COMMENTS
COMMENTAIRES

CONSTITUTIONAL LAW—THE INTER-DELEGATION DOCTRINE: A CONSTITUTIONAL PAPER TIGER?—In 1950 the Supreme Court of Canada held, with no binding authority to dictate the result,[1] that the constitution does not permit delegation of legislative authority between Parliament and provincial legislatures.[2] On each of the several occasions that the delegation question has since come before it, the court has consistenly (a) reaffirmed the constitutional prohibition, and (b) reached the conclusion that the particular enactment or legislative scheme before it could be sustained as not constituting "delegation" of the sort which is proscribed. The most recent instance is the court's decision in *Coughlin* v. *Ontario Highway Transport Board*,[3] and it is with the latter decision that this comment is primarily concerned. First, however, it may be useful to sketch in the course of decision in the Supreme Court.

In the original decision in 1950, *Attorney-General of Nova Scotia* v. *Attorney-General of Canada*,[4] the court, on a reference, held unconstitutional a legislative scheme which contemplated delegation between the Nova Scotia legislature and the Parliament of Canada in respect of two kinds of legislation. First, for the purpose of enacting "laws in relation to any matter relating to employment", the Nova Scotia legislature would be enabled to

[1] In argument before the Privy Council in *C.P.R.* v. *Bonsecours*, [1899] A.C. 367, Lord Watson had stated (as cited in Lefroy, Canada's Federal System (1913), p. 70): "The Dominion Parliament cannot give jurisdiction or leave jurisdiction with the province. The provincial parliament cannot give legislative jurisdiction to the Dominion parliament. If they have it, either one or the other of them, they have it by virtue of the Act of 1867. I think we must get rid of the idea that either one or the other can enlarge the jurisdiction of the other or surrender jurisdiction. To which Lord Davey adds: 'or curtail'." Although remarks passed in argument of course carry no binding effect as precedent, it is noteworthy that in *Attorney-General of Nova Scotia* v. *Attorney-General of Canada*, [1951] S.C.R. 31, [1950] 4 D.L.R. 369, aff'g, [1948] 4 D.L.R. 1 (N.S.S.C.), where all seven judges sitting gave separate reasons, six made express reference to Lord Watson's remarks.

[2] *Ibid.*

[3] (1968), 68 D.L.R. (2d) 384 (S.C.C.). The case was originally heard by Gale C.J.H.C. (1966), 53 D.L.R. (2d) 30, [1966] 1 O.R. 183, aff'd (1966), 53 D.L.R. (2d) 38n, [1966] O.R. 191n.

[4] *Supra*, footnote 1. Hereafter referred to as the *Nova Scotia* case.

delegate legislative authority to Parliament in respect of industries, works or undertakings otherwise subject to exclusive provincial legislative jurisdiction by virtue of section 92 of the British North America Act; conversely, the legislature could receive a delegation of authority from Parliament to enact such laws respecting industries, works or undertakings otherwise subject to the exclusive legislative jurisdiction of Parliament. Second, it was proposed that Parliament be enabled to delegate to the provincial legislature the power to enact an indirect tax of a specified kind and amount.[5] The court was unanimously of the opinion that such legislation, if enacted, would not be constitutionally valid, since neither Parliament nor a provincial legislature was capable of delegating to the other (or of receiving from the other a delegation of) legislative power with which the delegator had been exclusively vested by the terms of the British North America Act.[6]

Two years later in *P.E.I. Potato Marketing Board* v. *Willis*[7] a full court was unanimous in holding that the doctrine did not preclude delegation by Parliament to a provincially appointed and controlled board—a result which invited the criticism that the court was prepared to tolerate the doing indirectly of something which it had said could not, with constitutional propriety, be done directly.[8]

In *Attorney-General for Ontario* v. *Scott*[9] a question arose in connexion with a provision in the Ontario Reciprocal Enforcement of Maintenance Orders Act,[10] the effect of which was that the defences open to a defendant in Ontario proceedings were limited to those which would have been available to him in the reciprocating state (in this case, England) in which a provisional order against him had been obtained. The court held that there was no constitutional impediment to such a scheme. Adoption by reference of the laws of England did not amount to "delegation" in the material sense.[11] It may be noted at once that this decision

---

[5] Indirect taxation is, of course, beyond the constitutional reach of the provinces: B.N.A. Act, 1867, 30-31 Vict., c. 3, s. 92, head 2. *Cf.* s. 91, head 3.

[6] On the decision in the Nova Scotia Supreme Court, see Comment by Scott, (1948), 26 Can. Bar Rev. 984; on the Supreme Court of Canada decision, see Comment by Ballem, (1951), 29 Can. Bar Rev. 79.

[7] [1952] 2 S.C.R. 392, [1952] 4 D.L.R. 146.

[8] See Comment by Ballem, (1952), 30 Can. Bar Rev. 1050.

[9] [1956] S.C.R. 137, (1956), 1 D.L.R. (2d) 433, (1959), 114 Can. C.C. 224.

[10] R.S.O., 1950, c. 334, s. 5 (2), now R.S.O., 1960, c. 346, s. 5(2).

[11] The appeal was heard by the full court but Estey J. did not take

alone of those under review in no way involved federal legislation, so that no question arose of a transferral of legislative power across the constitutional boundary which marks out the respective legislative domains of the Parliament of Canada and of the provincial legislatures.

In *Lord's Day Alliance of Canada* v. *Attorney-General of British Columbia*,[12] the court had to consider the effect of prohibitions in the federal Lord's Day Act relating to the carrying on of certain activities on Sunday, such prohibitions being introduced with the following clause:[13]

> It is not lawful for any person, on the Lord's Day, *except as provided in any provincial Act or law now or hereafter in force*, to. . . .

This formula was tantamount to an invitation to provincial legislatures to legislate with the object of legalizing conduct which, in the absence of such provincial initiative, would constitute an offence under the federal enactment. In another unanimous decision of the full court, it was held that this arrangement did not constitute delegation of the kind which was constitutionally offensive, for it merely represented a self-limitation by Parliament on the application of its own enactment—an instance of conditional legislation. This was so even though the proposed amendment of the provincial Act in question,[14] being enacted at a later date than the material section of the Lord's Day Act, would have the effect of permitting that which had previously been forbidden under the terms of the federal Act. While delegation of a power to prohibit would presumably be beyond the pale constitutionally, the court was prepared to approve an arrangement which was very difficult to characterize otherwise than as a clear delegation of permissive power.[15]

In the *Coughlin* case[16] still another supposed difficulty arising from the ban on delegation was held by the court not to present a problem after all. The federal enactment under challenge was the Motor Vehicle Transport Act,[17] the general effect of which

---

part in the judgment. Three members of the court treated the matter as within provincial competence as a matter of private international law.

[12] [1959] S.C.R. 497, (1959), 19 D.L.R. (2d) 97, (1959), 123 CCC 81.

[13] R.S.C., 1952, c. 171, s. 6. Emphasis added.

[14] The Vancouver Charter, S.B.C., 1953, c. 55.

[15] For a fuller discussion of this subject, see Lysyk, Constitutional Aspects of Sunday Observance Law: *Lieberman* v. *The Queen* (1966), 2 U.B.C. L. Rev. 59, at pp. 61-63.

[16] *Supra*, footnote 3.

[17] S.C., 1953-54, c. 59. For a discussion of the constitutional background and implications of the Act, see Comment by Ballem, in (1954), 32 Can. Bar Rev. 788.

was to confer federal legislative authority in respect of extra-provincial highway transport on provincial boards and, in particular, by section 3(2) of the Act, to authorize such a board to issue a licence to a person operating an extra-provincial undertaking as if it were a local undertaking. In other words, the extra-provincial undertaking would be licensed according to the requirements of the local provincial statute and regulations, as the latter might be amended from time to time. By a majority of five to two, the court once again held that the constitutional prohibition on delegation had not been violated.

When Parliament purports to adopt by reference a particular piece of *existing* provincial legislation for Parliament's own purposes, it is easy enough to distinguish the process from any sort of delegative arrangement. Its effect is that instead of setting out *in extenso* the provisions of the provincial enactment adopted as a model, Parliament has simply incorporated those provisions by reference to them in its own statute. It is a legislative short-cut, a kind of shorthand device, that avoids cluttering up the federal statute book with needless repetition. There is no question of delegation, for the provincial legislature plays no role whatsoever; Parliament has simply copied from that province's statute book as it stood at the time of referral. All this is equally true, of course, with respect to a provincial adoption by reference of an existing federal enactment.

The situation is not quite the same where the referring legislature purports to adopt not merely the *existing* enactments of the other, but its *future* enactments as well. Where, as in *Coughlin* Parliament has, on a true construction of its statute, purported to adopt the terms of provincial legislation as it may from time to time exist—that is, including future enactments or amendments—then Parliament is no longer simply taking a leaf from the province's statute book as it read at the time of referral. Nor is the provincial legislature playing a wholly passive role insofar as federal law is concerned. The difference is that an amendment to the provincial statute will now have the direct and immediate effect of altering federal law without Parliament in any way playing a part in the change which has been so effected in federal law. If this is a delegative process, it is no answer to say that Parliament retains the power to deal with any change thus effected in federal law which it finds unpalatable, for the *Nova Scotia* case[18]

[18] *Supra,* footnote 1.

decided that retention of a power to repeal or amend by the delegator would not cure the constitutional defect.

Given a constitutional doctrine prohibiting inter-delegation between federal and provincial legislative bodies, the inherent problem with anticipatory adoption by reference of such enactments as the referred-to legislature might choose to pass has been recognized judicially[19] and legislatively,[20] and has been lucidly discussed in the pages of this *Review*.[21] The difficulty was succinctly stated in the course of the thorough analysis undertaken by Doull J. when the *Nova Scotia* case was before that province's Supreme Court:

> Co-operation by legislation by reference, is not very different from legislation by delegation, but has the difficulty that amendments cannot be made concurrently and if it is provided that future amendments are adopted, the legislation is by delegation.[22]

The majority judgment in *Coughlin*, however, does not really come to grips with this problem. It relies[23] on the court's earlier decision in *Attorney-General for Ontario* v. *Scott*[24] despite the fact that that decision (as pointed out in the dissenting reasons in the instant case),[25] was in no way concerned with the flow of legislative power over the constitutional barrier separating federal and provincial legislative spheres. One might readily concede that Parliament or a provincial legislature could each delegate a power to regulate to the Parliament of the United Kingdom—or to the Emperor of Japan, or to X—while not being able to delegate in the same way to each other. Is this, in fact, really any different from the distinction that the court relied on to accomplish the

[19] See *R.* v. *Fialka*, [1953] 4 D.L.R. 440, [1953] O.W.N. 596, (1953), 106 C.C.C. 197 (C.A.), where the point was left open. In *Re Brinklow*, [1953] O.W.N. 325, the special difficulty of anticipatory adoption does not appear to have been adverted to by Judson J., where the learned judge refers to the purpose of incorporating legislation by reference as being "to avoid its repetition" (at p. 326); the decision was reversed on other grounds, [1953] O.W.N. 327. For a different reading of the *Brinklow* case, see Laskin, Canadian Constitutional Law (3rd ed., 1966), p. 41. The point was argued unsucessfully in *Regina* v. *Glibbery* (1962), 36 D.L.R. (2d) 548 (Ont. C.A.) where, however, the court relied exclusively on *A.G. Ont.* v. *Scott*, *supra*, footnote 9; as to the latter decision, see *infra*. See also the text accompanying footnote 22, *infra*.

[20] See The Statutory References Act, 1955, S.O., 1955, c. 80.

[21] Read, Is Referential Legislation Worth While? (1940), 18 Can. Bar Rev. 415, esp. at pp. 434-444. The author's conclusion was that as between Parliament and a provincial legislature, such an attempt to adopt future laws, rules or regulations of the other would be invalid (at pp. 444 and 448).

[22] *Supra*, footnote 1, at p. 31 (D.L.R.).

[23] *Supra*, footnote 3, at p. 388 (S.C.C.).

[24] *Supra*, footnote 9.

[25] *Supra*, footnote 3, at p. 397 (S.C.C.).

difficult feat of distinguishing the *Nova Scotia*[26] case from its ruling in *P.E.I. Potato Marketing Board* v. *Willis*?[27]

One difficulty with assessing this line of decisions, including *Coughlin*, is that the Supreme Court has not clearly distinguished the various senses in which "delegation" has been said to impose fetters on legislative action. There is the so-called "abdication" or "abandonment" limitation (which must be the last resort of a hard-pressed counsel),[28] and an interesting variant, successfully argued in a recent Saskatchewan decision,[29] going to the extent to which the delegate may define the terms of the delegating statute so as to affect the measure of the delegate's authority. But these questions owe nothing to the federal nature of our constitution. Nor, except in a very limited sense, does the familiar passage from Viscount Haldane's reasons in *Re Initiative and Referendum Act*[30] concerning the ability of a legislature to "create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence".[31] Nor, it has been suggested above, does incorporation by reference, *except* on the precise question of adoption by Parliament of future enactments of a provincial legislature, or *vice versa*—an arrangement which does involve the one legislative body changing, entirely on its own motion, laws otherwise beyond its constitutional reach.

This comment is not the place to re-open the question of the wisdom of the original decision in the *Nova Scotia* case. The doctrine there established has been re-affirmed once again in *Coughlin*, and there is no immediate prospect of its being swept away short of constitutional amendment. The more immediate question goes to delimiting the scope of what remains of this prohibition on inter-delegation—that is, delegation between Parliament and provincial legislatures—assuming that the Supreme Court is not prepared to distinguish the doctrine completely out of existence.

Whether pro- or anti-delegation, those who have offered a working definition of delegation have tended to equate it with an agency arrangement, with the delegator, of course, in the role of

[26] *Supra*, footnote 1. [27] *Supra*, footnote 7.

[28] See, *e.g.*, *Re Gray* (1918), 57 S.C.R. 150, (1918), 42 D.L.R. 1, [1918] 3 W.W.R. 111.

[29] *Trans-Canada Pipe Lines Ltd.* v. *Provincial Treasurer of Saskatchewan* (1968), 67 D.L.R. (2d) 694 (Sask. Q.B.).

[30] [1919] A.C. 935, at p. 945. *Cf. Re Outdoor Neon Displays Ltd. & Toronto*, [1959] O.R. 26 (C.A.), aff'd on other grounds, [1960] S.C.R. 307.

[31] *Cf.* Rutherford, Delegation of Legislative Power to the Lieutenant-Governors in Council (1948), 26 Can. Bar Rev. 533.

principal, and the delegate being identified with an agent. So far as inter-delegation is concerned, it was still possible to say after the decision in *P.E.I. Potato Marketing Board* v. *Willis*[32] (and whatever one's qualms about colourable devices) that while Parliament and provincial legislature could employ a common agent, it was not open to Parliament to use the provincial legislature itself as an agent for initiating direct changes in federal law. This formulation of principle was put under stress with the *Lord's Day Alliance* case,[33] the result of which, as we have seen, is that a provincial legislature may, without further assistance or intervention at the federal level, effect a direct change in federal law within the province by rendering inapplicable therein a federal prohibitory enactment. That suggested statement of principle is subjected to further strain with the *Coughlin* approval of yet another arrangement whereby a provincial legislature may directly effect changes in federal law. If it is, nonetheless, the concept of agency which lies at the heart of the delegation doctrine, it appears that it is only a special and very limited sense of agency which will be fatal to the validity of co-operative federal-provincial legislative schemes.

In due course the Supreme Court may choose to shed more light on what it conceives to be the essence of that form of delegation which is unacceptable. In the meantime, the doctrine is one which may test the ingenuity of, but seems unlikely to confound, a careful legislative draughtsman. Chief Justice Cartwright, speaking for the majority in *Coughlin*, made reference to that part of the proposed legislation under examination in the *Nova Scotia* case which had to do with the delegating legislative authority over matters "relating to employment". He then observed that:

> The difference between such a bill and the Act which we are considering is too obvious to require emphasis.[34]

Is it? Let us take, for example, as laws "relating to [a] matter relating to employment", the present Nova Scotia Trade Union Act[35] and the federal Industrial Relations and Disputes Investigation Act.[36] (An example involving provincial and federal labour welfare legislation would serve equally well.) Let us suppose that instead of speaking in terms of delegating authority to make laws (as did the proposed legislation considered in the *Nova Scotia* case), the Nova Scotia legislature simply repealed all provisions

[32] *Supra*, footnote 7. [33] *Supra*, footnote 12.
[34] *Supra*, footnote 3, at p. 387 (S.C.C.).
[35] R.S.N.S., 1967, c. 311. [36] R.S.C., 1952, c. 152.

of its own Act and substituted a section which purported to incorporate by reference the terms of the federal Act, as the latter might from time to time exist, making the same applicable to all industries, works and undertakings otherwise within the exclusive jurisdiction of the provincial legislature. (The reverse adoption by reference of the Nova Scotia Act to make it applicable to employees in industries, and so on, otherwise within federal jurisdiction would be equally simple). Would this "incorporation by reference" be constitutionally sound? Or are there yet limits on the extent to which the Supreme Court will tolerate transparent schemes devised to escape the reach of the ban on inter-delegation?

Certainly the practical result in *Coughlin* is difficult to disagree with. It is undoubtedly more convenient if the referring legislative body can dispense with updating its own enactment each time the referred-to legislature amends the adopted statute. The majority in *Coughlin* could express satisfaction that the result reached was supported by the Attorney General of Canada as well as by the Attorneys General of all the provinces represented on the appeal, and that the arrangement appeared to be a model of co-operative federalism. And it is no doubt unnecessary to cavil at the fact that these arguments based on convenience and the importance of co-operation were precisely those which had failed to dissuade the Supreme Court from the course it embarked on in 1950 with its original finding that the constitution did not permit inter-delegation. Those who deplored the result in the *Nova Scotia* case may applaud the legerdemain which has permitted the court to allow its inter-delegation doctrine to languish unemployed ever since. Their appreciation may, however, be tempered by the consideration that the court's failure to define, otherwise than negatively, the kind of "delegation" which is proscribed leaves it relatively free to resurrect the doctrine in the future.

K. LYSYK*

* * *

EXPROPRIATION — COMPENSATION — BUSINESS DISTURBANCE DAMAGES WHERE EXISTING USE NOT HIGHEST AND BEST USE — DOUBLE RECOVERY. — Recent judgments of the Supreme Court of Canada,[1] the Court of Appeal for Ontario[2] and the Exchequer

* K. Lysyk, of the Faculty of Law, University of British Columbia, Vancouver.

[1] *Saint John Harbour Bridge Authority* v. *J. M. Driscoll Ltd.* (1968), 68 D.L.R. (2d) 502.

[2] *Re Zeta Psi Elders Association of Toronto and University of Toronto*, [1967] 2 O.R. 185.

Court of Canada,[3] respectively, when read together, confirm that the judicially-created[4] "value to the owner" concept in expropriation compensation law still has potentiality for obscuring a logical approach to the determination of an owner's loss and for making difficult any reasonable prediction of the amount of awards.[5] The general difficulty flowing from the use of this concept lies in the selection and application of criteria for determining why, and to what extent, in "proper" cases an owner should be paid more than the market value of this property.[6]

---

[3] *National Capital Commission* v. *Budd*, [1968] 1 Ex. C.R. 402.

[4] Cripps, Compulsory Acquisition of Land (11th ed., 1962), p. 673.

[5] The root statutory provision is s. 63 of the Lands Clauses (Consolidation) Act, 1845, 8 & 9 Vic., c. 18 (Imp.) which simply provided that "In estimating the purchase money or compensation to be paid . . . regard shall be had . . . to the value of the land". The balance of the section makes provision for damages for severance and injurious affection. See J. D. Arnup, The Basis of Compensation—Part I, Special Lectures Law Society of Upper Canada (1958), p. 15, for the development of formulae expressing the value to the owner concept down to the test laid down in *Diggon—Hibben Ltd.* v. *The King*, [1949] S.C.R. 135: "The owner at the moment of expropriation is to be deemed as without title . . . and the question is what would he as a prudent man at that moment pay for the property rather than be ejected from it." The cases stress that the amount to which an owner is entitled "cannot be determined with mathematical accuracy" (*Woods Manufacturing Co. Ltd.* v. *The King*, [1951] S.C.R. 504, at p. 515)—the award in many cases being a global figure or a lump sum, and not a built-up figure. The value to the owner concept has been severely criticized as resulting in inflated awards and settlements and also as being difficult to apply. See the Second Report of the Committee Dealing with the Law and Practice Relating to the Acquisition and Valuation of Land for Public Purposes (1918), Cmd 9229, p. 8; The Report of the British Columbia Royal Commission on Expropriation (1961-63), p. 64. The Report of the Ontario Law Reform Commission on the Basis for Compensation on Expropriation (Sept. 21st, 1967), pp. 12-17. The usually suggested alternative to the application of the value to the owner concept ("[the] rationalization of the cases consumes both time and effort"—Ontario Law Reform Commission Report, *supra*, p. 15) is a legislative statement of the component elements of compensation and of other special rules as to its assessment. See the Acquisition of Land (Assessment of Compensation) Act, 1919, 9 & 10 Geo. 5, c. 57, s. 2 (Imp.) re-enacted in the Land Compensation Act, 1961, 9 & 10 Eliz. 2, c. 33, s. 5 and Bill No. 5 of the Ontario Legislature, The Expropriations Act, 1968-69, clauses 13-15, given first reading on November 25th, 1968 and second reading on December 4th, 1968. After this comment was submitted to the Review, Bill No. 5 received its third reading and became law (except for one section) on December 20th, 1968 and the *Zeta Psi* judgment, *supra*, footnote 2, was varied by the Supreme Court of Canada on January 28th, 1969. See *infra*, footnote 42.

[6] "It may therefore be taken as established that in Canada the courts have adopted the formula 'value to the owner' which may mean market value plus, in appropriate circumstances, compensation for other factors which would not necessarily have any value in the market but which do have value to the owner. Herein lies the difficulty. What extra factors may be considered and how can they be valued, since, *ex hypothesi*, they have no market value?" E. Todd, Winds of Change and the Law of Expropriation (1961), 39 Can. Bar Rev. 542, at p. 554.

The three cases all concerned one only of several issues associated with this difficulty and came to varying conclusions. The issue is: Where an owner, at the time of expropriation, is using his land for a purpose which is less profitable than its highest and best use, is he obliged to elect to be compensated on the basis of (a) the land's market value at its highest and best use, simply, on the one hand, or, (b) on the land's existing use market value plus the increment value of buildings, fixtures and business disturbance loss, on the other? Put another way, can the owner be awarded both market value for the land's highest and best use *plus* compensation for the loss of any increment benefits relating to the existing use? The judgment of the Supreme Court of Canada, at least in its result, appears to favour the award of highest and best use market value plus business disturbance loss; the Court of Appeal judgment would allow something less than highest and best use market value, although not demonstrably actual use market value, plus disturbance damages; and the Exchequer Court judgment in its reasons, and result, is authority supporting the view that the owner, in such circumstances, is put to the election referred to.

It will be convenient to consider first the judgment in the Exchequer Court proceedings, *National Capital Commission* v. *Budd*,[7] since it is the only decision of the three which expressly recognizes the issue in all of its aspects. In *Budd*, President Jackett observed that where an owner is using his land for carrying on a business, which land use is the highest and best use that may be made of it, the value to the owner is:[8]

(a) the market value of the bare land for its highest and best use,
(b) the amount by which his business buildings and fixtures increase that market value, and
(c) an amount equal to all the amounts by which he would be out of pocket if he had to move his business to alternative premises (*i.e.* business disturbance).

He then considered the case where the use of land by the owner for his business does not constitute the highest and best use. On this he said:[9]

> It seems obvious, and I think that it is common ground in this case, that *value to the owner* in such a case is the larger of
> (a) market value of the bare land for the highest and best use, or

[7] *Supra*, footnote 3. [8] *Ibid.*, at p. 407.
[9] *Ibid.* In a footnote to this portion of the judgment Jackett P. referred to Keith E. Eaton, Federal Expropriation Problems (1958), 1 Can. Bar J. 33, at p. 40; *Horn* v. *Sunderland*, [1941] 2 K.B. 26 (C.A.) and *The King* v. *Edwards* (1946), Ex. C.R. 311.

(b) market value of the bare land for the use for which it is being used, plus the amount that that value is improved by the business buildings and fixtures plus the "business disturbance" amounts to which I have referred [the various amounts that he would be out of pocket if he had to move his business (moving costs, depreciation in fixtures, loss of profits during the move, *etc.*)].

The facts of the *Budd* case assist in illustrating the application of this approach. The owner, who used the land in question as a market garden, claimed that the land had a "before" (the case involved a partial taking) value of $97,104.00 comprising (a) $65,004.00 which was submitted to be its market value *for the market garden operation* and (b) $32,100.00 "as elements of damage or value to the owner, and in respect of buildings that were on the land"[10]—and had an "after" value of $18,636.00. The total claim was, therefore, $78,468.00. The learned judge held that the evidence did not establish that the land had a market value of $65,000.00 for the market garden operation. He found that for this purpose it "did not exceed $35,000.00".[11] He held the "disturbance" element in the claim to have a value of $30,000.00. On this basis (that is, the actual use value plus disturbance damages) the total value to the owner was "not more than $65,000.00."[12] He then went on to find that the "before" value of the land for its highest and best use, which was "as a speculative holding for building development",[13] was $65,000.00 (which, by coincidence, was the owner's figure for its market value as a market operation and the court's figure for its value to the owner on the basis referred to in the preceding sentence). He then held that the "after" value of the owner's lands were not worth more than $10,000.00 "as the remnant of a market gardening operation"[14] but that it had a market value of $12,000.00 "as land in the market for speculators having in mind potential building development".[15] The court then deducted this latter figure from the $65,000.00 market value based on the land's highest and best use and awarded the owner $53,000.00.

Having been awarded the market value of the land on a basis more than twice its actual use value the owner was not also awarded the additional $30,000.00 for business disturbance. If this had happened then there might have been an element variously referred to as "double compensation",[16] "double recovery"[17] or

[10] *Ibid.*, at p. 410. [11] *Ibid.* [12] *Ibid.*, at p. 411. [13] *Ibid.*
[14] *Ibid.*, at p. 413. [15] *Ibid.*
[16] *The Queen* v. *Supertest Petroleum Corporation Limited*, [1954] Ex. C.R. 105, at p. 142.
[17] The Report of the Ontario Law Reform Commission on the Basis for Compensation on Expropriation, *op. cit.*, footnote 5, at p. 22.

"duplication".[18] It should be observed that, from the judgment, it does not appear that the owner was contending for a market value on highest and best use basis ($65,000.00) plus business disturbance. It was the owner's contention that the land's market value for a market garden purposes was $65,000.00 and that business disturbance should be awarded on top of that. The evidence, as indicated, fell short of establishing this market value.

The leading authority supporting the doctrine set forth by Jackett P. in *Budd* is the English Court of Appeal judgment in *Horn* v. *Sunderland Corporation*.[19] There the land, which has been used as a farm, was valued at the sum of £22,700.00. This valuation was based on its highest and best use which was as "building land".[20] The owner, in addition to his claim to be awarded the value of the land as building land claimed a substantial sum by way of business disturbance. The majority of the Court of Appeal, Sir Wilfred Greene M.R. and Scott L.J., after conceding that the issue was "of some nicety and considerable importance"[21] and "not free from difficulty"[22] held that compensation for disturbance could only be awarded to the extent (if any) that the value of the land for agricultural purposes together with damages for disturbance exceeded the compensation payable on the basis of the land being building land. Greene M.R. supported this conclusion as follows:[23]

> In the present case the respondent was occupying for farming purposes land which had a value far higher than that of agricultural land. In other words, he was putting the land to a use which, economically speaking, was not its best use, a thing which he was, of course, perfectly entitled to do. The result of the compulsory purchase will be to give him a sum equal to the true economic value of the land as building land, and he thus will realize from the land a sum which never could have been realized on the basis of agricultural user. Now he is claiming that the land from which he is being expropriated is for the purpose of valuation to be treated as building land and for the purpose of disturbance as agricultural land, and he says that the sum properly payable to him for the loss of his land is (a) its value as building land plus (b) a sum for disturbance of his farming business. It appears to me that, subject to a qualification which I will mention later, these claims are inconsistent with one another. He can only realize the building value in the market if he is willing to abandon his farming business to obtain the higher price. If he claims compensation for the disturbance of his farming business, he is saying that he is not willing to abandon his

[18] Eaton, *op. cit.*, footnote 9, at p. 40.
[19] *Supra*, footnote 9. [20] *Ibid.*, at p. 39.
[21] *Ibid.*, at p. 31, per Greene M.R.
[22] *Ibid.*, at p. 40, per Scott L.J.
[23] *Ibid.*, at p. 35.

farming business, that is, that he ought to be treated as a man who, but for the compulsory purchase, would have continued to farm the land, and, therefore, could not have realized the building value.

And:

From what I have said, it will appear (and this is the qualification which I have mentioned) that, in my opinion, the respondent is disentitled to an award for disturbance only if the sum of £22,700. equals or exceeds the value of the land based on the hypothesis that it will be used only for farming purposes, plus whatever value should be attributed to the minerals, plus the loss by disturbance to the extent (if at all) that the sum of these figures exceeds the sum of £22,700, compensation should be awarded.[24]

Scott L.J. said:[25]

How can the respondent be entitled to a money payment by way of compensation for disturbance of his farm on the top of a price ascertained by valuing the whole of the land as land immediately ripe for building development and thus producing a figure much greater than the market value of it as a farm? Ex hypothesi, the building value is only realizable if and when the land is offered in the market as building land, which necessarily postulates that the selling owner will have given up his farm and cleared the land of all its farming buildings, stock and implements, or at least, is ready and willing to do so at his own expense. Conversely, in so far as he chooses to leave that task to be performed by the purchaser, he must submit to the deduction of the cost of it from his price.

And:

Where by reason of the notice to treat, an owner is enabled to effect an immediate realization of prospective building value and thereby obtains a money compensation which exceeds both the value of the land as measured by its existing user and the whole of the owner's loss by disturbance, to give him any part of the loss by disturbance on top of the realizable building value is in my opinion, contrary to the statutes.[26]

[24] *Ibid.*, at p. 39. [25] *Ibid.*, at p. 42.

[26] *Ibid.*, at p. 50. The applicable statute was the Acquisition of Land (Assessment of Compensation) Act, 1919, *supra*, footnote 5, which provided: "2. In assessing compensation an official arbitrator shall act in accordance with following rules: . . . (2) The value of the land shall . . . be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realize. . . . (6) The provisions of r. (2) shall not affect the assessment of compensation for disturbance or any other matter not directly based on the value of the land." The majority of the court stressed that the case would have been decided the same way under the Lands Clauses (Consolidation) Act, 1845, *supra*, footnote 5, which did not confer an independent right to disturbance damages, such damages being an element going to build up the "purchase price", *I.R.C.* v. *Glasgow S.W. Ry Co.* (1887), 12 App. Cas. 315, since rule (6) in the 1919 statute also did not confer such a right. "It merely leaves unaffected the right which the owner would before the Act of 1919 have had in a proper case to claim that the compensation to be paid for the land should be increased on the ground that he had been disturbed." *Ibid.*, at p. 34. See also *ibid.*, at pp. 41, 42 and 43. Goddard L.J. in his dissent, differed

Horn v. *Sunderland* cannot be left without reference to the spirited and persuasive dissent of Goddard L.J. who held that the owner was entitled to his business disturbance damages as well as the market value of the land on it highest and best use. He said:[27]

> If the owner of a house puts it up for sale, he knows that to obtain the market price he must give vacant possession, and he will not expect to get in addition to the price a sum to compensate him for the expense of removal. Disturbance implies that something is taking place against the will of the person disturbed. If an owner is expelled from his house, the expense he is put to in removal is in no way connected with the value of his house. It is a loss which he has suffered, as it seems to me, by being expelled, whatever the value of the house may be. . . . As I have already said, compensation for disturbance is one of the elements to be taken into account, under the Lands Clauses Act, in arriving at the total sum to be paid to the claimant, but it has never been held, as far as I am aware, that the right to have this element taken into account depends on the market value of the land. . . .

Both Goddard L.J. and Scott L.J. in his majority judgment proliferate hypothetical examples to support their respective views as to the properly applicable legal and land economics principles which are of great assistance in understanding the nature of the duplication, or double recovery, issue.

In the Supreme Court of Canada judgment in *Saint John Harbour Bridge Authority* v. *J. M. Driscoll Limited*[28] the *Horn* v. *Sunderland* principle, without the decision itself being referred to, was given, it is respectfully suggested, an uneven application. The parcel of land in question, containing 135,565 square feet, was valued at $1.00 a square foot on a highest and best use (as a large warehouse or manufacturing plant) basis—$135,565.00. Its actual use (supplying lumber to ships taking cargo in the port of Saint John) value, it appears, was significantly less than this.[29] The New Brunswick Land Compensation Board, whose award had been increased by the New Brunswick Supreme Court, Appeal Division, had found the land to be worth 35 cents a square foot, —on the basis of evidence of sales which were held by the Appeal Division and the Supreme Court of Canada not to be truly comparable.

---

on this particular point, as well as on the general principles which should be applied. "The right to be compensated for his disturbance is provided by the Act of 1919." *Ibid.*, at p. 52. See also at pp. 53-54, 55.

[27] *Ibid.*, at pp. 52-53 and p. 56.

[28] *Supra*, footnote 1.

[29] "The business, however, was not a particularly profitable one, the net profit for the six years preceding the expropriation having averaged only $13,189.00." Per Spence J., *ibid.*, at p. 505.

To the amount of $135,565.00 awarded for the value of the land at $1.00 a square foot Spence J. for a unanimous court, added $7,710.69 for business disturbance, the owner having been forced out of business by the expropriation. He said:[30]

> . . . I am . . . in agreement with [Ritchie J.A.'s] view that a displaced owner should be left as nearly as possible in the same position financially as he was prior to the taking. In the present case, the respondent having occupied its lands with this particular business then would expect to obtain a valuation of the lands by a sale on the open market at the amount found by the Appeal Division, *i.e.*, $1 per sq. ft. It would also expect to be able to terminate his use of those lands for the purpose of carrying on the trade which the respondent carried on in an orderly fashion and, in all probability, to move the site of the enterprise elsewhere. In the present case, the respondent found it impossible to obtain other suitable premises and had to wind up its business selling only the inventory and the personal property. This it had to accomplish in a very short time. As I have pointed out, it was less than two and one-half months from the date of the resolution expropriating the lands to the date on which the possession was surrendered.

Spence J. also decided that the owner was *not* entitled to be compensated for the value of the existing buildings on the land (which value had been awarded by the Land Compensation Board and the majority of the Appeal Division in the amount of $62,000.00) or for any element of "special value" to the owner (which had been allowed by Ritchie, J.A. in the Appeal Division in the amount of $15,000.00). As to the claim respecting the buildings, Spence J. said:[31]

> It must be remembered that this latter figure of $1.00 per square foot [as opposed to the 35c per square foot found by the Land Compensation Board] represented the opinion of Mr. Corbett [the owner's appraiser] as to the value of the land when put to its highest and best use, that is, for a large warehousing or manufacturing enterprise and did not represent the value of the land when used by a small business supplying lumber items to ships. Before any purchaser could utilize the land for that highest and best use, the purchaser would have to remove from the site the considerable number of frame buildings which existed at the time of the expropriation and which had been valuable and efficient for the use for which the owner was putting them at the time of the expropriation.

And:

> Therefore, I am of the view that having adopted the rate of $1 per square foot as the value of the lands, it was an error of principle to add to that amount any valuation of the buildings and that the award

[30] *Ibid.*, at p. 511.
[31] *Ibid.*, at pp. 509-510.

of the Appeal Division should be reduced by the sum of $62,000 representing the value of the buildings included in the amount awarded.[32]

With respect to the claim for an increased award for special value Spence J. said:[33]

> It is also true that the lands in so far as site and equipment were concerned were excellently suited for the use put by the owner and had a special value to him for such purpose. It must, however, be remembered that the Appeal Division is not fixing the value of those lands when used for such purpose but found upon the evidence of Mr. Corbett the potential value of the land based on a higher and better use and thereby increased the value of the lands from 35c per square foot to $1 per square foot. I am of the opinion that if there were an element added to that latter rate to compensate for the special value to the owner it would be in breach of the well-recognized principle as stated by Abbott, J., in *Jutras* v. *Minister of Highways for Quebec*, [1966] S.C.R. 732, at p. 745:
>
> > "So far as the damages sustained as a result of the expropriation are concerned, the appellant is entitled to be fully compensated *but not enriched thereby.*"
>
> (The italicizing is my own.) I would therefore, not allow any amount for special value to the owner.

It is submitted that Spence J.'s reasoning which results in a disallowance of the claims respecting the value of the buildings and special value should have been equally applicable, under the *Horn* v. *Sunderland* principle, to the claim for business disturbance. There appears to have been no question on the facts that the expropriation did inflict on the owner loss of a business disturbance nature. However, any award for this element, if the *Horn* v. *Sunderland* principle is valid, could be said to have resulted in an element of duplication in the total award and hence the owner might have been "enriched thereby"—to use the language of the *Jutras* case.[34]

It may be thought that the Ontario Court of Appeal in *Re Zeta Psi Elder Association of Toronto and University of Toronto*,[35] in increasing an award of the Ontario Municipal Board, treated the duplication issue in an oblique manner. The actual use of the expropriated premises at the time of expropriation was as a university fraternity house providing lodging, meals and a meeting place for the members of the fraternity. The highest and best use of the land was found to be "redevelopment"[36] probably for apart-

---

[32] *Ibid.*, at p. 510. [33] *Ibid.*, at pp. 510-511.
[34] *Jutras* v. *Ministre de la Voirie de Québec*, [1966] S.C.R. 732.
[35] *Supra*, footnote 2.
[36] *Ibid.*, at pp. 186 and 189.

ment house purposes.[37] The expropriating authority's appraiser testified that the land's highest and best use value was $160,000.00 and that its existing use value (including the building), "after exhaustive calculations"[38] was $140,000.00. The Board found his evidence to be much more convincing than that of the claimant's appraiser and, holding that the claimant had not "proven itself entitled to any special value over and above fair market value",[39] awarded it $160,000.00. It is not clear whether the Board made an express finding on the validity of the $140,000.00 existing use value figure—even though it agreed generally with the expropriating authority's evidence.

The Court of Appeal held that the land's market value for redevelopment was not $160,000.00 but $188,760.00 and that the premises had a special value to the owner "above the land value for redevelopment purposes"[40] which it quantified at $31,500.00—$30,000.00 for reconstruction and renovation of a new site for fraternity house purposes and $1,500.00 for moving and incidental expenses. The court then subtracted from the $188,760.00 the amount of $18,000.00 which was the valuation, on the highest and best use basis, of 1,500 square feet out of a total of 15,730 square feet, because the owner did "not require all of the present land for fraternity house purposes".[41] To the resulting figure of $170,760.00 the court added the special value to the owner amount of $31,500.00 to arrive at a total award of $202,260.00.

It may be that the figure of $170,760.00 represented the court's finding of actual use value.[42] If this be the case then there

[37] Evidence, p. 338. [38] Reasons of Ontario Municipal Board, at p. 7.
[39] *Ibid.*, at p. 5. [40] *Supra*, footnote 2, at p. 190. [41] *Ibid.*, at p. 190.
[42] After holding that the whole area was not needed for fraternity house purposes the court said: "It follows that the value for redevelopment purposes of some reasonable portion of the land area must be *deducted from the calculation of special fraternity house value.* . . ." Italics added. If the italicized words read "deducted *for* the calculation of fraternity house value" this statement would be a clear indication that the court was endeavouring to find an actual use market value. The relationship between the actual use value and redevelopment value being that the former was a use economically inferior (in fact, non-profit, in the commercial sense) to the latter of the *whole* premises, it is difficult to follow the reasoning which led to actual use value (if this was the object of the reasoning) being the value of the *whole* land on a redevelopment use basis minus part of it on valued on the same basis. The owner's appraiser said that he did not understand the concept of existing use value in relation to non-commercial and non-income producing uses of land. Evidence, pp. 800-801. The difficulty of calculating actual or existing use value surely does not mean that such a value does not exist or that, in these circumstances, it should be treated as being the same as highest and best use market value. "To understand the problem in this case, it is important to have in mind that one and the same piece of land may notionally have one market value

would be no double recovery element in the ultimate award. However, the matter is not clear. The only evidence on actual use value, it appears, was that it was $140,000.00. The Court of Appeal did not, in so many words, expressly make a finding of actual use market value. If the evidence of $140,000.00 for existing use value was accurate(and it is not intended here to comment on the validity of findings of value in either tribunal) and the Court of Appeal's finding of $188,176.00 for redevelopment use value was accurate, then it would appear that there could have been a duplication element in the final award of some $14,084.00—$202,260.00 minus $188,176.00.

Whatever verbal formulae or tests are used to govern the quantum of an award, the most basic general proposition is that an owner is to be compensated for his loss.[43] While this proposition is in itself, of course too general to be applied in arriving at an actual detailed award[44] a departure from it could explain a variation from an award which might otherwise have been predicted. This observation may be relevant to the result in the *Zeta Psi* case. The court expressed the basic approach to compensation in the following language: "The value to the owner is the right to receive a money payment which *is not less than the loss imposed.*"[45] In *Horn* v. *Sunderland*, Scott L.J. put the purpose of

---

for one possible use and different market values for other possible uses." *National Capital Commission* v. *Budd, supra*, footnote 3, at p. 405. The owner's primary claim in *Zeta Psi* was to have the compensation based on the principle of reinstatement. Both the Ontario Municipal Board and the Court of Appeal agreed that the principle had no application in the case because "it cannot be said to be a property devoted to a purpose of such a nature that there is no demand or market for the property". *Supra*, footnote 2, at p. 187. The Supreme Court of Canada, by a majority of three to two (see *supra*, footnote 5) varied the award from $202,260.00 to $212,000.00, holding the fraternity was entitled to "the greater of either the value of that site for redevelopment purposes [which it found to be $194,490.00] or the cost of replacing that site with another for the purpose of carrying on a fraternity house [which it found to be $210,500.00]. It held, following *Driscoll, supra*, footnote 1. that it was wrong to allow anything for "renovation and reconstruction", but that $1,500.00 for moving and incidental expenses "when the replacement basis of valuation is that accepted" is a "proper item". The dissenting judges would have restored the award of the Ontario Municipal Board, $160,000.00, and held that neither the $30,000.00 for renovation and reconstruction nor the $1,500.00 for moving and incidental expenses were allowable.

[43] Cripps, *op. cit.*, footnote 4, pp. 673-674. See also Nichols, Eminent Domain (3rd ed., 1950), s. 12.22 [1] "[I]t is the loss to the owner which measures the just compensation to which he is entitled." See also s. 8.6. 2 Orgel, Valuation under the Law of Eminent Domain (2nd ed., 1953), p. 251: "[M]any of the judicial opinions state that the measure of compensation is what has the owner lost?".

[44] "I always say . . . that no general proposition is worth a damm." O. W. Holmes, Jr. in Holmes-Pollock Letters (1942), p. 118.

[45] *Supra*, footnote 2, at p. 190. Italics added.

the compensation legislation this way: ". . . [The owner] gains a right to receive a money payment not less than the loss imposed, *but on the other hand, no greater.*"[46] The omission of a qualifying expression that the money payment is to be no greater than the loss imposed in the Court of Appeal's judgment almost carries the implication that in some cases it may be proper for the compensation to exceed the loss. The statement may be some clue to the result in this difficult case—difficult by reason of the absence of unquestionable evidence on actual use value and also by the necessity of deciding the extent, if any, to which the location value of the subject premises as a fraternity house site could be translated into a compensable economic interest.

The duplication, or double recovery, problem in so far as it relates to disturbance damages, has received comparatively little attention in the cases.[47] The *result* of the Supreme Court of Canada

[46] *Supra*, footnote 9, at p. 42. Italics added. "Such a practice [of giving to the dispossessed owner an amount of compensation which exceeds the total sum of his real loss arising from the acquisition] would now, as before, contravene the basic principle of compensation." *Ibid.*, at p. 49. "The root principle is that the owner is entitled to compensation for his loss no more and no less." *Hall & Humber Investment Co. Ltd.* v. *Hull Corporation*, [1965] 2 Q.B. 150, at p. 158 (C.A.), per Lord Denning M.R. Another portion of the Court of Appeal judgment in *Zeta Psi* bends the value to the owner concept in favour of the owner: "The value of a property to its owner is identical in amount with the adverse value of the entire loss, direct *and indirect*, that the owner might expect to suffer if he were to be deprived of the property." *Ibid.*, at p. 187, italics added. Contrast Kerwin J. in *Irving Oil Co. Ltd.* v. *The King*, [1946] S.C.R. 551, at p. 556: "[T]he displaced owner should be left as nearly as possible in the same position financially as he was prior to the taking, provided that the damage loss or expense for which compensation was claimed was *directly attributable* to the taking of the lands." Italics added. And Denning L.J. in *Harvey* v. *Crawley Development Corporation*, [1957] 1 Q.B. 485, at p. 493 where he refers to "the rule that everything which is a *direct* consequence of the compulsory acquisition can be recovered under the head of 'compensation for disturbance' ". Italics added.

[47] Duplication arising from the award of full disturbance damages has been guarded against in *Re Boulton and The Standard Fuel Company and The Toronto Terminals Railways Co.*, [1933] O.W.N. 298, at p. 300 (C.A.), affirmed by, [1935] 3 D.L.R. 657, at p. 659 (P.C.); *The King* v. *Edwards*, [1946] Ex C.R. 311, at pp. 336-337; *The King* v. *Thomas Lawson & Sons Ltd.*, [1948] Ex. C.R. 44, at pp. 64-68; *The Queen* v. *Supertest Petroleum Corporation Limited*, [1954] Ex. C.R. 105, at pp. 141-142; *Hull & Humber Investment Co. Ltd.* v. *Hull Corporation, ibid.*, at p. 158; *Re Brown and the Corporation of the City of Peterborough*, [1957] O.R. 224, at p. 237 (C.A.). (A partial taking of dairy farm lands where the land taken was valued for subdivision purposes and a claim was put forward for disturbance to the dairy farm operation on the remaining lands. Roach J.A. said: "Plainly the claimants are not entitled to the advantages and at the same time to be compensated for the disadvantages. They cannot have their cake and eat it." *Ibid.*, at p. 237; and *Re Hinder and Metropolitan Toronto*, [1964] 2 O.R. 286, at p. 295 (C.A.) (No award for injurious affection in the loss of certain screen trees which had been destroyed since this loss was "wholly dissipated" by the fixing of the value of the taken land according to its potential use as a commercial site). On the other hand,

judgment in *Driscoll* is clear authority for the award of disturbance damages on top of highest and best use value of the land in cases where the actual use is less than the highest and best use. However, the court did not specifically address itself to the duplication issue respecting damages, and it cannot therefore, be said to have authoritatively pronounced upon it.

In this writer's view there are good reasons why the duplication issue should be treated seriously and be settled legislatively. It is commonplace for actual use values of agricultural, commercial and single-family dwelling lands to be outstripped substantially by market values based on more profitable uses. Should counsel for expropriated owners in such cases prepare and adduce evidence relating to business disturbance damages? This can be costly and time-consuming and if the proven amount of this damage, when added to actual use value, does not exceed market value on the land's highest and best use then the expense (no matter which party ultimately bears it) and the time will have been wasted—if the *Horn* v. *Sunderland* principle is to apply. Further, if the principle is applicable, and counsel seeks to adduce disturbance damage evidence, then such evidence will be of no value unless there is also evidence of the land's market value for its actual use. In many cases evidence of actual use market value may be very difficult to obtain as, for example, in cases where most of the recent sale prices in the surrounding area are based on highest and best use. Counsel cannot expect the tribunal to extricate him from any difficulty he may have in such circumstances by interpolating actual use value at some discount of highest and best use value, (notwithstanding *Zeta Psi*) or something of this sort, for the cases establish that the onus is on the claimant to prove his case—which includes all elements in his claim.[48]

---

when faced with the duplication argument, the following decisions allowed both highest and best use market value and full disturbance damages or damages for injurious affection: *Re Coquitlam School District No. 43 Expropriation* (1960), 32 W.W.R. 513 (B.C.S.C.) (Where the reasoning of Goddard J. in *Horn* v. *Sunderland* was found to be "unanswerable"); and *Re Mitchener and the Queen* (1968), 70 D.L.R. (2d) 218 (Sask. C.A.) (Where the result could be justified on the ground of legislation conferring a separate right to damages on a partial taking. See Highways Act, 1961 (Sask.), c. 25, s. 50(1) (b), now R.S.S., 1965, c. 27, s. 51(1) (b)).)

[48] *The King* v. *Kendall* (1912), 14 Ex. C.R. 71, at p. 86; *The King* v. *W. D. Morris Realty Limited*, [1943] Ex. C.R. 140, at pp. 154-155; *Re Duthoit and Province of Manitoba* (1966), 54 D.L.R. (2d) 259, at p. 267; and *National Capital Commission* v. *Budd*, *supra*, footnote 3, at p. 408. In Royal Commission—Inquiry into Civil Rights, Report No. 1 (February 7th, 1968) (Hon. J. C. McRuer), at pp. 1058-1059, it is said that the

In a case where market value for actual use (for example, $90,000.00) were only slightly below market value on the highest and the best use basis (for example, $100,000.00) and business disturbance damages were substantial (for example, $40,000.00) then if the double recovery principle were applicable it would obviously be to the benefit of the owner to abandon any claim based on highest and best use market value and to claim actual use value plus disturbance damages. The absence of evidence on actual use value before the tribunal could result in an award of $100,000.00 —solely market value on a highest and best use basis, instead of $130,000.00. Conversely, if there is a substantial disparity between the two market values, say $30,000.00 for actual use and $100,000.00 for highest and best use, then unless it is clear that the business disturbance damages are going to be substantial—in this example, over $70,000.00—then the owner need not spend the time or the money in preparing and presenting evidence of disturbance damages.

It is, therefore, of practical significance that the law on this particular issue in the application of the value to the owner concept be settled authoritatively. Two recent Canadian studies of compensation law, from a policy vantage-point, have recommended that legislation should be drawn to prevent double recovery.[49] In the present state of the case law it is not unreasonable to look to our legislatures for clear and express guidance, one way or the other,[50] on this issue.[51]

JOHN W. MORDEN*

* * *

---

burden of proving market value should not be placed on either party to expropriation proceedings but that the onus of proof of items of special value or consequential damage should be on the owner.

[49] Report of the British Columbia Royal Commission, *op. cit.*, footnote 5, p. 94: ". . . [I]n no case shall compensation exceed the greater of (a) existing use value plus disturbance, or (b) value based on the highest and best use." See also pp. 110-112. Report of the Ontario Law Reform Commission, *op. cit.*, footnote 5, pp. 22-23.

[50] It may be thought that the analyses of the double recovery problem in the foregoing studies, *ibid.*, are too brief to do it full justice. See R. E. Megarry's comment on *Horn* v. *Sunderland* in (1942), 58 L.Q. Rev. 29, at p. 30 where he concluded with the hope that "the view so clearly expressed by Goddard L.J. will ultimately be upheld as being not merely good sense but also good law".

[51] Clause 13(2) of Bill No. 5 of the Ontario Legislature, *supra*, footnote 5, given first reading on November 25th, 1968 and second reading on December 4th, 1968 is intended to give some guidance on the issue. It reads: "Where the land of an owner is expropriated, the compensation payable to the owner shall be based upon,

*John W. Morden, of the Ontario Bar, Toronto.

IS THE WAGON MOUND GOOD LAW IN CANADA?—The question posed by the title is natural, but misleading. The recent debate[1] in England over the proper rule of remoteness in torts has centred around two contradictory cases, *In re an Arbitration between Polemis and Furness Withy and Co.*[2] and *Overseas Tankship (U.K.) Ltd.* v. *Morts Dock & Engineering Co.*[3] (popularly called the *Wagon Mound* case). But if one wishes to know what is the proper rule to be followed in Canada, one cannot simply ask which of these two cases is to be followed here. There are other cases besides these two which discuss this issue of remoteness, and some of the cases are binding authority in Canada. The purpose of this comment is to point out their existence, and to make some suggestions as to which rule must be followed, from the standpoint of *stare decisis*.

Of course the first case to deal with the rule of remoteness and to impose liability for all the direct results of negligence, whether or not foreseeable, was not the *Polemis* case. Such views were expressed by some of the judges in *Smith* v. *L. & S. W. Ry*,[4] though there have been some early expressions of the contrary view.[5]

The matter appears to have come up for the first time here in a 1919 decision of the Supreme Court of Canada, *Winnipeg*

(a) the market value of the land;
(b) the damages attributable to disturbance;
(c) damages for injurious affection; and
(d) any special difficulties in relocation,

but where the market value is based upon a use of the land other than the existing use, no compensation shall be paid under clause *b* for damages attributable to disturbance that would have been incurred by the owner in using the land for such other use."

This provision is now law. See *supra*, footnote 5.

[1] As it is arguable that too much ink has already been spilled over this issue, I have tried to confine the text largely to matters relevant to the question raised by the title. Things tending to repeat what English writers have already said are hidden away in the footnotes.

[2] [1921] 3 K.B. 560, 90 L.J.K.B. 1353 (C.A.).

[3] [1961] A.C. 388, [1961] 1 All E.R. 404 (P.C.). A second suit arising out of the same facts, *Overseas Tankship (U.K.) Ltd.* v. *Miller Steamship Co.* [1967] 1 A.C. 617, [1966] 2 All E.R. 709 (P.C.), popularly called *Wagon Mound No. 2*, reaffirms the rules given in No. 1, and extends them to nuisance, though the findings of fact there were very different from those in the first suit.

[4] (1870), L.R. 6 C.P. 14 (Ex. Ch.), per Kelly C.B., Channell B., and Blackburn J.; the views of the other four judges were less clear.

[5] But see *Rigby* v. *Hewitt* (1850), 5 Ex. 240, 155 E.R. 103; and *Greenland* v. *Chaplin* (1850), 5 Ex. 243, 155 E.R. 104, cited by Bankes L.J. in *Polemis*. *Rigby* and *Greenland* were approved in *William Cory & Son.* v. *William Frane, Fenwick & Co.*, [1911] 1 K.B. 114, at p. 122, 80 L.J.K.B. 341, at p. 349 (C.A.). Similar views had been earlier expressed in the House of Lords in *Lynch* v. *Knight* (1861), 9 H.L.C. 577, at p. 600, 11 E.R. 854, at pp. 863-864.

Electric Ry. v. *Canadian Northern Ry.*[6] There passengers of a street car had fallen or jumped from the car when a collision with a train was seen to be imminent, and a question was raised as to whether their fall was too remote a consequence to entail liability. Duff and Anglin JJ. said clearly that:[7]

> Where the harm in question is the direct and immediate consequence of the negligent act then it is within the ambit of liability.

and that:

> When it has once been determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not.

They anticipated the *Polemis* decision by two years. The other member of the majority in the Supreme Court did not mention this issue at all, as he seems to have thought that the injuries were foreseeable. The other two members of the court dissented on the facts. Whether the rule of liability for all direct consequences is part of the *ratio decidendi* and thus binding, appears to turn on whether or not one counts the opinions of dissenting judges. The answer to that is by no means clear.[8]

The next year in *Weld-Blundell* v. *Stephens*[9] Lord Sumner in the House of Lords dealt with the issue of remoteness at some length, and his remarks are still worth reading. If anything, they seem to point to a rule both more flexible and more vague than what is now contemplated by the exponents of either the directness or the foreseeability rules. But the Court of Appeal the next year had no doubts when it decided the *Polemis* case: it held the defendant liable for all the direct consequences of his negligence, no matter how bizarre or improbable they may have seemed.

In 1922 the Ontario Appellate Division said[10] that *Polemis* "disposed of" any argument to the contrary, without any mention of the prior Supreme Court decision to the same effect in the *Winnipeg Electric* case. Other Canadian decisions in the Supreme Court[11] and the courts of Alberta,[12] British Columbia,[13] Manitoba,[14]

---

[6] (1919), 59 S.C.R. 352, 50 D.L.R. 194, [1920] 1 W.W.R. 95.

[7] *Ibid.*, at pp. 367, and 369-370 (S.C.R.), quoting English authorities.

[8] See Cross, Precedent in English law (1961), pp. 98-102. *Cf. Walter* v. *A.-G. Alta* (1966), 58 W.W.R. 385 and *R.* v. *Tenta* (1968), 67 D.L.R. (2d) 536, at p. 540.

[9] [1920] A.C. 956 (H.L.).

[10] *F. W. Jeffrey & Sons Ltd.* v. *Copeland Flour Mills Ltd.* (1922), 52 O.L.R. 617, [1923] 4 D.L.R. 1140, per Rose J.

[11] See, for instance, the Supreme Court of Canada in a Quebec appeal, *Regent Taxi* v. *Congregation des Petits Frères*, [1929] S.C.R. 650, at pp. 660-661 (reversed on other grounds), [1932] A.C. 295, [1932] 2 D.L.R. 70 (P.C.).

For footnotes 12, 13 and 14 see next page.

New Brunswick,[15] Nova Scotia,[16] Saskatchewan,[17] and Newfoundland[18] followed the *Polemis* case, and the directness rule seemed to have carried the day.[19] Indeed, in 1929[20] the Ontario Court of Appeal applied the *Polemis* rule, apparently as part of the *ratio* of their decision. The Supreme Court of Canada[21] dismissed an appeal from this decision from the bench without written reasons, and their oral reasons as reported appear to turn largely on the facts without any reference to this point of law. But there are other decisions of the Ontario courts[22] clearly applying the *Polemis* rule.

A movement in the other direction was begun by the House of Lords in 1933,[23] and was spurred by two Scottish cases which reached the House of Lords during the Second World War. *Hay (or Bourhill)* v. *Young*[24] held that liability extends only to persons to whom danger could have been foreseen, and that of course tends to militate against the correctness of *Polemis*: why must the victim be foreseeable but not the type of accident or injury?

---

[12] *Polemis* was followed by McGillivray J.A. in the Appellate Division in *Powlett* v. *University of Alberta*, [1934] 2 W.W.R. 209, and approved (*obiter*?) by Howson J. at trial in *Black* v. *C.P.R.*, [1941] 2 W.W.R. 621, at pp. 625-628, and by Egbert J. at trial in *Duce* v. *Rourke* (1951), 1 W.W.R. (N.S.) 305, at p. 339 (though subject to the *novus actus* rule).

[13] *Polemis* was followed by a trial judge in *Patten* v. *Silberschein*, [1936] 3 W.W.R. 169 (relying on the 7th edition (1928), of Salmond on Torts), and by the Court of Appeal in *Brodt* v. *Wearmouth*, [1937] 1 W.W.R. 777, at pp. 781-782, and the Court of Appeal in *MacGibbon* v. *Robinson*, [1953] 2 D.L.R. 689, at p. 693.

[14] The test of directness was applied by the Court of Appeal in *Mizenchuk* v. *Thompson*, [1947] 2 W.W.R. 849. But *cf.* footnote 55, *infra*.

[15] *Polemis* was followed by the Court of Appeal in *Filion* v. *New Brunswick International Paper Co.*, [1934] 3 D.L.R. 22.

[16] *Polemis* was referred to by the Court of Appeal, seemingly with approval, in *Humphries* v. *Pictou County Power Board*, [1931] 2 D.L.R. 571 (a case on contract), and *Halifax Shipyards Ltd.* v. *Canadian Government Merchant Marine Ltd.*, [1938] 4 D.L.R. 356.

[17] *Polemis* was followed at trial in *Reinhart* v. *Regina*, [1944] 2 W.W.R. 313, which was affirmed by the Court of Appeal, [1944] 3 W.W.R. 333, and also referred to *Polemis*, apparently with approval, in *Leibel* v. *South Qu'Appelle*, [1943] 3 W.W.R. 566, at pp. 577-578, but only for the proposition that the precise mode of operation need not be foreseen.

[18] *Polemis* was followed at trial in *Miller* v. *Power* (1956), 39 M.P.R. 207, at p. 216.

[19] *Cf.* a case in contract, *Great Lakes S.S. Co.* v. *Maple Leaf Milling Co.*, [1924] 4 D.L.R. 1101, 41 T.L.R. 21 (P.C.).

[20] *Harding* v. *Edwards*, [1929] 4 D.L.R. 598, at pp. 600, 603.

[21] [1931] S.C.R. 167.

[22] *E.g. Negro* v. *Pietro's Bread Co.*, [1933] 1 D.L.R. 490, at p. 494 (C.A.), and *Amell* v. *Maloney*, [1929] 4 D.L.R. 514, at p. 517 (C.A.). But *cf.* footnote 50, *infra*.

[23] *Liesbosch* v. *Edison*, [1933] A.C. 449, especially at 463-464 (H.L.), where *Polemis* was said to apply only to immediate physical consequences: see Winfield, Torts (5th ed., 1950), p. 69 *et seq.* See also footnote 5, *supra*.

[24] [1943] A.C. 92, [1942] 2 All E.R. 396 (H.L.).

What is more, the case contains express dicta to this effect. Lord Thankerton said:[25]

> 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. . . .

That might be taken as referring only to physical area and not scope of risk, but the fact he went on to distinguish *Polemis* carefully indicates that he probably meant scope of risk. Lord Russell of Killowen[26] made it even clearer that directness was not the rule:

> In considering whether a person owes to another a duty, a breach of which will render him liable to that other in damages for negligence, it is material to consider what the defendant ought to have contemplated as a reasonable man. This consideration may play a double role. It is relevant in cases of admitted negligence (where the duty and breach are admitted) to the question of remoteness of damage, *i.e.*, to the question of compensation not to culpability. . . .

Lord Macmillan said:[27]

> . . . *In re Polemis* was cited. Whether the law there laid down is consonant with the law of England it will be for this House to pronounce when the occasion arises. As at present advised, I doubt if it is the law of Scotland, and I could cite ample authority to the contrary. . . .

Shortly afterwards, the case of *Glasgow Corporation* v. *Muir*[28] was before the House of Lords, and Lord Macmillan uttered more dicta[29] in the same vein:

> In Scotland, at any rate, it has never been a maxim of the law that a man acts at his peril. Legal liability is limited to those consequences of our acts which a reasonable man of ordinary intelligence and experience so acting would have in contemplation.

Lord Romer said:[30]

> . . . subjected to any unusual risk that would have been within the contemplation of any reasonable person. If any *such* risk had materialized and caused damage to the respondents or any of them, the appellants would undoubtedly have been liable.

While these dicta seem to have had little or no effect on the courts in England,[31] they certainly bore fruit in Canada, where the

---

[25] *Ibid.*, at p. 399 (All E.R.). [26] *Ibid.*, at p. 401 (All E.R.).
[27] *Ibid.*, at p. 403 (All E.R.).
[28] [1943] A.C. 449, [1943] 2 All E.R. 44 (H.L.).
[29] *Ibid.*, at p. 48 (All E.R.).
[30] *Ibid.*, at p. 53 (All E.R.), italics mine.
[31] Indeed, in *Morrison S.S. Co.* v. *Greystoke Castle (Cargo)*, [1946] 2 All E.R. 696, at p. 709 (H.L.), Lord Porter appeared to follow the *Polemis* decision, though Denning J. criticized it *obiter* in *Minister of Pensions* v. *Chennell*, [1946] 2 All E.R. 719, at p. 721, mentioning not only

Winnipeg Electric case[32] had by this time been completely forgotten. In *R.* v. *Anthony*,[33] Cameron J. in the Exchequer Court applied the dicta in *Glasgow Corporation* v. *Muir*[34] and held that damage must have been foreseeable if it is not to be too remote. The Supreme Court reversed his decision,[35] but solely on the ground that on the facts there was no duty of care and no liability. Thus the question of remoteness did not arise at all.

On the other hand, *R.* v. *C.P.R.*[36] the next year turned largely on remoteness of damage. Unfortunately, the various members of the Supreme Court did not make it clear which rule they thought to be the proper one. Kerwin J. discussed the proper rule,[37] but he thought that the accident there had not even been a direct result of the negligence (let alone foreseeable), and so he did not have to reach any settled conclusion as to the proper rule. Taschereau J.[38] did seem to adopt the *Polemis* rule of liability for direct results, but in any event he too thought the results there not even direct. It is difficult to tell which test was used by Rand J.[39] or Estey J.[40] Kellock J.[41] mentioned the issue, but in the result he did not have to decide it.

The question arose again the next year in *Booth* v. *St. Catharines*,[42] but the proper rule was not made any clearer. Kellock J.[43] quoted the foreseeability test of remoteness from *Glasgow* v. *Muir*, but for another purpose. Estey J.[44] felt that the rule of liability for direct results was correct, and quoted *Polemis*, but this may have been *obiter*, for he went on to find that the accident here had been foreseeable as well. The other members of the court did not mention remoteness at all.

In *Cook* v. *Lewis* in 1951,[45] Rand J. quoted *Polemis*, apparently with approval, but of course remoteness was not in issue in that case.

The Supreme Court next considered the problem in 1953 in *Grandel* v. *Mason*.[46] The majority of the court applied the test of foreseeability, this time quoting *Hay* v. *Young*. The passage which they approved is the portion of the speech of Lord Russell of

the duty cases, but also those on intervening causes. In *Thurogood* v. *Van den Berghs and Jergens Ltd.*, [1951] 2 K.B. 537, [1951] 1 All E.R. 682, the Court of Appeal held that *Polemis* was still binding, despite the dicta in the House of Lords to the contrary.

[32] *Supra*, footnote 6. [33] [1946] 3 D.L.R. 577. [34] *Ibid.*, at p. 581.
[35] [1946] S.C.R. 569. [36] [1947] S.C.R. 185.
[37] *Ibid.*, at pp. 189-190. [38] *Ibid.*, at p. 194.
[39] *Ibid.*, at pp. 195-196. [40] *Ibid.*, at pp. 208-209.
[41] *Ibid.*, at p. 205. [42] [1948] S.C.R. 564. [43] *Ibid.*, at p. 578.
[44] *Ibid.*, at pp. 583-584.
[45] [1951] S.C.R. 830, [1952] 1 D.L.R. 1, at p. 3.
[46] [1953] 1 S.C.R. 459, at p. 467.

Killowen which is quoted above.[47] One cannot be absolutely certain that the Supreme Court were dealing with remoteness rather than culpability (for the passage quoted deals with both), but it seems probable that they meant to deal with both. But they found that the test was satisfied, and the damage had been foreseeable, so that the defendant was liable. The same result would clearly have flowed had they applied the *Polemis* rule of directness. Does that make their use of foreseeability any less a part of the *ratio?*

The question of remoteness in tort has only come before the Supreme Court once since, in *Gilchrist* v. *A. & R. Farms Ltd.*[48] Much as had been the case in *Grandel* v. *Mason*, the majority found that both the directness and the foreseeability tests were satisfied, so that the defendant would be liable on either test. But this time Cartwright J. for the majority simply pointed this out, and said that it was unnecessary to consider which was the correct test, though he did quote the foreseeability test. Ritchie J., dissenting, was similarly of the opinion that it was unnecessary to choose between the tests there.

As decisions of the House of Lords are not binding on Canadian courts,[49] and decisions of the Privy Council rendered since the abolition of appeals from Canada do not bind either,[50] we must look to the decisions of the Supreme Court of Canada on the subject of remoteness in tort. Their answer is not very clear, for most of the cases contain what are at best mere dicta on the subject. The *Winnipeg Electric* and *Grandel* judgments express decided views as part of the decision, the former in favor of directness, and the latter against. But for all that it is by no means clear that either of these rules is given as part of the *ratio* of the court's decision, though the doubt stems from different reasons in each case. The postwar decisions of the court do seem to have shown more support for the foreseeability rule than for *Polemis*, and presumably the more recent decisions of the Privy Council in the two *Wagon Mound* suits, and the British decision

[47] *Supra*, footnote 26.

[48] [1966] S.C.R. 122, at pp. 125-126, 132; 54 W.W.R. 595, at pp. 597-598, 605.

[49] *Robins* v. *National Trust Co.*, [1927] A.C. 515 (P.C.); *Safeway Stores Ltd.* v. *Harris*, [1948] 4 D.L.R. 187 (Man. C.A.); *Anderson* v. *Chasney*, [1949] 2 W.W.R. 337, at p. 361 (Man. C.A.); *Bashir* v. *Commissioner of Lands*, [1960] A.C. 44, at p. 62 (P.C.); *Parker* v. *R.* (1963), 111 C.L.R. 610; *Uren* v. *Fairfax*, [1967] Aust. Argus R. 25 (H.C.).

[50] *Cf.* Joanes, Stare Decisis in the Supreme Court of Canada (1958), 36 Can. Bar Rev. 174, and Rinfret C.J.C. dissenting, in *Re Storgoff*, [1945] S.C.R. 526.

to follow these decisions, would tend to reinforce lower Canadian courts' tendencies to opt for the foreseeability rule.

But one cannot contend that Canadian courts are clearly bound by the Supreme Court decisions to follow one rule rather than the other. In most provinces, what are binding on the courts are decisions of the local appellate courts. In many cases these adopt the *Polemis* rule, and this (as we have seen) is the case in Ontario,[51] though some recent cases have questioned this view.[52] In Saskatchewan, Disbery J. in *Shulhan* v. *Peterson, Howell & Heather (Canada) Ltd.*[53] carefully reviewed the authorities and concluded that Saskatchewan courts were still bound to follow *Polemis*. But recent cases indicate that this may not be true of all the provinces,[54] especially Manitoba.[55] Sooner or later the Supreme

---

[51] *Supra*, footnotes 10 and 20.

[52] *Cf. Thiele & Wesman Ltd.* v. *Rod Service (Ottawa) Ltd.* (1962), 45 D.L.R. (2d) 503, where the Ontario Court of Appeal was willing to leave the question open, and *Foster* v. *Registrar of Motor Vehicles* (1961), 28 D.L.R. (2d) 561, at p. 574 (C.A.), where Schroeder J.A. dissenting, referred to the *Wagon Mound* case with approval. Porter C.J.O., at p. 562, and Kelly J.A., at p. 582, also seemed to refer to it with approval. The Court of Appeal in *Ontario Construction Co.* v. *George Hardy Ltd.*, [1950] O.W.N. 749, at p. 750 quoted with approval a passage from *Glasgow Corp.* v. *Muir* on the foreseeability of remoteness as did Ferguson J. at trial in *Hutterly* v. *Imperial Oil Co.* (1956), 3 D.L.R. (2d) 719, at p. 722.

[53] (1966), 57 D.L.R. (2d) 491, following *Leibel* v. *South Qu'Appelle*, [1943] 3 W.W.R. 566, [1944] 1 D.L.R. 369 (Sask. C.A.); *Honan* v. *McLean* (1953), 8 W.W.R. (N.S.) 523, [1953] 3 D.L.R. 193 (Sask. C.A.). But see the contrary approach of Tucker J. in *Boyanchuk* v. *Borger Bros.* (1964), 48 D.L.R. (2d) 235, at p. 240, and *Yorkton Agricultural and Industrial Exhibition Association* v. *Morley* (1966), 57 W.W.R. 97, at p. 100.

[54] Kirby J. at trial in Alberta followed the *Wagon Mound* case rather than *Polemis* in *Lauritzen* v. *Barstead* (1965), 53 W.W.R. 207, especially at p. 127, and so did Riley J. in *Kern* v. *MacDougall* (1963), 42 W.W.R. 695. So apparently did a British Columbia trial judge in *Regush* v. *Inglis* (No. 2) (1962), 38 W.W.R. 245.

The New Brunswick Court of Appeal in *Buchanan* v. *Oulton* (1965), 51 D.L.R. (2d) 383, at p. 385 found it unnecessary to decide which was the correct rule, and there are a number of other similar cases in the other provinces. There seems no point in reciting them here.

In Nova Scotia, Ilsley C.J. referred to the *Wagon Mound,* seemingly with approval, in *Swift Canadian Ltd.* v. *Bolduc* (1961), 29 D.L.R. (2d) 651, at p. 663, and the Court of Appeal approved it in *Tanner* v. *Atlantic Bridge Co.* (1966), 56 D.L.R. (2d) 162, at pp. 164, 167.

The British Columbia Court of Appeal in 1946 in *Gard* v. *Duncan S.D.* (1945-46), 62 B.C.R. 323, at p. 337, per O'Halloran J.A. gave what appears to be the test of foreseeability in remoteness.

[55] The Manitoba Court of Appeal has followed *Wagon Mound,* rather than *Polemis,* in *Oke* v. *Government of Manitoba* (1963), 41 D.L.R. (2d) 53, at pp. 58, 60, 43 W.W.R. 203, at p. 210; and *Gilchrist* v. *A. & R. Farms Ltd.* (1964), 50 W.W.R. 705, at pp. 706-707, reversed by the Supreme Court on other grounds, *supra,* footnote 48.

Similarly Dickson J. followed *Wagon Mound* at trial in *MacKenzie* v. *Hyde* (1967), 42 D.L.R. (2d) 259, at p. 264, as had Smith J. in *Poirier* v. *Turkewich* (1963), 42 D.L.R. (2d) 259, at p. 264. But *cf.* footnote 14, *supra.*

Court of Canada will be faced squarely with the problem. As the answer is in some doubt, both from the point of view of precedent, and on the merits, an early chance to have the matter finally settled would be most welcome.

J. E. CÔTÉ*

* * *

CONTRACTS—BREACH OF DUTY—LIABILITY RESPECTIVELY OF SHIPPER AND CARRIER.—The reasons for judgment of Pigeon J.[1] in the Supreme Court of Canada decision in *Tahsis Co. Ltd.* v. *Vancouver Tug Boat Co. Ltd.*[2] suggest, for the judicial enquiry in cases involving allegations of tortious or contractual breach of duty on the part of two or more persons, a working formula, the premise of which is a recognition that the judicial process in such a case (1) is nothing more or less than the affirmation, or adjustment,[3] as the case may be, of the right of one involved to expect another not to be negligent; and (2) has the object of assigning responsibility on the basis that he whose expectation in that respect was not reasonable should pay or bear the loss, rather than in accordance with the court's view as to "cause" or "proximate cause".[4]

Although one must confess that the Supreme Court of Canada did not say that it was proceeding in such a manner, this comment is to submit (1) such an approach is implicit in the reasons for judgment of Pigeon J.; and (2) such an approach, in any event, may offer to the practitioner a reliable guide to estimate the probable outcome of any given case. Whether the court will expressly sanction such an approach remains to be seen.

That the law in this field should profess to function on the basis of affirming or adjusting rights would be entirely consistent with the general concept that a citizen has the right of freedom of action in all areas except where prohibited. One seeks the assistance of law to declare upon and give relief in respect of an

---

*J. E. Côté, of the Alberta Bar, Edmonton, Alberta.

[1] Martland and Spence JJ. concurring; Ritchie and Abott JJ. dissenting.

[2] (1968), 65 W.W.R. 257 (S.C.C.), rev'ing (1967), 62 D.L.R. (2d) 371, 60 W.W.R. 65 (B.C.C.A.), which rev'd (1966), 54 W.W.R. 395 and addendum 55 W.W.R. 914 (trial).

[3] Julius Stone, Social Dimensions of Law and Justice (1966), p. 164 *et seq.*

[4] Prosser, Handbook on the Law of Torts (3rd ed., 1964), p. 312. *McLean* v. *Bell* (1932), 147 L.T. 262, at p. 264, per Lord Wright: "The decision of the case must turn not simply on causation but on responsibility." *The "Eurymedon"*, [1938] P. 41, at p. 58, per Scott L.J.; *Tiddy* v. *Battman*, [1934] 1 K.B. 319.

asserted right; and he who has the duty relative to the right is the person who is made accountable at law.

The operation of the suggested working formula involves the recognition and application of two propositions of the law not commonly associated with working solutions in such cases. The first proposition recurs constantly in the authorities, and it is that a person is under a duty or obligation at law to exercise reasonable care to avoid or avert the consequences of the neglect or carelessness of another; and the second is the corollary of the first, namely, that such other person to whom such duty or obligation is owed has the right to expect, that is, legal standing to require, the other to exercise reasonable care to avoid his own neglect or carelessness.

It may seem strange, against the background of the law's emphasis on "duty", to be giving rights to a negligent person, but desert or lack of desert have no relevance in the judicial enquiry into responsibility for damages or loss.[5] In any event, it is submitted that logic dictates the definition or statement of a corresponding "right" in one person as the converse of a "duty" or "obligation" laid upon another. If one can accept this premise, the way is open to explore a rationale for the courts to determine responsibility without recourse to the frequently-unsatisfactory test of causation.[6]

If responsibility for damages or loss is to connote something more than that which is involved in cause-and-effect, the only method of approach consistent with the authorities is to consider any case involving allegations of tortious or contractual breach of duty of care on the part of two or more persons as one calling for affirmation, or adjustment, as the case may be, of claims of right to have acted in the manner shown by the evidence. Those whose conduct is called in question, in effect, are asking the court to affirm their right to have proceeded as they did in the expectation that others would be able to avoid or to avert the consequences of their neglect or carelessness by the exercise of reasonable care.[7]

[5] *B.C.E.R.* v. *Loach*, [1916] 1 A.C. 719, at pp. 727-728, per Lord Sumner: ". . . Many persons are apt to think that, in a case of contributory negligence like the present, the injured man deserved to be hurt; but the question is not one of desert or the lack of it, but of the cause legally responsible for the injury. . . . The object of the enquiry is to fix upon some wrongdoer the responsibility for the wrongful act that has caused the damage. It is in search not merely of a causal agency, but of the responsible agent."

[6] *Sigurdson* v. *B.C.E.R.* (1952), 7 W.W.R. (N.S.) 35 (J.C.P.C.); *Stapley* v. *Gypsum Mines, Ltd.*, [1953] 2 All E.R. 478, at pp. 485-486, per Lord Reid.

[7] Rather than to ask whether one held such an expectation, the test

It is submitted that if it was reasonable to proceed in such expectation, the court should wish to give effect to such right in assigning responsibility for damages or loss; but whether the right is to be affirmed or adjusted will depend upon what findings of fact are made on the issue whether it was reasonable to expect that one or both would not be negligent. Accordingly, the right may be exclusive, or rights may compete, or a right may not come up for adjustment by reason of failure to prove that it was infringed or violated by the other having failed to exercise reasonable care.[8] *Tahsis Co. Ltd.* v. *Vancouver Tug Boat Co. Ltd.*[9] is an example of the latter; and because only two parties were involved, the right that was established by Tahsis Co. Ltd. turned out to be exclusively held.

Duty, breach of duty, and a sufficient case to go to a jury, had there been one, having been established, then, if it was reasonable for one to have acted as he did in the expectation that the other would avoid or avert the consequences of one's neglect or carelessness, but not so for the other, it is submitted that one's right will have been established, and it clearly ought to be given effect to; but, on the other hand, if neither has established that it was reasonable to have proceeded in such expectation, it would seem to be a case for apportionment under contributory negligence legislation, for both are at fault within the meaning of such legislation, with no right to be upheld. If, however, the unlikely occurs, and both parties are held to have proceeded in the reasonable expectation that each would avoid the negligence of the other, then, it would appear that there is a stalemate. Such a finding would be tantamount to declaring that it is not possible to determine whose breach of duty was responsible for the loss. Although each may have been in breach of duty, neither party in this event would have discharged the burden of proof that the other's breach was responsible for the loss.[10]

Stripped of other aspects, the case on appeal in *Tahsis Co.*

---

ought to be objective: Would a reasonable man so proceed in such reliance?

[8] It is submitted that this approach would afford a rational development of the case law involving the so-called "Seat-Belt Defence". The question of fact in any given case as the years go by (and assuming the availability of evidence to show that the use of a seat belt would have been effective in the prevention or reduction of damage or loss) would be whether it was reasonable for one to expect that the consequences of his own neglect or carelessness would be avoided in whole or in part by the other's wearing of a seat belt.

[9] *Supra*, footnote 2.

[10] *Service* v. *Sundell* (1929), 45 T.L.R. 569, [1929] W.N. 182 and 241.

Ltd. v. *Vancouver Tug Boat Co. Ltd.*[11] involved an allegation that the tug boat company failed to carry out a contractual duty to exercise due diligence to give proper and adequate loading instructions for a barge presented to the plaintiff for loading. In the course of loading, the barge capsized, spilling the plaintiff's cargo and damaging the plaintiff's wharf.

It was accepted by all concerned that there was no practicable way of putting the cargo of wood chips aboard without listing the barge to some degree. The tug boat company, knowing this, gave the plaintiff certain instructions with respect to allowable list, but did not consult an engineer or naval architect before doing so. It was sought to throw the blame for the capsize on the plaintiff on the basis of evidence that the barge would not have capsized had the plaintiff not exceeded the allowable list during the loading operation, or, alternatively, allowed the loading to continue at a time when, for one reason or another not involving negligence, the barge had become "hung up" with the result that the real angle of list was not apparent; but there was no evidence that the plaintiff had, in fact, exceeded the allowable angle of list, and there was no evidence that for any length of time during the loading the list of the barge was not changing, nor was there any evidence to suggest that the plaintiff's loader should have had knowledge that there was anything abnormal in the rate of change of list that was being realized.

In holding the tug boat company liable, Pigeon J. gives us a fascinating glimpse into the judicial process of assigning responsibility for damages or loss in such a case as this. It is submitted that the reasons for judgment, carefully analyzed, show that:

a) The court declined to be drawn into any enquiry as to what was the cause or proximate cause[12] of the capsize, as the courts below had been drawn into.

---

[11] *Supra*, footnote 2.

[12] If the question of responsibility for damages or loss is not to be determined by the test of causation, why are juries still being asked to determine whose negligence caused the plaintiff's damages or loss? Causation is universally considered to be a vexing question, yet the usual causation questions are left with the jury in the hope that common sense will prevail. Perhaps the jury should be asked instead to answer questions that would enable the judge to assign responsibility in accordance with the suggested working formula, such as these:

1) What was A's damage or loss in dollars?
2) (After directing the jury on the extent of the duty laid by law on the parties), Was A in breach of his duty to do such-and-such?
3) If so, specify in what respect.
4) Was B in breach of his duty to do such-and-such?

b) The question whether there had been a breach of duty or obligation was to be determined by the standard of "what may be properly expected in the circumstances",[13] and not by what might be necessary to cope effectively with the consequences of another's negligence. In the circumstances of the case, the tug boat company was in breach of its duty, but the plaintiff was not.

c) The question of responsibility for the damages or loss could be determined by a consideration of whether it was reasonable for one to expect the other to avert or to avoid

---

5) If so, specify in what respect.
6) No matter what your answer to 2, was it was reasonable in the circumstances for A to rely on B to avoid or avert the consequences of the acts or omissions on the part of A specified by you in your answers to 3?
7) No matter what your answer to 4 was, was it reasonable in the circumstances for B to rely on A to avoid or avert the consequences of the acts or omissions on the part of B that you have specified in your answer to 5?
8) If your answers to 6 and 7 are both "No"; then, state in percentages the degree that you consider each to have been at fault in the responsibility for A's damages or loss.

Nothing in these questions would operate, of course, to prevent the trial judge from directing a jury, in a given case, that there was no evidence upon which they might find that it was reasonable for the parties to have relied on each other in the way indicated by this comment. Such a direction could be expected in, for instance, a given traffic case where the risk, time, and distance factors are so coincident that it would be perverse to find that either driver was entitled to rely on the other to avoid or avert the negligence or carelessness of the other. Similarly, nothing in the questions would operate to prevent the trial judge from directing a jury that the claim for damage or loss was too remote from the breach of duty or not within the risk created by the breach of duty. That would be a question for the judge and not for the jury.

[13] *Supra*, footnote 2, per Pigeon J., at pp. 287 and 291: ". . . the result (of the tug boat company's argument) is to say to appellant: 'Irrespective of the insufficiency of the margin of stability which respondent's instructions provide, you are under obligation to make up for such insufficiency by a high enough degree of care'. In my opinion, this is contrary to the fundamental basis on which negligence is to be defined. It is not a failure to act in such a way as to prevent damage from occurring. It is a failure to act with reasonable care. What is reasonable care is to be determined not according to what will prevent the damage but according to what may properly be expected in the circumstances. . . . In my view, what is clearly established is that respondent took the risk of putting the barge in service without ascertaining its stability characteristics. Haphazard instructions were then verbally given and full loads required when appellant would rather not have loaded so heavily. This did not leave an adequate margin of safety and the result of so trying to establish the characteristics of the barge when loading was that it capsized. It is true that there was some minimal margin of safety and that theoretically the mishap might have been avoided, but this is not evidence of negligence because one cannot expect from the others more than reasonable care, not such extreme care as might avert the consequences of one's own negligence or lack of due diligence."

the consequences of one's own neglect or carelessness.[14] In the circumstances of the case:

i) It was not reasonable for the tug boat company to expect that the plaintiff would be able to avoid a capsize at all events. Why? Because the loading instructions given did not provide a sufficient margin for error, which was the fact.

ii) But it was reasonable for the plaintiff, whether involved in the chain of causation or not, to load in the expectation that the loading instructions were adequate to avoid the risk of capsize.

The plaintiff's right to proceed in that reasonable expectation therefore was given effect to by the court in the assignment of responsibility against the tug boat company. The right of the tug boat company to proceed in the expectation that the plaintiff, by the exercise of reasonable care, would avoid or avert the consequences of the former's neglect or carelessness did not come up for adjustment because there was no evidence that the latter had failed to exercise reasonable care.

ROBERT J. HARVEY*

* * *

HIGHWAY ACCIDENTS AND THE DEMISE OF TORT LIABILITY.—*Introduction.*

The recent report of the British Columbia Royal Commission on Automobile Insurance[1] is the most significant government report on this subject in Canada so far.

When the commission was appointed three years ago increasing insurance premiums and rising casualty figures had been a cause of great concern, and the commission's terms of reference suggest that the government was in no mood for trivial endeavours. The commission was charged to investigate all significant aspects of the present system, including costs and delay involved in the determination and recovery of compensation by the victims of automobile accidents, the adequacy of compensation, and the

[14] One is drawn to the conclusion that the court so proceeded because Pigeon J. avoided an enquiry into causation, and looked to responsibility instead, laying particular emphasis on the evidence showing how unreasonable it was for the tug boat company to expect that the consequences of its own breach of duty could be avoided or averted by the plaintiff.

*Robert J. Harvey, of the British Columbia Bar, Vancouver.

[1] The commission was established in 1966 by Order in Council No. 239, and its report was made public in October 1968.

costs of automobile insurance. As if to leave no doubt that the inquiry should be fundamental, the commission was specifically required to consider whether tort liability should be replaced by some plan of accident insurance, and if so, whether such a plan should be administered by insurance companies or by the government.

Tort liability.

By starting with an appraisal of tort liability, the report goes straight to the crux of the problem area. The commission felt that liability is of little or no value as a deterrent against accident causing behaviour. "While the levying of higher rates and surcharges against those insureds making claims under their policies or those with convictions deserves mention, these are watered down penalties at best."[2] Tort liability must be evaluated solely as a vehicle for reparation. Viewed in this way, the system was found to be "one combining hardship and waste".[3]

First, "The system of fault lends itself to delays".[4] The extent of the delay was illustrated in a sample survey undertaken for the commission analysing data on 1,253 traffic accidents. The median time from accident to final compensation was found to be nine months in the serious injury and fatal cases.[5] Moreover in the serious injury cases, although not the fatalities, the time was found to increase the higher the compensation. Thus the median was found to exceed two years for serious injury cases in the $5,000.00 and over range. Sometimes financial hardship resulting from delay may induce the claimant to settle for an inadequate sum.[6] Also the stress and strain of the bargaining process may have an adverse influence on rehabilitation.

On the adequacy of damages, conclusions were reached that have a familiar ring. In the sample survey mentioned above, it was found that the economic losses of the accident victims amounted to $2.7 million, while the total compensation (damages on tort claims *and* compensation from other sources) amounted to only $900,000.00. Moreover the present system was found to discriminate in favour of property damage as against injury claims, and in favour of small injury claims as against the more serious and tragic cases. "Thus, the ratios of average compensation to average economic loss for minor injury, serious injury and fatality cases were found to be 0.85, 0.44 and 0.20 respectively. . . . Clearly, the greatest burdens are being borne by those more

[2] P. 117. [3] P. 118. [4] P. 65. [5] P. 73. [6] P. 401.

seriously afflicted. Such victims are able to shift but a small fraction of their total economic loss."[7]

The overhead cost of automobile insurance was another cause of concern. The commission found that motorists "are paying aggregate amounts roughly 1.6 times the total of settlements paid by automobile insurers".[8] This was compared with administration expense ratios of less than 10% for workmen's compensation in British Columbia, and 11.3% to 16.3% under the Saskatchewan Automobile Insurance Act. To the commission, the lesson was clear. "While every reparation system has costs, two party or loss insurance is considerably cheaper to administer."

There was evidence too that liability insurance results in consumer dissatisfaction. People who have insured with one insurer and thereby established a client relationship with that company often resent having to deal with another person's insurer for the settlement of their claims.[9]

These arguments led to the inevitable conclusion. The public "will be better served by the institution of an entirely new method of insurance for compensating victims of motor vehicle accidents than by a continuation of present procedures for recovery of damages . . .".[10]

The recommended plan.

The essence of the plan recommended by the commission is that compensation for the victims of motor vehicle accidents should be payable regardless of fault, and that the amount of compensation should be fixed by criteria that do not require an intuitive judgment to be made in each case. Thus for motor vehicle accidents, tort liability would be abolished.

Every driver would be required to take out a basic insurance policy. This would be a policy for the particular driver rather than for the particular vehicle. In assessing premiums, the rate would be based on a demerit point system reflecting the driver's record of both traffic convictions and accidents.

The basic compulsory coverage would compensate the driver and his passengers for injury or death. It would also extend to the driver and each member of his family, resident in his household, if hit by a motor vehicle while a pedestrian or a bicyclist.[11] For accident victims over eighteen, the death benefit would be

[7] P. 404. [8] P. 119. [9] P. 316. [10] P. 606.

[11] P. 609. The limitation to pedestrians and bicyclists seems unnecessary. What, for example, of equestrians and tricyclists? Both are still common in several parts of British Columbia.

$20,000.00. The beneficiaries could elect to receive this as a lump sum or to take its actuarial equivalent as weekly payments. The disablement benefit would be $50.00 per week for people over eighteen, commencing eight days after the accident and continuing for the duration of the disability. Hospital costs would be covered by the policy, but not other medical expenses. These would be left to Medicare. For injury victims under eighteen, there would be a sliding scale of benefits increasing with age.

For the basic compulsory policy, the estimated premium to a white licence motorist would be $16.76, and the commission estimated that at present, 86% of British Columbia drivers would qualify for the white licence.[12]

Additional injury compensation and property damage coverage could be secured by voluntary negotiation.

A pedestrian victim of a motor vehicle accident who is not covered by a driver's policy would be compensated out of a central fund, similar to the present Traffic Victims Indemnity Fund.[13]

A new Automobile Insurance Board would be established, with functions including the administration of the central fund, the fixing of maximum premium rates for the basic policy, and the adjudication of disputes arising under the plan.

There is much that could be criticised or improved in the details of the plan. For example the vast majority of workers in British Columbia are now paid every second week or twice a month,[14] and presumably these are the periods for which they have become accustomed to budget. To pay the disability benefit every week therefore seems unnecessary, and it would surely reduce administrative costs if the payments were made twice a month, or perhaps even once a month. But the basic idea of shifting from liability to accident insurance is clearly sound. Compensation would cover a more comprehensive range of accident victims, would be more certain, quicker and cheaper to administer. Also much of the time of lawyers and the courts would be released for more socially useful roles. Of course some injury victims would receive less under the plan than they might on a successful tort claim. But the objective of the plan is to achieve a more efficient and equitable distribution of compensation, not to provide more for all.

[12] P. 615.
[13] P. 633.
[14] This appears from the figures on "Frequency of Pay Days" in the 1965 Survey of Working Conditions in Canadian Industry, Department of Labour, Canada.

Administration by insurance companies or the government.

The choice of accident insurance rather than liability insurance was made after a detailed cost-benefit analysis of each system. One might have expected the same approach in deciding whether the new plan should be administered by insurance companies or by the government. Unfortunately, however, the approach here was different. The report shows a predisposition to private insurers in suggesting that administration by the government would have to be justified by some showing of necessity.[15] Hence there was no real analysis of the extent to which it might be more or less beneficial.

In the chapter dealing with private or public administration of the plan, no mention is made of the abundant evidence that plans of personal injury compensation generally involve much lower administrative costs when administered by the state. Referring to the analogy of the Saskatchewan plan, the commission dismissed its relevance because it "found conditions quite different from those apparent in Saskatchewan around 1946 . . .".[16] But why was 1946 a relevant date? In an earlier part of the report, the commission had already concluded "that the insurance rates and coverages required and offered by the Saskatchewan Government Insurance Office compare favourably with similar insurance cover promised by the industry".[17] Surely the comparison should have been with Saskatchewan today; and if conditions are different, one would expect the report to say what the differences are and in what respects they are significant.

The analogy of workmen's compensation received similar rough treatment. It was dismissed on the ground that conditions in British Columbia today are different from what they were in 1916 when administration of workmen's compensation by the government was first introduced. Here again there was no attempt to show the significance of the differences. Only three years ago, another Royal Commission reported on workmen's compensation in British Columbia. Although some defects were found in the system of government administration, a submission that insurance companies be allowed to provide the coverage was not accepted.

Possible reasons why administration by the government might be cheaper include economies of scale, the elimination of agency commissions and insurance company profits, and the elimination of contribution and indemnity between different insurers.

---

[15] P. 718. [16] P. 723. [17] P. 556.

Other arguments for government administration were also not considered. For example, the commission recommended flat-rate weekly payments as the compensation for disablement without any discussion of whether earnings-related benefits might be preferable. Perhaps flat-rate benefits came to mind because compensation is calculated in this way under ordinary policies of personal accident insurance. But for social insurance, the modern trend in several countries is to move from flat-rate to earnings-related benefits. People tend to adjust their obligations as well as their way of life to the level of earnings that they have achieved, and it is at least arguable that compensation for those disabled from earning should be measured by reference to the loss of income. Thus one might have expected some discussion of whether flat-rate or earnings-related benefits are preferable, to be followed by a discussion of whether state or private insurance is most compatible with the benefit formula chosen.

The eligibility requirements for the disablement benefit illustrate another problem. The commission recommended that this benefit should be payable as long as the injury is "of such a degree that it prevents the injured party from working at his usual gainful occupation, or at some other occupation for which he is reasonably suited by education, training or experience".[18] Suppose an injury leaves a person unfit for his pre-accident occupation, yet fit for another occupation for which he is suited, but for which no jobs are available? At a time of rapid technical change, this is an important question, and in the development of any plan of disability compensation it is obviously necessary to consider how the plan will blend with unemployment insurance. The report did not consider whether government or private administration of the plan would be likely to achieve the best co-ordination with other sources of compensation for loss of income, with other types of insurance and with pension schemes.

The decision for administration by insurance companies may have much to be said for it. But it is unfortunate that there was no thorough appraisal of the arguments.

Why motor vehicle accidents?

A fundamental question, going to the root of the inquiry, is why the victims of motor vehicle accidents should be treated differently from the victims of other misfortuntes. The question is not raised in the report, let alone answered. The sudden drama

[18] P. 611.

of the event, the exposure to public view, the system of prosecutions, tort claims, the availability of statistical data and traffic safety campaigns all focus public attention on motor vehicle accidents. Yet measured quantitatively, injuries and deaths resulting from highway accidents may be less significant than those resulting from accidents in the home, and are certainly much less significant than disabilities and deaths resulting from disease.[19] One would think, therefore, that if a plan is recommended for compensating the victims of motor vehicle accidents, but not the victims of other misfortunes, some reason should be given for the limitation. As I have argued elsewhere,[20] however, there really is no reason. To end up with a population that is insured for death and disablement from some causes, but not others, makes no sense.

Of course many people carry life insurance, and some have policies of accident and sickness insurance. Where this is so, the commission's plan would provide additional benefits for an injury or death caused by a motor vehicle accident. But surely it is incredible to suggest that anyone really wants the financial position resulting from his death or disability to vary according to how it happened.

So far in Canada we have dealt with compensation for disablement and death by a proliferation of separate plans involving separate administrative structures. Thus we have workmen's compensation, the Canada Pension Plan, compensation for the victims of crimes of violence, the Saskatchewan Automobile Insurance Plan, sick pay, life insurance, personal accident insurance, and welfare. Expensive inquiries into complex issues of causation are often required to determine under which plan, if any, the victim is entitled to compensation.[21] This report would add one more plan to the list. The chance was again missed to consider whether a comprehensive plan of social insurance might not be a more satisfactory alternative.

Highway safety.

Apart from compensation, the report deals at length with highway safety. One recommendation is that a road accident re-

[19] For example, looking at deaths in Canada in 1966 of people aged 20 to 65 years, only 7% were attributed to motor vehicle traffic accidents, and only 15% were attributed to all accidents, poisonings and violence. (Calculated from the tables in "Causes of Death, Canada, 1966", D.B.S.).

[20] The Forensic Lottery (London, 1968). See also the report of the Royal Commission on Personal Injury Compensation, New Zealand (1967).

[21] For example, claims for workmen's compensation frequently involve

search laboratory should be established, to be financed by an increase in the gasoline tax. There is a tremendous need for this, although, as with many of the proposed innovations, it would be more efficient if it could be implemented at the federal level.

Of more direct concern to lawyers is the proposal for a new type of demerit plan. By this recommendation, a motorist would receive demerit points for each motoring conviction and for each traffic accident except the first. The demerit points would be used for two purposes: first, to determine the rate of premium payable for insurance, and second, to determine when a driving licence should be suspended.

The demerit plan seems basically sound. But it has a collateral feature that is questionable. This is that the motorist should have a different colour of driving licence according to his position on the demerit scale. A possible advantage is that censorship by licence discolouration might be a psychological sanction against bad driving. But a disadvantage, that the report does not consider, is that the position of a motorist on the demerit scale would be obvious to any police officer who stopped him for a motoring offence, or who was investigating an accident. The danger is that the demerit status of the motorist might have an improper though subconscious influence on the policeman's decision. It could work either way. Suppose, for example, a red licence motorist ignores a stop sign. The policeman, recognizing that a conviction would result in licence suspension and motivated by compassion, might warn him rather than prosecute. Conversely, in a collision between a red licence motorist and a white licence motorist, the policeman might be influenced by the assumed probability that an offence was committed by the red licence motorist. Once a motorist has been convicted, his driving record should obviously be considered in deciding the sanction, but it is surely irrelevant to the initial decision on whether a charge should be laid. The trouble with the coloured licence scheme is the risk that it may influence that decision.

However, the coloured licence proposal is really collateral to the demerit plan, and it would be quite feasible to implement the plan without it.

Conclusion.

Although poorly written in parts, the report marks two very

an inquiry into whether the accident was one arising out of and in the course of the employment, or whether the present disability is attributable to the particular accident.

significant achievements. First, the research undertaken for the commission and the briefs that were filed make available to posterity a collection of valuable data about the operation of the present system. Second, the report adds weight to the growing belief that tort liability must be replaced by a more comprehensive system of insurance under which compensation is not dependent on either fault or liability.

However, two fundamental issues remain. First, whether the new insurance plan should be administered by the government or by private insurers. Second, whether the victims of motor vehicle accidents should be treated differently from the victims of other misfortunes. The first question was answered by asserting a conclusion without a cost-benefit analysis. The second question was totally ignored. For government attention to these issues, we must wait for another day.

TERENCE G. ISON*

* * *

INCOME TAX—NEGATIVE INCOME—EQUITY AND FAIRNESS.—The recent decision of the Supreme Court of Canada in the *Minister of National Revenue* v. *Henry J. Freud*[1] involved a relatively insignificant sum of money expended by a United States citizen but it may be significant importance to Canadian taxpayers. Mr. Justice Pigeon in delivering the judgment of the court broke new ground in a rapidly changing field of law using concepts of equity and fairness, concepts that are not generally considered to be relevant in revenue cases. The case is significant in that the court considered various problems raised by its decision in *R. K. Fraser* v. *M.N.R.*[2] as well as the question of negative income, that is a loss is simply an income computation that resulted in a loss, or the concept of offsetting losses from one source against income from another source, a practice that has been universally followed by taxpayer and tax collector alike, although never expressly approved by Canada's highest court.[3]

---

*Terence G. Ison, of the Faculty of Law, Queen's University, Kingston, Ontario.

[1] [1968] C.T.C. 438, 68 D.T.C. 5279.

[2] [1964] S.C.R. 657, [1964] C.T.C. 372, 64 D.T.C. 5224.

[3] Since the decision in the *Freud* case the Supreme Court of Canada has considered the problem, see *M.N.R.* v. *Wahn*, [1969] C.T.C. 61, 69 D.T.C. 5075. In *G. H. Steer* v. *M.N.R.*, [1965] 2 Ex. C.R. 458, at p. 462, [1965] C.T.C. 181, at p. 185, 65 D.T.C. 5115, at p. 5118, Noël J. stated: "Section 3 of the Income Tax Act defined 'income for a taxation year' to be 'income for the year from all sources' which is a single concept. It is not merely the aggregation of one's income from all sources from which there

The facts of the *Freud* case are quite simple. The taxpayer, a resident of Windsor, practised law in the City of Detroit and was the driving force behind a project to design a small personal sports car. The goal was not to manufacture the sports car but to develop a prototype of the sports car to the point where the concept could be sold to a major manufacturer who would produce it. The taxpayer and his associates incorporated a Michigan corporation to carry out this venture and in the course of several years the taxpayer made advances to the corporation receiving shares in return. In 1960 the project needed an infusion of new funds in order to carry on and make one last attempt to sell the model. No one was prepared to come to its assistance in its hour of need other than the taxpayer who contributed a sum slightly under $14,000.00. A portion of this amount was paid to the company and a portion was paid directly to suppliers of labour and materials. Unfortunately for all concerned this last ditch attempt was unsuccessful, the project was abandoned and the taxpayer and his associates were unable to recover any of their investment.

The taxpayer claimed that the amount in question was a business loss and deductible against his professional income in the year in which it was incurred. The Minister disallowed the loss on the ground that it was a capital loss within the meaning of section 12(1)(b) of the Income Tax Act.[4] The taxpayer appealed to the Tax Appeal Board but the appeal was dismissed[5] by the Assistant Chairman, R. S. W. Fordham, Q.C. on the ground that the expenditure was a capital outlay.[6] The taxpayer

were incomes in the year but it is made up of the gains from all sources minus the losses from these sources or, expressed otherwise, the net income from all sources of income taken together." The decision of Noël J. was reversed by the Supreme Court of Canada on a different point, see [1967] S.C.R. 34, [1966] C.T.C. 731, 66 D.T.C. 5481. In *Interprovincial Pipe Line Co.* v. *M.N.R.*, [1959] S.C.R. 763, [1959] C.T.C. 339, at p. 347, 59 D.T.C. 1229, at p. 1233, Mr. Justice Locke in delivering separate reasons for judgment suggested that s. 139(1)(az), R.S.C., 1952, c. 148 (now s. 139(1a)(a), S.C., 1960, c. 43, s. 33(5)) required that the computation of the profit or loss of separate businesses had to be calculated separately. However, he did not suggest that once separate computations had been made the profits and losses from various sources could not be aggregated. But see J. G. McDonald, Case Comment (1959), 37 Can. Bar Rev. 625. See also the comments of Pigeon J. in *M.N.R.* v. *Wahn*, at pp. 63-72, C.T.C., 5077-5082 (D.T.C.).

[4] *Ibid.*, as am. [5] (1964-65), 37 Tax A.B.C. 303, 65 D.T.C. 110.

[6] It is interesting to note that while Mr. Fordham held that the expenditure was a capital asset, he also held that the respondent intended that the expediture would bring about a marketable asset which he could sell at a profit and that the taxpayer had no intention to manufacture the vehicle. Mr. Fordham did not deal with the problem of the corporate entity standing between the taxpayer and the prototype.

appealed to the Exchequer Court of Canada[7] and met with success. Mr. Justice Gibson held that the expenditure was made for the purpose of obtaining income from a source within the meaning of the opening words of section 3 of the Income Tax Act and was deductible since any profits realized would have been income from a source within the opening words of that section and hence taxable.[8] Mr. Justice Gibson did not consider the problem that if there was income it might have been the income of the company and taxable in its hands rather than the taxpayer's hands nor did he deal with the argument that the advances may have been loans, the repayment of which would have been a capital receipt to the taxpayer. It is not surprising that the Minister of National Revenue appealed the decision of the Exchequer Court to the Supreme Court of Canada.

The Supreme Court of Canada dismissed the Minister's appeal and held that the money was expended for the purpose of earning income from an adventure in the nature of a trade,[9] a business within the extended meaning of that term in section 139(1)(e) of the Income Tax Act, and since it resulted in a loss, the loss was deductible from the taxpayer's other business income, his professional income from the practice of law. Mr. Justice Pigeon in delivering the judgment of the court first directed himself to the problem of whether a taxpayer is permitted to offset a business loss incurred in one venture against business income realized in another venture. It is interesting that the court concerned itself with this question since it was not in issue and in practice the Department permits this kind of offsetting, although the Supreme Court had never had the question before it

---

[7] [1967] 1 Ex. C.R. 293, [1966] C.T.C. 641, 66 D.T.C. 5414.

[8] The idea that there may be income from a source other than income from a business, property or office and employment is a concept that has been expressed more than once in the Exchequer Court, see *G. H. Steer* v. *M.N.R.*, *supra*, footnote 3; *J. H. Wood* v. *M.N.R.*, [1967] 1 Ex. C.R. 199, [1967] C.T.C. 66, 67 D.T.C. 5045. The Supreme Court of Canada allowed the taxpayers' appeal in the *Wood* case, [1969] C.T.C. 57, 69 D.T.C. 5075, on the ground that the taxpayer was not carrying on a business and the court did not deal with the question that the gain might have been income from a source within the opening words of s. 3.

[9] *Supra*, footnote 1, at pp. 441 (C.T.C.), 5281 (D.T.C.). While the Minister conceded that the venture itself was an adventure in the nature of a trade within the meaning of s. 139(1)(e), Mr. Justice Pigeon considered the meaning of that term as it applied to taxing ventures and then stated: "Such being the principles to be applied in cases when a profit is obtained, the same rules must be followed when a loss is suffered. Fairness to the taxpayers require us to be very careful to avoid allowing profits to be taxed as income but losses treated on account of capital and therefore not deductible from income when the situation is essentially the same."

before.[10] Pigeon J. referred to the fact that in 1952 Parliament amended section 13 of the Income Tax Act by deleting from that section the requirement that the taxpayer's income "shall be deemed to be not less than his income for the year from his chief source of income"[11] and the fact that the 1958 amendment to section 27(1)(e) removed the requirement from that section that the carry forward and the carry back of losses had to be applied against income from the same type of business.[12] Pigeon J. concluded that ". . . thus our law no longer looks askance at taxpayers who do not believe in 'the adage that the cobbler should stick to his last'.[13] They are not subjected to discriminatory fiscal treatment by being taxed if successful but denied a deduction if unsuccessful".[14] Pigeon J. had no difficulty in concluding that a business loss from one source could be deducted from business income from another source in different years under the provisions of section 27(1)(e).[15] The real difficulty arose in determining that a business loss could be offset against business income earned in the same year although Pigeon J. stated that section 139(1)(x), the definition of "loss",[16] contemplated such deduction. However the question was left unanswered as the court was able to avoid determining the issue since the Minister did not contend that if the loss was deductible it could not be deducted in the year in which it was sustained.[17] It would seem very strange indeed that if a loss was deductible under the carry forward or carry back provisions of section 27(1)(e), it could not be deducted in the year it was sustained. The adoption of this view would be a rejection of the concept of loss as nothing more nor less than negative income and in some cases might possibly result in the very inequities with which Mr. Justice Pigeon was

[10] Cases cited, *supra*, footnote 3.

[11] The 1948 Income Tax Act as am. by S.C., 1951, c. 51, s. 4.

[12] Clause (A) of s. 27(1)(e)(iii) formerly read as follows: "(A) The taxpayer's income for the taxation year from the business in which the loss was sustained, or". This subsection was amended by S.C., 1958, c. 32, s. 12(1).

[13] At the Tax Appeal Board, Mr. Fordham remarked, *supra*, footnote 5, at pp. 304 (Tax A.B.C.), 111 (D.T.C.): ". . . this was but another instance of the truth of the adage that the cobbler should stick to his last."

[14] *Supra*, footnote 1, at pp. 440 (C.T.C.), 5281 (D.T.C.).

[15] *Ibid.*, at pp. 444 (C.T.C.), 5283 (D.T.C.).

[16] S. 139(1)(x) states: " 'Loss' means a loss computed by applying the provisions of this Act respecting computation of income from a business *mutatis mutandis* (but not including in the computation a dividend or part of a dividend the amount whereof would be deductible under Section 28 in computing taxable income) minus any amount by which a loss operated to reduce the taxpayer's income from other sources for purpose of income tax for the year in which it was sustained."

[17] In *Wahn* v. *M.N.R.*, [1968] C.T.C. 5, 68 D.T.C. 5023 (Ex.), Mr.

concerned. The fact that the Supreme Court had difficulty with this question illustrates the fact that what is practised by the taxpayer and permitted by the Department of National Revenue is not necessarily the law.

Certainly one of the most interesting facets of this case is the court's consideration of its earlier decision in *R. K. Fraser* v. *M.N.R.*[18] In the *Fraser* case, several developers acquired a parcel of land and sold it to a corporation which they controlled. They subsequently disposed of the shares in the corporation at a profit. While the taxpayer in the *Fraser* case was not a trader in shares, the Supreme Court of Canada had no difficulty in holding that he was taxable on the profits realized on the sale of the shares on the ground that the incorporation of a company and the sale of its shares was merely an alternate way of carrying out the real estate transaction. In the *Freud* case the court made it clear that in the *Fraser* case the existence of the separate legal entities was not disregarded, in other words, it was not a question of piercing the corporate veil and by this the court implied that its earlier decision in *Army and Navy* v. *M.N.R.*[19] which dealt with the sanctity of the corporate entity was unaffected by the *Fraser* decision. In the *Freud* case, the court concluded that since the taxpayer and his associates had no intention of developing the sports car themselves but rather from the very beginning they intended to sell it to a manufacturer, the taxpayer's activities constituted an adventure in the nature of a trade within the meaning of section 139(1)(e) of the Income Tax Act[20] and would have been taxable had a profit been realized on the same basis as taxability was imposed in the *Fraser* case.

Justice Gibson held that the taxpayer had the right to carry back a business loss and apply it against business income in a previous year even though there was sufficient non business income in the year in which the business loss was incurred to absorb the loss. The Minister's appeal to the Supreme Court of Canada in the *Wahn* case was allowed. See *M.N.R.* v. *Wahn*, *supra*, footnote 3. Cartwright C.J.C. held that the business loss could only be carried forward or backward in accordance with s. 27(1)(e) if it exceeded the business income for the year in which it was incurred. In other words, a loss may, and in fact must, be deducted in the year in which it is incurred. Pigeon J. after reviewing the question of deduction of losses left the question open. See at pp. 5082 (D.T.C.), 71 (C.T.C.).

[18] *Supra*, footnote 2; see also *Associated London Properties Ltd.* v. *Henriksen* (1942-45), 26 T.C. 46; *DeToro* v. *M.N.R.*, [1965] Ex. C.R. 715, at p. 724, [1965] C.T.C. 321, at p. 329, 65 D.T.C. 5194, at p. 5199; *Slater et al* v. *M.N.R.*, [1966] C.T.C. 53, 66 D.T.C. 5047; *Pic Development Co. Ltd.* v. *M.N.R.*, [1967] Tax A.B.C. 812, 67 D.T.C. 535; *Winton* v. *M.N.R.*, [1967] Tax A.B.C. 128, 67 D.T.C. 132.

[19] [1953] 2 S.C.R. 496, [1953] C.T.C. 293, 53 D.T.C. 1185.

[20] *Supra*, footnote 1, at pp. 441 and 444 (C.T.C.), 5281 and 5283 (D.T.C.).

In the *Fraser* case the taxpayer was held accountable for the profits realized on the sale of shares; in the *Freud* case it was not clear whether the taxpayer would have realized his gain, had there been one, by selling the shares or selling the prototype and retaining the profits in the company. Mr. Justice Pigeon did not let this uncertainty affect his decision and in fact he extended the *Fraser* case in that he observed that this case implied that irrespective of the method adopted, any profit would have been income not capital gain.[21] It is difficult to determine whether by this it is meant that if in *Fraser* and in *Freud* the taxpayer had caused the company to sell the underlying assets and thereby realize a profit he would have been taxable immediately on his share of the profits. If this is so, it would seem to follow that the *Fraser* and *Freud* cases do result in a piercing of the corporate veil, notwithstanding the court's protestations to the contrary.

Another hurdle that the court had to surmount in reaching its conclusions was the Minister's argument that the amount in question should be characterized as a loan from the taxpayer to the company. A portion of the funds was advanced to the company and a portion was advanced directly to the suppliers of material and labour. Mr. Justice Pigeon made the preliminary observation that while the portion advanced directly to the company might have been recovered by the taxpayer on the basis of money had and received, the portion advanced directly to suppliers would probably be considered a voluntary payment and not recoverable.[22] However, this hurdle was not surmounted by the rejection of the argument that the amount was a loan. To the contrary, it was held that even if it was a loan or even if it was a payment for shares to be issued in the future, it was still part of an attempt to realize on the speculative venture.[23] It should be noted that at the time the money was expended all other avenues for obtaining funds had failed, and the only way the taxpayer could have realized on the earlier investments was to make the advances that formed the subject matter of the appeal.[24] It was held that any payments received by the taxpayer if the venture

---

[21] *Ibid.*, at pp. 442 (C.T.C.), 5282 (D.T.C.).
[22] *Ibid.*, at pp. 443 (C.T.C.), 5282 (D.T.C.).
[23] *Ibid.*, at pp. 443 (C.T.C.), 5283 (D.T.C.).
[24] *Ibid.*, at pp. 444 (C.T.C.), 5283 (D.T.C.). Mr. Justice Pigeon remarked: ". . . it was abundantly clear that respondent could have no hope of recovering anything unless a sale of the prototype could be accomplished. The outlays cannot be considered as a separate operation isolated from the initial venture, they have none of the characteristics of a regular loan."

had been successful would have been taxable in his hands and would not have been considered as repayment of a loan.[25]

While the taxpayer in this case was successful, it is questionable as to which side of the perennial fiscal debate will benefit more from the case, the taxpayer or the tax collector. Unless the case is given a restricted application by the courts, which they may well do by distinguishing it on its rather peculiar facts,[26] the application of the converse of this case may well result in the taxability of ventures that were otherwise thought to be beyond the reach of the taxing authorities. In particular the case suggests that in the *R. K. Fraser* situation the taxpayer will be taxable on the proceeds of trading assets realized by the company notwithstanding that the taxpayer still retains his shares in the company and in addition taxpayers may well be taxable on the repayment of advances that were formerly thought to be tax free repayments of shareholders' loans. One of the most reassuring points to come out of the case from the taxpayer's point of view is that if the revenue should realize a tax on the profits then it should also allow a deduction when the loss has occurred. It will be interesting to see if the *Freud* case is given a wide or a narrow application and who it benefits most, the taxpayer or the tax collector.

M. J. O'KEEFE*

* * *

LINGUISTIC JURISPRUDENCE—PROBLEMS INHERENT IN THE REIFICATION OF LEGAL METAPHOR—SEMANTIC AND LEGAL FALLACIES IN THE USE OF THE "CURRENT OF COMMERCE" DOCTRINE IN THE UNITED STATES SUPREME COURT.—To borrow a phrase from Mencken, no one today will ever go broke by overestimating the reach of the federal commerce power in the United States. It

---

[25] *Ibid.* "In my view, the payments made by respondent could not properly be considered as an investment in the circumstances in which they were made. It was purely speculation. If a profit had been obtained, it would have been taxable irrespective of the method adopted for realizing it. Such being the situation, the sums must be considered as outlays for gaining income from an adventure in the nature of a trade, that is a business within the meaning of the Income Tax Act, and not as outlays or losses on account of capital."

[26] One factor that was not mentioned in the Supreme Court judgment was that the taxpayer, a practising United States lawyer fully expected the profit or loss to flow through to him for United States income tax purposes and, in fact, was allowed the loss in question as a deduction from his personal income for purposes of the Internal Revenue Code.

*M. J. O'Keefe, of the British Columbia Bar, Vancouver.

is now said to be "commensurate with the national needs",[1] and has been successfully invoked by Congress as the basis for legislation dealing with such current problems as discrimination against Negroes in motels[2] and restaurants—[3] matters in which the social content heavily outweighs any economic aspects of the subjects regulated. In the varied course of its history, it has also been the foundation for national regulation of such diverse enterprises and things as professional football,[4] private morality,[5] and adulterated eggs.[6] And of course no discussion of the commerce clause would be complete without a reference to section 347 of Volume 21 of the United States Code—an unabashed monument to the American butter industry, prescribing meticulous and detailed regulations for *intrastate* sales of colored oleomargerine. Commerce, or more accurately, the federal government's power over commerce, is now clearly a brooding omnipresence within as well as without the borders of each state, and its mere invocation by Congress is sufficient to call forth a policy of judicial restraint in the examination of both the wisdom and the power of the federal government to enact legislation pursuant thereto.

This, of course, has not always been so. At one stage in the evolution of American constitutional doctrine, the Supreme Court of the United States was quite concerned with the possibility that "if Congress can thus regulate matters entrusted to local authority . . . all freedom of commerce will be at an end, and the powers of the states over local matters may be eliminated, and thus our system of government be practically destroyed".[7] Whether the ghastly effects foreseen in this bit of purple prose have in fact been realized is very much a matter of individual point of view. I merely use the quotation to show the firing of the first shot in the thirty-year war over the legislative control of gainful activity in the United States—a contest which might have been amicably settled at a much earlier date were it not for the judicial creation of an hypostatic fallacy that came to surround the concept of "commerce". The Supreme Court metaphorically changed "commerce"

---

[1] *North American Co.* v. *S.E.C.* (1946), 327 U.S. 686, at pp. 705-706. The source of the national power over commerce is art. I, sec. 8 of the Constitution of the United States: "The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes. . . ."

[2] *Heart of Atlanta Motel* v. *U.S.* (1964), 379 U.S. 241.

[3] *Katzenbach* v. *McClung* (1964), 379 U.S. 294.

[4] *Radovich* v. *National Football League* (1957), 352 U.S. 445.

[5] *Caminetti* v. *U.S.* (1917), 242 U.S. 470 (Mann Act).

[6] *Hipolite Egg Co.* v. *U.S.* (1911), 220 U.S. 45.

[7] *Hammer* v. *Dagenhart* (1918), 38 S.Ct. 529, at p. 533.

from a constitutional abstraction into a thing, and dealt with it as a physical entity for three decades. It is in the realm of conjecture as to how many of the decisions to be discussed went the way they did because the members of the court felt themselves compelled by the logic of linguistic fallacy, and in how many of the decisions the Justices merely used the hypostatization as a means with which to create the social and political situations towards which their own personal axiological approach to the Constitution impelled them. The realization that the Supreme Court stands at the apex of a vast mass of litigation in the lower courts leads the analysis away from such subjective considerations, on the grounds that the impact of the hypostasis upon the United States was in fact manifested through *stare decisis* and legislation growing out of these decisions, irrespective of the perception and views of the Justices who created and used it.

During the first century of the Constitution, Congress made no major effort to exercise the commerce power, allowing the states to regulate their own economic affairs. The legal problems that arose during this period were concerned with the "negative effect" of the commerce clause—that is, whether some state law conflicted with the federal power over commerce in its dormant state. The Supreme Court eventually held that where a state statute attempted to deal with a subject of commerce which in its nature was national, or admitted of only one uniform system or plan of regulation, then the enactment was invalid because the Constitution had assigned legislative jurisdiction over these matters exclusively to the federal government.[8] Aside from this fairly broad and vague test, there was no developed concept of any federal domain under the commerce power when Congress enacted the first major statutes thereunder—the Interstate Commerce Act of 1887 and the Sherman antitrust law of 1890.

After a somewhat shaky start[9] the Supreme Court finally reached what appeared at the time to be solid conceptual ground in the 1905 case of *Swift & Co.* v. *United States.*[10] At issue was

[8] The text sets out the gist of the "Cooley Test", which served as a guide for half a century. See *Cooley* v. *Board of Wardens of the Port of Philadelphia* (1851), 12 How. 299. The Cooley Test was in turn a refinement of Chief Justice Marshall's early look at the commerce power in *Gibbons* v. *Ogden* (1824), 9 Wheat. 1, wherein the distinction was drawn between Congressional legislation for national purposes and the state police powers.

[9] *E.g.*, in *U.S.* v. *E. C. Knight Co.* (1895), 156 U.S. 1, a divided court concluded that appellee's acquisition of 98% of the sugar refining capacity in the United States was not within the reach of federal anti-trust laws under the commerce power.

[10] (1905), 196 U.S. 375.

a Sherman Act injunction against a meat dealers' conspiracy to fix prices. Far more influential than the specific holding of the case (which was against the dealers) was the metaphor chosen by Mr. Justice Holmes as the means by which to connect the stockyards with interstate commerce:

> When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stockyards . . . *the current thus existing is a current of commerce* among the states, and the purchase of cattle is a part and incident of such commerce.[11]

When considered in terms of the magnitude of effects, these were towering words indeed. Up until they were spoken, no one quite had a grasp upon what was meant by "commerce" in Article I, section 8 of the United States Constitution. After the *Swift* case, no one had any doubts. Commerce was a current, a flow, a stream that carried goods from one state to another, and so long as the objects of commerce remained within the banks of this meandering legal ectoplasm, they were properly subjects of national regulation.

In a sense, this was a liberating notion. Considering that the Supreme Court had theretofore been mainly concerned with negative implications, it is not surprising that such a simple, solid and homely metaphor should pass so easily into linguistic valhalla. It provided a seductively attractive physical parallel to the actual external events of commerce—the movement of goods from one place to another. It established a line where none had previously existed, circumscribing a *physically* ascertainable area of congressional legislative supremacy. The court was able to move away from the older concepts measured in terms of state encroachment upon a hypothetical national domain, and instead to deal with the domain itself.

Congress, too, saw the utility of this notion, and wrote it into the Packers and Stockyards Act:

> [A] transaction in respect to any article shall be considered to be in commerce if such article is *part of that current of commerce* usual in the livestock and meat packing industry. . . .[12]

The stockyard dealers who thereby fell under federal regulation challenged the constitutionality of national regulation of events

---

[11] *Ibid.*, at pp. 398-399 (emphasis added).
[12] (1921), 42 Stat. 159 (emphasis added).

allegedly local. The Supreme Court, in *Stafford* v. *Wallace*,[13] rejected this claim, saying:

> The sales are not in this aspect merely local transactions. They create a local change of title, it is true, *but they do not stop the flow*; they merely change the private interests in *the subject of the current*, not interfering with, but, on the contrary, being indispensable to its continuity.[14]

Thus it may be seen that both Supreme Court and Congress were treating "commerce" as a *thing* rather than as an extremely complex legal and constitutional abstraction. The advantages of doing this have already been set out. The disadvantages are not so readily visible, but no less vital. The danger involved in such a pseudo-tangible reification is that the legal attributes of the hypostatized concept will come to be considered as co-extensive with those of the physical referent of the metaphor in which the concept is embodied. Consciously or unconsciously, this embodiment in an analogous example from the physical world of events of legal significance will lead the courts, in interpreting, applying or acting upon these events, to impart to them the visible characteristics and limitations of the chosen determinate object, rather than the parameters of the incorporeal aggregate of legal relationships. Legal distinctions can thus be made to proceed from the rules of the physical sciences rather than from the operation of the legal order. Unless extreme care is taken in dealing with legal metaphor, the result will be an incarnation of legal concepts and judicial approaches based upon dealings with a thing rather than an idea.

This is precisely what happened in the United States to the constitutional notion of "commerce". During the first third of the Twentieth Century, "the [Supreme] Court talked increasingly of 'direct' and 'indirect' effects or burdens on interstate commerce [as imposed by state legislation], the former being held invalid and the latter valid".[15] As the Supreme Court said in *Port Richmond & Bergen Point Ferry Co.* v. *Board*: "A state may not impose *direct burdens* upon interstate commerce . . .".[16] This type of emphasis would not have been possible were it not for the influence of the hypostatic fallacy. A state law is not of itself a tangible thing in any physical sense, nor is it capable of "burdening" a legal conception or an idea, either "directly" or "indirectly". For the court to attempt to measure the "direct" or

---

[13] *Stafford* v. *Wallace* (1922), 258 U.S. 495. [14] *Ibid.*, at p. 516.
[15] Dowling, Interstate Commerce and State Power (1940), 27 Va. L. Rev. 1, at p. 6.
[16] (1914), 234 U.S. 317, at p. 330 (emphasis added).

"indirect" impact of a state created "burden" upon the legal relationships of "commerce" is an impossible metaphysical problem, requiring the same sort of mental gymnastics as does, for example, the absurd situation that arises when two irreconcilable presumptions are solemnly weighed against each other to determine which shall overcome;[17] or when a court must somehow determine the quantum of evidence that will outweigh a contrary presumption.[18] Nevertheless commerce as a *thing* was susceptible to this sort of treatment, and the Supreme Court talked of "flow", "current" and "direct burdens" well into the 1930's.[19] The court was led into such situations as occurred in *DiSanto* v. *Pennsylvania*[20] wherein the majority struck down a state statute as a direct burden on commerce while Justices Holmes and Brandeis dissented because the statute "places no direct burden on such commerce".[21] It was probably the inherent difficulty of reaching any sort of functional description of the respective provinces of the national and state governments so long as the analytical processes of the court were bogged down in this sort of metaphysical nonsense that prompted Justice Stone in the same case to snap in dissent:

> [T]he traditional test of the limit of state action by inquiring whether the interference with commerce is direct or indirect seems to me too mechanical, too uncertain in its application, and too remote from actualities, to be of value.[22]

The problems engendered by the emerging federal commerce power might all have been placed into neat groups by a few hundred similar exercises of judicial scholasticism extending over a half-century or so. However this orderly process was cut short by the great depression. Suddenly the demarcation of the bounds of the "stream of commerce" changed from imaginary movements on a hypothetical chessboard to the very real problems of the survival of the Roosevelt schemes for national recovery. It was in the cases under the depression legislation that commerce broke from the physical restraints that it had borne since the *Swift* case.

[17] See, *e.g.*, *Sillart* v. *Standard Screen Co.* (1937), 194 A. 787 (Sup. Ct. N.J.), wherein the court supervised the struggle between the presumption that a missing husband was still alive after an absence of only five years, and the presumption of validity of a subsequently contracted common law marriage by the "widow". The latter prevailed.

[18] See, *e.g.*, *Wyckoff* v. *Mutual Life Ins. Co.* (1944), 147 P. 2d 227 (Sup. Ct. Or.). In this case the court treated the presumption against suicide as *evidence*, to be somehow or another weighed against that evidence surrounding the insured's death that pointed to suicide.

[19] Stern, Commerce and Due Process, in Levy, American Constitutional Law Historical Essays (1966), pp. 193, 200.

[20] (1927), 273 U.S. 34. [21] *Ibid.*, at p. 39. [22] *Ibid.*, at p. 44.

Up until this stage of American constitutional history, the reification of "commerce" had really been just an obstacle to clear analysis. In the first vital tests of the recovery programmes of the New Deal, the fallacy operated to choke off federal legislation dealing with commercial problems of undoubted national importance.

The National Industrial Recovery Act of 1933[23] was aimed at increasing wages, fixing maximum hours of labor, providing for collective bargaining and generally regulating industrial practices through the Presidential proclamation of a "code of fair competition" for the trade or industry involved. This raised the problem of whether or not these matters were a part of, or inside the "thing" that had been created by the Supreme Court known as "interstate commerce". One of the early answers came in the celebrated "sick chicken" case—*Schechter Poultry Corp.* v. *U.S.*[24] The Schechter company had refused to comply with the federal "Live Poultry Code" on the grounds that the purchase of live chickens in New York City, ninety percent of which had come from out of state, and their subsequent slaughter and sale to retailers, was not "in" interstate commerce, and was therefore beyond the regulatory power of Congress. At stake was not just the course of the New York poultry industry, but rather the question of meaningful federal economic intervention into the entire American industrial scene, at a time when thirteen million persons were unemployed, and the average weekly wage of the lucky remainder was $16.13.[25]

The Supreme Court proceeded by examining the physical aspects of the company's business. It drew a distinction between "a stream of interstate commerce—where goods come to rest within a state temporarily and are later to go forward in interstate commerce"—and the cessation of the "flow" after the "property has arrived [from out of state] and has become commingled with the mass of property within the state and is there held solely for local disposition and use".[26] This, of course, is all quite logical: Congress can regulate the "flow"; the "flow" has ended; *ergo*, Congress can no longer regulate. The conclusion stated by the court was that there was "no warrant for the argument that the poultry handled by the defendants at their slaughterhouse

---

[23] (1933), 48 Stat. 195.
[24] (1935), 295 U.S. 495.
[25] Stern, The Commerce Clause and the National Economy, 1933-1946 (1946), 59 Harv. L. Rev. 645, at p. 653.
[26] *Schechter Poultry Corp.* v. *U.S.*, *supra*, footnote 24, at p. 543.

markets was in a *'current'* or *'flow'* of interstate commerce . . .".[27]

All of this is valid only so long as interstate commerce is viewed in terms of the "current of commerce" metaphor. As a result of the uncritical acceptance of this analogy, the National Industrial Recovery Act was declared unconstitutional, and a major Congressional attempt at putting the crippled economy back on its feet was thwarted.

The next significant operation of the reification fallacy in the Supreme Court occurred in the *Carter Coal* case.[28] This involved the Bituminous Coal Conservation Act[29]—federal legislation designed to establish minimum wages and maximum hours in the coal industry. In this industry, labor costs make up sixty per cent of the cost of production,[30] and in the price-slashing competition of the depression, it was economically impossible for one state to establish a floor wage for coal miners without the substantial risk that some other coal-producing state would undercut it. The need for national legislation was seen by both the United Mine Workers and the operators, and the Coal Act was a product of their joint draftsmanship, in an effort to prevent the disastrous competition that had become imminent after the *Schechter* decision had abrogated the Bituminous Coal Code.[31]

The court considered the *Swift* line of cases and found that:

> It was nowhere suggested in these cases that the interstate commerce power extended to the growth or production of the things which, after production, *entered the flow*.[32]

This simplistic mechanical test sufficed to invalidate the Coal Act. Until the coal was placed on the gondolas for transportation to another state, and movement in the "current of commerce" had begun, all aspects of coal production were matters of exclusive state control. "Commerce" in the constitutional sense was still a *physical* event and not a *legal relationship*, and the controlling question was not whether the economic situation in the coal producing states was a matter of interstate commerce, but rather whether the motion of inanimate objects across state lines had begun.[33]

---

[27] *Ibid.* (emphasis by the court). Later in the opinion, the court adverted to the "well established distinction between direct and indirect effects" upon interstate commerce, and concluded that the effect of the corporation's practices was only "indirect". *Ibid.*, at pp. 546, 551.

[28] *Carter* v. *Carter Coal Co.* (1936), 298 U.S. 238.

[29] (1935), 49 Stat. 991. [30] Stern, *op. cit.*, footnote 25, at p. 664.

[31] *Ibid.*, at p. 666.

[32] *Supra*, footnote 28, at p. 305 (emphasis added).

[33] This smacks of the phenomenon pointed out by Holmes that in the early English law of deodand, as well as in admiralty "the fact of *motion*

The Supreme Court also refined the test for determining whether the conditions of production of commodities destined for interstate sale were a "direct" or an "indirect" effect upon commerce, on the basis of its prior holdings that the federal regulatory sphere was limited to cases of "direct" effect:

> The word "direct" implies that the activity or condition invoked or blamed shall operate *proximately*—not mediately, remotely, or collaterally—to produce the effect.[34]

Again, it needs only to be pointed out that this type of reasoning grows best in the metaphysical soil of reification. Unless the legal concept is thought of in tangible dimensions (such as a stream) there is no way to draw rational conclusions based upon the difference between a "proximate" effect upon the thing and an event that is only a "remote" or "mediate" effect. And even then, the conclusion has only the form of logic, the substance having fled before the advent of the reification. Although my concern is not so much with the constitutional philosophy of the majority as with the mechanical and artless fashion in which it was brought to bear, it is probable that this "physical facts" approach together with the proximate causation language borrowed from the law of torts was, like the contributory negligence doctrine,[35] the use of labels to describe a desired result, rather than being the formula by which the result was reached.[36] At a minimum, however, the Supreme Court must have believed that it bore the external trappings of a workable legal test for the guidance of Congress and the lower courts. Of course if any of the majority of the Justices fully accepted the "current of commerce" metaphor as the proper basis for decision in and of itself—and there is no reason to discount this possibility—the hypostatic fallacy can truly be said to have had far-reaching results at a time when the usual split on the court was five to four in favor of the conservative wing.[37]

---

is adverted to as of much importance. . . . '[W]here a man is killed by a cart or by the fall of a house, or in other like manner, and the thing in motion is the cause of the death, it shall be deodand. . . .' [M]otion gives life to the object forfeited. . . . [I]f a man falls from a ship and is drowned, the motion of the ship must be taken to cause the death, and the ship is forfeited. . . ." The Common Law (1881), pp. 25-26.

[34] *Supra*, footnote 28, at p. 307 (emphasis added).

[35] As in the process described in Malone, Formative Era of Contributory Negligence (1946), 41 Ill. L. Rev. 151.

[36] This possibility was adverted to in the dissent of Stone J., in the *Di Santo* case, *supra*, footnote 20.

[37] The 5-4 split was the situation that brought on the "court packing" plan, the need for which was obviated when Mr. Justice Roberts joined the liberal wing to save the remainder of the New Deal. This, in the waggish phrase of the late 30's, was the "switch in time that saved nine".

The embodiment of interstate commerce in a metaphorical current was abandoned by the court at a time when continued insistence upon the reification would have denied to the national power any significant control over the national economic crisis. This took place in the landmark case of *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*,[38] which upheld the constitutionality of the National Labor Relations Act.[39] In the course of this far-reaching opinion, the five-Justice majority held that "the Congressional authority to protect interstate commerce . . . is *not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate or foreign commerce*".[40] The court then completed the etherealization of commerce by saying:

> Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate . . . Congress cannot be denied the power to exercise that control.[41]

Thus passed from the legal scene the limitations placed upon the commerce power that followed from the limitations inherent in the "current of commerce" metaphor. Congress, after the *Jones & Laughlin* case, could regulate any activity which was closely and substantially related to the national economy as a *field*, regardless of the irrational consideration of the physical movement of the products of that economy, or any mechanical line drawn at the beginning of the "flow", as in *Carter Coal*, or drawn at its terminus, as in *Schechter Poultry*.

The remaining relic of the reification of commerce was the idea that Congress could only reach economic activity that "directly" affected interstate commerce, in some mystical proximate causation sense. This notion was clearly undermined in *Jones & Laughlin*, and soon joined the "flow" theory on the scrapheap of outmoded constitutional doctrine, in the case of *Wickard* v. *Filburn*.[42] This litigation concerned the constitutional validity of the Agricultural Adjustment Act of 1938,[43] under which Congress set production quotas for farm products that had never moved in interstate commerce. The Congressional theory, which was

---

[38] (1937), 301 U.S. 1.

[39] (1935), 49 Stat. 449. The Act provided for the creation of the National Labor Relations Board and the right of employees to organize and engage in collective bargaining. The Board was empowered to prevent "unfair labor practices". The labor relations sections are the same as those in the Coal Act, *supra*, which was declared unconstitutional in the *Carter* case.

[40] *Supra*, footnote 38, at p. 36 (emphasis added). [41] *Ibid.*, at p. 37.

[42] (1942), 317 U.S. 111. [43] (1938), 52 Stat. 31.

accepted by the Supreme Court, was that the price of wheat depended upon the total supply rather than upon the amount sold commercially, and that the wheat consumed upon the farms where it had been produced had a depressing effect upon the national price.

Following the implications of *Jones & Laughlin*, the court said that:

> Recognition of the relevance of the economic effects in the application of the commerce clause . . . has made the mechanical application of legal formulas no longer feasible. Once an *economic measure* [as opposed to a mechanical measure] of the reach of the power granted to Congress in the commerce clause is accepted, questions of federal power cannot be decided simply by finding the activity to be "production" *nor can consideration of its economic effects be foreclosed by calling them "indirect".* . . . [A]ppellant's activity . . . may be reached by Congress . . . *irrespective of whether [its economic effect] is what might at some earlier time have been defined as "direct" or "indirect".*[44]

The court in *Wickard* v. *Filburn* went even further than the abandoning of these mechanical tests. It recognized that, in their absence, any judicial attempt to define the scope of the federal power would invariably involve the court in the policy issues from which economic considerations cannot be effectively severed. Thus cut free from the confines of metaphor, the court said that, as far as the exercise of the commerce power in the future was concerned, "effective restraints on its exercise must proceed from political rather than from judicial processes".[45]

The current of commerce reification had outlived its usefulness. It had served to impart positive dimensions to the commerce clause at a time when these were lacking. However it had become a trap for the exercise of the national power in an area and at a time where its untrammeled exercise was vital to a troubled country. Further, it became festooned with metaphysical doctrines springing out of the notion that since it was a thing, an idea incarnate, it could be meaningfully influenced by physical events either directly and proximately, or indirectly and remotely. In terms of linguistics, this is imparting the attributes of things to words, in the hopes of making the word behave as would the thing that it symbolizes. It may be that the reaction against this, when it came, was too violent, and the consignment of the definition of the scope of "commerce" to Congress was judicial abdication rather than judicial restraint. However the Supreme Court still retains

---

[44] *Supra*, footnote 42, at pp. 123-134 (emphasis added).
[45] *Ibid.*, at p. 120.

the power to determine whether or not a subject of national regulation is so far removed from economic activity that it becomes an invasion of the reserved powers of the states.[46] It remains to be seen whether the court will be able to eventually develop new doctrines which effectively establish a working balance consistant with the concept of a federal system without resort to the mechanical reification of the past.[47]

EDWARD F. RYAN*

---

[46] This power was exercised in *U.S.* v. *Five Gambling Devices* (1953), 346 U.S. 441 where the court held that Congress had gone too far in attempting to require registration and reporting by persons engaged in interstate traffic in slot machines.

[47] Although the substantive law surrounding interstate commerce in the United States is simply a framework for this linguistic analysis of an ecumenical jurisprudential problem, the American experience with the "current of commerce" metaphor poses some serious implications for Canada in a substantive as well as in a jurisprudential sense. In the 1957 *Reference Re the Farm Products Marketing Act*, the Chief Justice of the Supreme Court of Canada observed in [1957] S.C.R. 198, at p. 205: "Once an article enters into *the flow of interprovincial or external trade*, the subject matter and all its attendant circumstances cease to be a matter of mere local concern". (emphasis added). The metaphor was recently used even more explicitly by the Supreme Court of Canada in the case of *Canadian Warehousing Association* v. *The Queen*, where the judgment of the court, in (1969), 1 D.L.R. (3d) 501, at pp. 503 and 504, three times refers to "the stream of commerce" as if it were an intrinsic part of settled Canadian law. Holmes' use of almost the same metaphor sixty-five years ago has helped to change the United States federal structure beyond recognition. If our courts elect to pursue this path, it is to be hoped that they will first make a careful study of the American experience with the "flow of commerce" concept in order to arrive at an informed understanding of its inherent problems not only as a metaphor, but also as a constitutional doctrine.

*Edward F. Ryan, of the Faculty of Law, University of Western Ontario, London.