers, are unable to draw a distinction between what is merely sharp practice on expert advice and what is a fraudulent act or scheme.

Obviously, the lack of clarity in the aims of the criminal law is well illustrated by this grey area of illegal economic acts and asocial activity. Perhaps it would be an ideal place in which to implement a plan for erasing criminal records when the convicted person has lived an honest, law-abiding life for five years or more. This scheme, which has been gaining popularity recently, would minimise retribution and de-accentuate the differences between torts and crimes.

These references to "guilt" or differentiations between various frames of mind have a curious propensity to lead us back to the "hardcore" guilt-ridden, blameworthy types of behaviour which are the basic crimes. If these acts continue to be crimes, are we not suggesting that most of them are punished by death (rarely now) or long terms of imprisonment for reasons which are based on thinly disguised retribution?

As stated above, the categorization of the rationales of punishment are unreal and misleading, and by singling out retribution, one must not fall into the same error. To suggest however that these terms of imprisonment are anything other than vengeance is gilding the lily.

Norris J.A. in *Hinch and Salanski* pointed out that one of the objects of the criminal law is "to maintain a standard of behaviour necessary for the welfare of the community. (which includes the welfare of the offender)".²¹ He went on to say that, in sentencing, the public welfare encompassed the "safety of the public", "the deterrent effect of a sentence", punishment,²² and reformation of the offender. Most of the above is question-begging or, alternatively, imponderable. To suggest that the aim of the criminal law is to maintain proper standards of community behaviour and to state that the public welfare aims, *inter alia*, at the safety of the public certainly does not tell us very much. Norris J.A. also said that the sentence of the court seeks to have a deterrent effect. What do we know of deterrence? Admittedly, deterrence may be the most important consideration in criminal law and involves the whole notion of criminal law—we are hoping to stop citizens from doing acts of which we disapprove at the present time and we are hoping that they will not repeat them. But this definition of deterrence tells us nothing because we can deter by

²¹ *Ibid.*

²² *Ibid.*

choosing the most dangerous criminals and incarcerating them for the remainder of their natural lives, we may deter by imposing long sentences whether for revenge or for purposes of rehabilitation. Finally we may deter by suspending sentence or placing on probation. Therefore, Norris J.A.'s categories have very little meaning because we have so little knowledge of the effects of the penal dispositions made. If we wish to protect society then anti-social behaviour must be stopped and that requires a formula of which we know little at the present time. We must make the best economic use of our resources;²³ the truly dangerous, in a physical sense, must undoubtedly be kept in such security that they cannot repeat their depredations. This should be a relatively small group who will increasingly be dealt with in a psychiatric way. What of the others? We must ensure that we are not retributive but this hardly coincides with Norris J.A.'s concept of that term. This much is obvious from the passages he quoted in support of his thesis that retribution is irrelevant. He cited Middleton J.A. in *Rex v. Childs*²⁴ who conceived of the *lex talionis* as being "torture, whipping and solitary confinement". Everyone knows that the modern vengeful society is not that unsubtle. Similarly the British Columbia Court of Appeal cited Roach J.A. in *Rex v. Warner, Urquart, Martin and Mullen*²⁵ where it was said that there must be "a right proportion between the punishment imposed and the gravity of the offence". "It is in that sense", said Roach J.A. "that certain crimes 'deserve' certain punishments and not on any theory of retribution".²⁶ This statement, on the other hand, seems too subtle for the average mind. Yet it contains the essence of the problem in the present case and the uneasiness which it created. The value system under which the court operated has a rather twisted notion of desert. A court which can jail union officials for a year (admittedly in the name of deterrence) for a quasi-criminal contempt of court will have some problem convincing many people that they are not being vengeful.²⁷ Similarly appellate courts which can permanently incarcerate a homosexual (who had no pedophilic or violent tendencies) as a "dangerous sexual offender" when it was proved that he was nothing of the sort is hardly convincing in protestations that they are not vengeful.²⁸

²³ See Outerbridge. *The Tyranny of Treatment* (1968), 10 Can. J. of Corr. 378.

²⁴ (1939), 71 C.C.C. 70 (Ont. C.A.), cited at p. 209, *supra*, footnote 2.

²⁵ (1946), 87 C.C.C. 13 (Ont. C.A.). ²⁶ *Supra*, footnote 2, at p. 210.

²⁷ See *Regina v. Neale, Clarke, O'Keefe and Power*, [1967] 2 C.C.C. 175 (B.C.C.A.).

²⁸ *Klippert v. The Queen* (1967), 2 C.R.N.S. 319 (S.C.C.).

What of the dissent of Robertson J.A. in *Hinch and Salanski*? Does that offer any light or encouragement? Robertson J.A. considered that the magistrate had misdirected himself and found the suggestion that the respondents were victims erroneous and misleading. (For instance, the magistrate made reference to Mead who was "armed with a terrific authority which created this horrible opportunity" and that Mead "wielded tremendous power, tremendous influence, and was, in fact, able to create an empire for himself".²⁹) Robertson J.A. found these statements exaggerated at best and pointed out, as stated earlier, that the respondents could have declined all further contracts instead of entering into new ventures and preparing false documents. Similarly, the learned judge believed that the magistrate was wrong to accept defence counsel's submissions that the respondents had "not received, in these circumstances, an illicit penny".³⁰ Robertson J.A. pointed out that Hinch and Salanski entered into the agreements for the profit motive and had looked upon the payments to Mead as "an expense of carrying on a profitable business".³¹

Finally, in considering sentence, Robertson J.A. stated that, in his opinion, a sentence of five years would not have been disturbed on appeal. He decided, however, that he would substitute a term of eighteen months, taking into account the lack of previous record, their standing in the community, their repentance, and that "men whose environments have been such as those of the respondents will probably find it harder to bear any given term of imprisonment than a man who has once been incarcerated and chooses to risk imprisonment again by committing a subsequent offence".³² He also believed that a very long sentence was not necessary as the respondents had "probably learned their lesson by now". He refused to take into account the fact that a successful civil suit had been instituted against them and that one had mortgaged his house to pay the judgment. He called this "merely bowing to the inevitable".³³

One could agree with all the following except the type of sentence. The judge believed that deterrence was the key factor. (He dismissed the notion of retribution because any sentence that satisfied the principle of deterrence would in this case satisfy that of retribution.) In relation to deterrence, he said:³⁴

With respect, I think that the learned magistrate completely overlooked the principle of deterrence. Considering the amount of construction

²⁹ *Supra*, footnote 2, at p. 216.

³⁰ *Ibid.*, at p. 217.

³¹ *Ibid.*

³² *Ibid.*, at p. 218.

³³ *Ibid.* ³⁴ *Ibid.*, at pp. 217-218.

work that goes on in British Columbia, the vast sums involved in many projects, and the opportunities that can arise to perpetrate profitable frauds, the imposition here of a sentence of imprisonment of one month—a fine of \$2,000 means next to nothing to a man who is playing for such high stakes—is well nigh an invitation to other men with good reputations (which can be cited if need arises) low resistance to temptation and a desire to make large gains to run the risk of being found out in a scheme to defraud those with whom they do business.

As stated earlier, we know very little about deterrence but the above statement seems to make more common sense than any previous comment from the case under review.

These comments have been lengthy and the patient reader might well ask what use they serve. A mere comment on a single case is both too short and too long because it cannot do justice to the whole subject matter of criminal law, sentencing policy, criminology and corrections. Similarly, these problems cannot be properly exemplified by an isolated case decided by a magistrate who has neither the time nor the expertise to take all these matters into consideration. Furthermore, he is hardly in the proper forum to take such a broad view of the criminal process.

The case of *Regina v. Hinch and Salanski* is simply the most recent illustration of the problem facing the criminal law and those who administer it. We must be prepared to rethink our attitudes toward all criminal offenders and our methods of punishing, treating and rehabilitating them—not just some of them.

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