COMMENTS
COMMENTAIRES

THE ABORTION DECISION—A QUALIFIED CONSTITUTIONAL RIGHT IN THE UNITED STATES: WHITHER CANADA?*—On January 22nd, 1973, the Supreme Court of the United States handed down its judgments in the *causes célèbres* of *Roe* v. *Wade*[1] and *Doe* v. *Bolton*.[2] In both instances, the Supreme Court, by a majority of seven to three[3] declared the statutory law restricting the availability of abortions in the states of Texas[4] and Georgia[5] respectively as unconstitutional, being in violation of the Due Process Clause of the Fourteenth Amendment[6] in the American Bill of Rights. The result of these decisions is far-reaching since they effectively invalidate laws governing abortion similar to one or the other of the two states involved in the decisions. Upon initial analysis, it would appear that the abortion laws of fully forty-six states have become invalidated as unconstitutional,[7] leaving unscathed only the so-called abortion-on-request format presently prevailing in the states of Alaska, Hawaii, New York and Washington. The reason for this encompassing result is that in striking down the provisions of the Texas provisions, the Supreme Court had ruled as unconsti-

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[1] (1973), 93 S. Ct 705. On appeal from the United States District Court for the Northern District of Texas.

[2] (1973), 93 S. Ct 739. On appeal from the United States District Court for the Northern District of Georgia.

[3] In each instance, the division of the court was identical. The opinion of the court was delivered by Blackmun J., in which Burger C.J., and Douglas, Brennen, Stewart, Marshall and Powell J.J. joined. Burger C.J., and Douglas and Stewart J.J., filed concurring opinions. White J., filed dissenting opinions in which Rehnquist J., joined. Rehnquist J., also filed dissenting opinions separately.

[4] Vernon's Ann. Tex. P.C., arts 1191-1194, 1196.

[5] Ga. Code, ss. 26-1201 to 26-1203 (1969).

[6] The Fourteenth Amendment was passed in 1868 and provides: ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[7] See *Roe* v. *Wade*, *supra*, footnote 1, at p. 709, footnote 2; and at p. 720, footnotes 35-37.

tutional the provisions of all the so-called conservative (or "restrictive") states; and, by striking down the provisions of the Georgia provisions, the Supreme Court had invalidated as also unconstitutional the provisions of the states generally regarded as moderate. These two categories constitute the majority of the states; leaving as already pointed out, only the four liberal states.[8]

The right and its qualifications

The Texas Penal Code provisions dealing with abortion[9] is typical of the restrictive category. By article 1191, "abortion" is defined as meaning "that the life of the foetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused". All abortions are then prohibited with penal confinement for contravention. The sole saving clause is under article 1196 entitled "By medical advice": "Nothing in this chapter applies to an abortion procured or attempted by medical advice *for the purpose of saving the life of the mother.*"[10] The majority of the states have similar provisions in their statute books.[11] The Supreme Court decision to invalidate the provisions was based on the concept of guaranteed constitutional rights—specifically: the right of privacy. Blackmun J., succinctly put it thus:[12]

> The Constitution does not explicitly mention any right of privacy. In a line of decisions, . . . the court has recognised that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution . . ..
> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined,[13] in the Ninth Amendment's[14] reservation of rights to the people, is broad enough to

[8] The adjectives appended to the description of a given set of provisions is highly emotive and vary widely depending on whether the user is pro- or anti-abortion. Thus "conservative", "oppressive" and "restrictive" would describe the same set of provisions. Likewise, at the other end of the spectrum, "liberal" and "progressive" would be contrasted with "permissive". However, by and large, the abortion provisions can readily be delineated into three categories: First—those which proscribe abortion with perhaps the only exception of saving the pregnant mother's life; second—those which permit abortion with certain exceptions and safeguards; and third—those which fall in between; which usually take the form of proscribing abortion but gives wide latitude and discretion in the exceptions. For the sake of identification only, the three categories will be described as "restrictive", "liberal" and "moderate" respectively.

[9] *Supra,* footnote 4.

[10] Italics mine.

[11] *Roe* v. *Wade, supra,* footnote 1, at p. 709, esp. footnote 2, where Blackmun J., lists the states concerned.

[12] *Roe.* v. *Wade, ibid.,* at p. 726. See also Stewart J., in his concurring opinion at p. 734, footnote 2, where he describes the nature of the constitutional right of privacy.

[13] (1970), 314 F. Supp. 1217 (N.D. Tex.).

[14] The Ninth Amendment was passed in 1791 and provides: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

> encompass a woman's decision whether or not to terminate her pregnancy . . ..

In defining the ambit of this right of privacy, the court rejected the contention that it was an absolute right with a terse "with this we do not agree".[15] It then went on to explain that although the right of personal privacy includes the abortion decision, the right was only a qualified right which must be considered against important state interests in regulation. This qualification is based on a concept arrived at in earlier decisions[16] to the effect that "where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest' . . . and that legislative enactments must be narrowly drawn to express only the legitimate State interests at stake".[17]

What, then, are the "legitimate State interests" which qualify a pregnant mother's right of privacy? The Supreme Court spells them out in this manner:

> . . . the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, . . . and . . . it has still *another* important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes "compelling".

The immediate question that urges itself upon one is: what is the point at which the legitimate state interests as defined become "compelling". Again, the answer is provided by the court:[18]

> With respect to the State's important and legitimate interests in the health of the mother, the "compelling" point, in the light of present medical knowledge, is at *approximately* the end of the first trimester. This is so because of the now established medical fact, referred to at p. 724, that until the end of the first trimester mortality in abortion is less than mortality in normal childbirth. It follows that, from and after this point, a *State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. . . .*[19]
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> This means, on the other hand, that for the period of pregnancy prior to this "compelling" point, the attending physician, in consultation with

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[15] *Roe* v. *Wade, supra,* footnote 1, at p. 727.

[16] *Kramer* v. *Union Free School District* (1969), 395 U.S. 621, at p. 627; *Shapiro* v. *Thompson* (1969), 394 U.S. 618, at p. 634; and *Sherben* v. *Verner* (1963), 374 U.S. 398, at p. 406.

[17] *Roe* v. *Wade, supra,* footnote 1, at p. 728.

[18] *Roe* v. *Wade, ibid,* at pp. 731-732. It is important that this passage be reproduced *in toto,* first, because it is the crux of the whole approach of the Supreme Court; and second, it provides the nexus between this case and *Doe* v. *Bolton, supra,* footnote 2, which seems to pick up at precisely the point where *Roe* v. *Wade* left off. See *infra.* Indeed, one is enjoined to read the two decisions together. At p. 733, per Blackmun J.

[19] Italics mine. The "extent of the regulation" was dealt with in *Doe* v. *Bolton, supra.* See *Infra.*

> his patient, is free to determine, without regulation by the State, that in his medical judgment the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.
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> With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the foetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period except where it is necessary to preserve the life or health of the mother.

With regard to the degree of interference permitted to a state, one is to an extent, given some further guidance. For example, the state is permitted the power to define the term "physician", but even then, this power is limited in that the state may define the term to mean only a physician currently licensed by the state, and thereby proscribe any abortion by a person who is not a physician so defined. Thus a state may only indirectly impose limitations on persons who may perform abortions, that is through the laws governing the licensing of physicians. However, what remains unsaid is the fact that the rules governing the licensing of physicians are in themselves subjected to the constitutional civil rights and liberties and thus a state which tries to circumvent the abortion issue by utilising its licensing procedures will, it is submitted, find itself being challenged as to constitutional validity once again. It would seem, therefore, the net effect of this right granted to a state will merely mean that it may proscribe abortions being performed by other than "medical doctors" in the common understanding of that sense. Interestingly, on the other hand, although strictly speaking, it would seem that a state, if willing to extend the availability of abortions, may permit persons other than medical doctors to perform abortions by extending the definition of "physician" to include them; it would be most unlikely for obvious reasons.[20]

The next issue that arises for examination is the extent of the controls which a state may impose to regulate the abortion procedure when the state's interest in the health of the mother becomes "compelling" approximately at the end of the first trimester. It is important to note that so far as positive direction from the court is concerned, one can only extract the propositions (1) that the state may regulate the persons permitted to perform an abortion,[21] (2) that the regulation is restricted to so far as "reasonably

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[20] *May* v. *State* (1973), 492 S.W. 2d 888. The Arkansas Supreme Court held that the state abortion statute is untouched by *Roe* v. *Wade* and *Doe* v. *Bolton* insofar as it prohibits abortions by laymen. The defendant, a layman, has no standing to attack the statutes.

[21] *Supra*, footnote 1, at p. 732.

relate to the preservation and protection of maternal health".[22] It would seem therefore that by definition, all other considerations are excluded. And, (3) that the regulation may only extend to "abortion procedure".[23] It is at this juncture that it will be convenient and appropriate to turn to the decision of *Doe* v. *Bolton*.[24]

In the *Bolton* case, dealing with the abortion provisions of the state of Georgia,[25] the Supreme Court was dealing with a significantly different form of legislation which falls within the "moderate" category. No doubt the striking down of the Georgia statute created not a small amount of astonishment since the Georgia provisions were enacted only in 1968, (superseding laws not dissimilar to the Texas format) and which are modelled on the American Law Institute's Model Penal Code[26] although the Georgia provisions are somewhat more restrictive.

Under Georgia law, abortion is a crime but there is excepted "an abortion performed by a physician duly licensed to practice medicine and surgery, and based upon his best clinical judgment that an abortion is necessary[27] because: (1) A continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health; or (2) the foetus would likely be born with a grave, permanent, and irremediable mental or physical defect; or (3) the pregnancy resulted from forcible or statutory rape.[28] The section then continues to provide certain conditions *each* of which must be complied with

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[22] *Ibid.*

[23] *Ibid.* No real indication is given as to precisely what "abortion procedure" means although guidance may be obtained from two sources. First, in *Roe* v. *Wade*, Blackmun J., immediately continues to give examples of permissible state regulation: ". . . requirements as to the qualifications of the person who is to perform the abortion; . . . the licensure of that person; . . . the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like." It can be seen that these examples all refer only to the nature and quality of the physical facilities in its broadest terms only. Actual methodology, control and process, *etc.*, are not included, it would seem, if one was to apply the *ejusdem generis* rule. Second, one may obtain a measure of negative guidance from *Doe* v. *Bolton* inasmuch as the procedural controls struck down in that case, cannot be promulgated and likewise anything along similar lines. See *infra.*

[24] *Supra,* footnote 2.

[25] *Supra,* footnote 5.

[26] S. 230.3 (Proposed Official Draft, 1962). The American Law Institute's model was adopted in various forms by no less than fourteen states. See *Roe* v. *Wade*, *supra,* footnote 15, at p. 720, footnote 37. The Model Penal Code is reproduced in full as Appendix B in *Doe* v. *Bolton, supra,* footnote 2, at p. 754.

[27] Ga. Code 26-102, *supra,* footnote 5. The law would have been acceptable to the Supreme Court had the provisions stopped here. Unfortunately, it continues.

[28] The reader's attention is particularly drawn to the use of the conjunctive "and" and the disjunctive "or" in the section.

before an abortion becomes fully protected as an exception. Briefly they may be summarised as follows:

(1) The pregnant woman must be a legal resident of the state of Georgia, and the attending physician must certify this fact to the best of his knowledge.

(2) The attending physician must certify his clinical judgment as to the necessity of the abortion for one or more of the three permitted reasons.

(3) The attending physician's certificate must be accompanied by two similar certificates from similarly qualified physicians who have separately examined the pregnant woman.

(4) The abortion must be performed only at a hospital licensed by the State Board of Health and accredited by the Joint Commission on Accreditation of Hospitals.

(5) The abortion can only be performed if it is approved by a majority of a committee as constituted under the statute of the accredited hospital and,

(6) If the pregnancy was a result of rape, the pregnant woman must also file a statement under oath.

With one stroke, the Supreme Court struck down all the conditions as unconstitutional. The procedural requirements, that is the JCAH accreditation of hospitals; the Committee's approval, and; the two doctors' concurrence, were all held to be in violation of the Fourteenth Amendment; whilst the resident requirement was struck down as being contrary to the Privileges and Immunities Clause, Article IV, paragraph 2 of the Constitution. Also, by laying down in *Roe* v. *Wade* the nature and scope of a woman's right to an abortion—the whole decisions of which were explicitly said to be applicable to *Doe* v. *Bolton*[29], the Supreme Court effectively also invalidated the specific conditions under which an abortion may be performed and in so doing, naturally, the requirement that a victim of rape must file a certificate as to the rape also falls.[30]

The effect and effectiveness of the decisions

What the Supreme Court has done is to lay down that the validity of abortion laws are to be measured according to a graph-line which is the period of gestation of a human foetus. This period is divided into three segments. First, the first trimester of the woman's pregnancy; second, the period between the end of the

[29] *Supra*, footnote 2, at p. 746.

[30] This condition that a rape victim must submit a written statement under oath together with the attendant formalities is perhaps a good example of the provisions which give sustenance to the allegation that to report a rape is to put the victim on trial, not the rapist.

first trimester and viability of the foetus; third, the period between viability of the foetus and birth of the child. Against the graph-line as delineated, is set the degree of privacy to which a woman is entitled; or alternatively the extent of her constitutional right.

For the first period, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.[31] This medical judgment "may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman".[32] The court went on to point out that "medical judgment" meant the attending physician's "best clinical judgment that an abortion is necessary"—a phrase used in the Georgia statute. It is apparent that the court relies on the licensing of physicians as being sufficient guarantee that the physicians will be competent and sound of judgment.[33]

In the interim period between approximately the end of the first trimester and the point of viability of the foetus, the state may (and is limited to), regulate abortion procedures in ways reasonably related to protection of maternal health. As was pointed out earlier, such regulation as is permitted to the state seems to refer only to the competence of the physicians concerned and certain safety measures relating to the operating facilities. As *Doe* v. *Bolton* clearly showed, the state may not prescribe specific conditions under which an abortion may or may not be performed; nor may the state interject any constraints on the availability of abortion by requiring such as second opinions or committee approval.

In the final period, that between viability of the foetus and birth, the state having been deemed to have acquired a compelling interest in protecting the potentiality of human life, is permitted to "regulate and even proscribe abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother".[34] It is important to note that a woman's constitutional right would seem to extend up to the time of birth so long as it was necessary for the preservation of her life *or* health. A number of observations may be drawn therefrom.

First, it is plain that the Supreme Court was convinced that the abortion decision was primarily a medical one and that the role of the law was secondary. In each of the three periods outlined by

[31] *Supra*, footnote 2, at p. 732. *Roe* v. *Wade, supra*, footnote 1.
[32] *Doe* v. *Bolton, ibid.*, at p. 747.
[33] *Ibid.*, at p. 751.
[34] *Roe* v. *Wade, supra*, footnote 2, at p. 732.

the court, whether or not an abortion should be performed was to be determined by a properly qualified physician exercising his best medical judgment, and furthermore, the word "medical" was to be interpreted in the widest terms. The law to the extent that it does play a role does so only for the purpose of protecting the mother's life or health by ensuring that she is treated only by medically qualified persons working with adequate facilities; and in addition to but subordinate thereto is the purpose of giving a measure of protection to potential members of society—the viable foetus. This leads one to the second observation, which is the fact that the Supreme Court has indicated with absolute certainty that the interests of the mother is superior to that of the foetus. This superior interest gradually reduces as the foetus develops towards term. Another way of putting the views of the Supreme Court may perhaps be to say that a foetus has no rights whatever in the first trimester. In the interim second period, the foetus becomes a recognised factor, but only as a medical factor to be considered in the context of the mother's general health and welfare. Only in the period after viability when "the foetus then presumably has the capability of meaningful life outside the mother's womb"[35] does it obtain contingent rights which, if a state chooses to recognise, will crystallise—but even then only if the right does not come into direct conflict with the life or health of the mother. The justification for this approach was twofold: that the Constitution does not define "person" but in every use of the word and in subsequent interpretations, "person" has always been applied to living beings—"none indicates, with any assurance; that it has any possible pre-natal application".[36] Furthermore, the Supreme Court implicitly rejected the "rights of the unborn child" argument by observing that: "Perfection of the interests involved . . . has generally been contingent upon live birth. In short, the unborn have never been recognised in the law as persons in the whole sense."[37]

Third. The Supreme Court has, by withdrawing legal controls, accepted that abortion, apart from medical considerations, is primarily a personal decision involving the particular individual's moral values and religious beliefs. In this respect, the cases of *Wade* and *Bolton* are perhaps no more than a continuation of the approach in recent years of the Supreme Court to secularize the law, recognising that a person's personal beliefs are sacrosanct and the state should play no role in imposing any particular belief. In arriving at this conclusion to remove the abortion decision outside the framework of the law, the Supreme court was undoubtedly

[35] *Ibid.*, at p. 732.
[36] *Ibid.*, at p. 724.
[37] *Ibid.*, at p. 731.

heavily persuaded by recent studies which showed clearly that the common law as such had never regarded abortion *per se* as reprehensible.[38] Proscription of abortion was a result of intrusion by ecclesiastical law in the middle ages and subsequent misinterpretation by commentators.

Finally, however, the Supreme Court nonetheless realizes and lays down clearly that despite the personal nature of the abortion decision, the state does have certain interests in the issue as the guardian of societal interests. In an unpublished paper written for a group discussion in the summer of 1972, the author had presaged the Supreme Court by coining the term "The Three Sanctities" which are: The Sanctity of Life, the Sanctity of Freedom of Choice, and the Sanctity of the Supremacy of Societal Interests over that of the Individual. After examination of a spectrum of opinions, the observation was made that:

> . . . no one advocates abortion without some regard to sanctity of life, and also, no one really advocates the other extreme either, *i.e.* that fetal life must never be destroyed. It resolves therefore down to a much narrower question of under what circumstances destruction of fetal life would be permitted in favour of maternal welfare.

As to the controls that should be imposed, the paper continued with the second Sanctity—the Sanctity of Freedom of Choice with the following words:

> There is now generally recognised, at least in the civilized world, that there are certain fundamental human rights. Inherent in these rights is the right of self-determination, *i.e.* a right to a free choice.
> In relation to the freedom of the mother, it is paramount that each person be permitted to make up his or her mind as to whether he or she feels that abortion is justifiable. No one should, or can be permitted to impose his or her will on another. This freedom of choice is no more radical than freedom of worship. It is simply a recognition of each human being's integrity and a realization that values must vary from person to person. In a pluralistic and democratic society recognizing human integrity and dignity, this freedom must be present and held sacrosanct.

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[38] Without question, Blackmun J. was strongly influenced by two articles by Professor Cyril C. Means Jr., The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality (1968), 14 N.Y.L.F. 411; and especially the sequel, The Phoenix of Abortional Freedom: Is a Penumbral or Ninth Amendment Right About to Arise from the Nineteenth Century Legislative Ashes of a Fourteenth Century Common Law Liberty? (1971), 17 N.Y.L.F. 335. In the latter article, Professor Means shows clearly when, how and why abortion crept into the common law. It is interesting to note that Professor Means argues that the abortion right is protected by the Ninth Amendment —an argument accepted by the District Court in *Roe* v. *Wade* and not dismissed by the Supreme Court which, however, prefers to classify it as a right protected by the Fourteenth Amendment. Persons who have read Professor Means' articles will no doubt recognise much of the thought in Blackmun J.'s judgments.

> What then of the freedom of the unborn child? . . . As the unborn child cannot exercise its options, it would follow that its options must, like other persons under disabilities, be exercised on its behalf by duly qualified persons just as judges in court disqualify themselves from hearing a case in which they are in any way directly or indirectly involved or connected, so a pregnant woman must accept some degree of intervention in her decision. The only other duly qualified body who can or should figure in this decision can only be society as a whole. . . . This is consonant not only with the sanctity of freedom of choice, but also, it is the third sanctity in operation, viz. the sanctity of the Supremacy of Societal Interests over that of Individualistic Interests. . . . Inherent in this supremacy . . . is the protection of potential members of that society.

In conclusion, the relative weight of the Sanctities were expressed as follows:

> Apart from [the third Sanctity] of Supremacy of Societal Interests over the Individual Interests, the Sanctity of Freedom of Choice is paramount. This state of affairs must mean that regulating controls be always at the minimum.

Laudable though these general concepts may be, the question nonetheless remains as to whether the Supreme Court has effectively provided a solution to the controversial abortion problem. It is probably true to say that whatever approach the Supreme Court takes, it will be condemned by people holding opposing or different viewpoints. However, on a strictly practical basis of workability, has the Supreme Court succeeded? Regrettably the reply must be in the negative.

Without doubt, the justices of the court had engaged themselves in serious and thoughtful research in an attempt to arrive at a just and proper solution.[39] However, there are still many aspects which leave much to be desired and which undoubtedly will be cause for much litigation in the months and years to come.[40] If one is to sum up in one word, the word will have to be "imprecision". To begin with, although the Supreme Court divided a

[39] It is interesting to learn that Blackmun J., who wrote the majority opinion in both cases was originally amongst the ranks of the dissenters when the cases were first argued in December of 1971. Apparently, after rejecting a first draft of the opinion, he asked for the cases to be stayed and reargued in October 1972. During his summer vacation, it is reported the learned justice spent a week researching the history of the subject at the Mayo Clinic. Time, February 5th, 1973.

[40] This is evidently already a fact as in March 1973, the Colorado Supreme Court reversed two guilty sentences (*People* v. *Palmer, People* v. *Jorgensen*) and affirmed a third not-guilty sentence (*People* v. *Norton*) on account that much of the state's relatively new Abortion Act had been rendered unconstitutional by the U.S. Supreme Court decisions. See 507 P. 2d. 862. In Wisconsin, Attorney General Robert Warren issued a statement to all state district attorneys to the effect that the United States Supreme Court's decision in *Roe* v. *Wade* and *Doe* v. *Bolton* "effectively rendered unconstitutional and unenforceable the Wisconsin abortion statute". (13 Cr. L. 2063).

pregnancy into three periods to which different controls attach and which form the basis of the decision; the periods are totally imprecise. The first period is that stage of the pregnancy prior to *approximately* the end of the first trimester. How is "approximately" to be determined? The second and third period is delineated by viability of the foetus, but likewise, the point of time is totally imprecise. One is told that: "We need not resolve the difficult question of when life begins. When those trained in the respective discipline of medicine, philosophy and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."[41] The court then informs one that "viability is usually placed at about the seventh month (28 weeks) but may occur earlier, even at 24 weeks".[42] The question then is—when may a state proscribe abortion in protection of its compelling interest in potential human life? Is it at twenty-eight weeks or is it at twenty-four weeks; or indeed, is it also a purely medical question to be determined each time by the attending physician in his best clinical judgment as to whether the foetus has become viable? It is submitted that the latter process ill serves the interests of the state and even worse that of the potential member of society. Of necessity, there must be precision; and there must be a definite, determinable point of time at which the mother's interests are no longer supreme.

Also, the court gives no real indication of the precise type of controls which a state may impose in the second period. As pointed out earlier, as it stands at the moment, the scope is limited indeed. But *quare,* is it in fact so limited?

Finally, but by no means the least important and certainly not the only remaining question-mark arising, is the fact that no attempt was made to delimit the scope and meaning of the word "health". As is already noted, in the third period of pregnancy, abortion is still a woman's right if in medical opinion, to carry the pregnancy to term would affect the mother's "life or health". "Life" as such permits of little room for manipulation, but as yet, there is no legal or medical definition of "health" currently extant. The only definition that is accepted for general purposes is that provided by the World Health Organization—that is "a state of complete mental and social well-being". It is submitted that the words "complete", "mental" and "social" admit of such wide interpretation that most reasons for desiring abortion can come with the ambit of "health". It can extend not only to physical reasons,

[41] *Roe* v. *Wade, supra,* footnote 1, at p. 730.

[42] *Ibid.,* at p. 730. The authority for this statement is given as L. Hellman & J. Pritchard, William's Obstetrics (14th ed., 1971), p. 493; and Dorland's Illustrated Medical Dictionary (24th ed., 1965), p. 1689.

but also to social, economic reasons, and most certainly to psychiatric, psychological and eugenic reasons. Indeed, this very word is the loophole used by persons to legally justify abortion in such jurisdictions as permit abortion only to preserve the life or health of the mother.[43]

From these very few observations alone, it is probably not incorrect to say that the decisions of the Supreme Court in *Roe* v. *Wade* and *Doe* v. *Bolton* although a valiant attempt to settle an extremely complex and controversial issue, has not provided a workable solution, although perhaps it has provided some guidelines along which legislators can work and arrive at some degree of uniformity amongst the various states. However, it is noteworthy that the Supreme Court is apparently adamant in its holdings[44] and intends to adhere to the basic principles enunciated in the decisions. Only time (and litigation) will provide the much needed details and answers.

Application of Roe v. *Wade and Doe* v. *Bolton in Canada*

It is probably *à-propos* at this juncture to pause and reflect as to whether the decisions of the Supreme Court of the United States may have bearing to the abortion laws presently extant in Canada.[45] It is submitted that in all likelihood the impact would be

[43] *E.g.* Canada. See Canadian Criminal Code, R.S.C., 1970, c. C-34, ss 251, 252. On May 31st, 1973, a bill was introduced into Parliament to amend s. 251(6) of the Code, inserting a definition of "health" to mean "actual physical or mental danger to the mother; and without limiting the generality of the danger; danger shall not include consideration of social and economic conditions affecting the mother or her family unit". (Bill C-187, Twenty-ninth Parliament, first session, 21 Eliz. II, 1973). This bill, if passed, will mark the beginning of a strict delineation of what the term "health" encompasses. It will also mean the elimination of social and economic reasons for justifying abortion.

[44] On February 26th, 1973, the Supreme Court rejected an application to reconsider its rulings from the states of Texas and Georgia. In April it ordered the rejection of the laws of Connecticut. Meanwhile various District Courts have struck down, or are considering or will consider respective state legislation. For example, an attempt by Rhode Island to introduce a law in March permitting abortions only when the life of the pregnant woman was in danger was declared unconstitutional "on its face" by a federal judge on May 16th, 1973.

[45] Abortion is governed by the Criminal Code of Canada, *supra*, footnote 44. It is provided that a therapeutic abortion may be obtainable at an accredited or approved hospital when a therapeutic abortion committee adjudges and certifies that "in its opinion the continuation of the pregnancy of such female person would or would be likely to endanger her life or health". Although at first glance the law appears to be rather restrictive, the sections like all law, are open to construction and interpretation, which has the result that the law can in fact be fairly liberal. First, an abortion is justifiable so long as the therapeutic abortion committee feels that in *its* opinion an abortion is justifiable within the context of the Act, if so, an abortion is permissible. Whether an abortion is in fact justifiable in each case would therefore vary considerably depending on the composition of the committee and the views of each individual member. Second, it should

negligible for at least some considerable while. The reasons are simple but compelling.

First. The United States decisions are premised upon rights guaranteed by the American Bill of Rights, which forms part of the Constitution of the United States. In Canada, the Constitution is embodied in the British-North America Act.[46] There is a Canadian Bill of Rights,[47] but the nearest to the Fourteenth Amendment is section 1 which declares certain "human rights and fundamental freedoms", and in section 1(a) "the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law". It may appear that there is a parallel between the United States and Canadian provisions, but unfortunately, two reasons tend to deny the parallel. The Canadian courts have tended to interpret the "Due Process" clause as only a procedural guarantee rather than, as in the United States, both a substantive and procedural guarantee.[48] Also the Canadian Bill of Rights is not part of the Canadian Constitution *per se* and is primarily a federal statute with no more effect than any other federal statutes despite the provisions of section 2 to the effect that: "Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as . . . to authorise the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared." The net effect of this is that the justification of the United States decision, that is the woman's right to abortion is within the right to privacy guaranteed by the Fourteenth Amendment holds no water and can find no basis within the Canadian constitutional framework.

Second. Abortion is of necessity governed by the criminal law so as to ensure that only permitted abortions (even if it is merely to ensure that they are carried out by qualified medical personnel) are performed. Criminal law in Canada is by the British-North America Act within federal jurisdiction and applicable to all Can-

be noted that a therapeutic abortion is obtainable when the pregnancy *would* or *would likely* . . . *etc.* The very presence of the word "likely" indicates a flexibility as any expression of likelihood must of necessity be at best an informed or educated guess. Third, a therapeutic abortion is permitted whenever the continuation of the pregnancy would likely "endanger [the pregnant female person's] life or health". Until and unless "health" as defined (*supra,* footnote 44) is enacted into law, the scope for manoeuvre and interpretation is great. In practice, the sections of the Criminal Code are by and large not overly liberally interpreted although there appears to be considerable variance from hospital to hospital and from committee to committee.

[46] 28 and 29 Vict., c. 63, as am.

[47] S.C., 1960, c. 44. For an excellent discourse on the Bill, see W. S. Tarnopolsky, The Canadian Bill of Rights (1966).

[48] See Tarnopolsky, *op. cit., ibid.,* ch. IV.

ada. Thus any change in the present format would have to emanate from Parliament carrying with it the inherent conflicting and diverse views and interests of the various members of Parliament as well as the people of the regions they represent. It is perhaps an understatement to say that it is easier to obtain unanimity (or at least a majority) from nine justices than it is to wrench a majority from a legislature.[49]

Third. It would also be accurate, it seems, to point out that by and large, we here in Canada are, as a whole, more conservative in our views and beliefs than south of the border. This would indeed make it more difficult to obtain a majority in Parliament to produce the same result which the Supreme Court of the United States achieved. Moreover, it is also true that the various lobbies in Canada are by far less organised than in the United States.

Fourth. In view of the various uncertainties pointed out before, it would be more than likely that the Canadian legislature would delay any proposals until they have been able to see how everything works out in the United States. As already indicated, with the exception of only a few states, all the other states will have to amend existing or pass new abortion laws.[49a] It would be foolish to rush into uncertainty when we shall shortly have fifty experiments from which to profit by. Moreover, with such a controversial and delicate issue, it would be a strong government that would propose any substantial changes in the present law.

Finally, as was shown, the present law extant in Canada although by no means liberal is also not at all restrictive in its actual workings. Indeed it may be true to say that in most instances, where an abortion is actually necessary and justifiable, it is obtainable. Perhaps rather than change the law the government can see to it that adequate facilities are made available to accommodate needs as a frequent complaint at present is that even where

[49] On January 15th, 1973, Parliament gave first reading to Bill C-40, "An Act to provide for a national plebiscite on the removal of the abortion provisions from the Criminal Code of Canada". In view of the many ill-fated bills concerned with the liberalization of abortion laws, it is questionable whether one could await the passage of this bill with some form of assurance.

[49a] In the half year or so between the Supreme Court ruling and the writing of this comment, nineteen states have enacted abortion laws. In ten states, (Arizona, Illinois, Indiana, Louisiana, Maine, Maryland, Massachusetts, Missouri, North Dakota and Wyoming) the laws passed exempt physicians and hospitals from the necessity to do abortions. In five states (Indiana, Nevada, North Dakota, Rhode Island and Utah) laws were adopted which appear not to fully comply with the terms of the Supreme Court decisions. In seven other states (Georgia, Idaho, Illinois, Nebraska, North Carolina, South Dakota and Tennessee), the statutes passed seem to follow closely the Supreme Court directive. Finally, five additional states (Indiana, Maryland, Minnesota, North Dakota and Utah) passed resolutions in their legislatures calling for constitutional amendment to overturn the Supreme Court decisions. Meanwhile, the battles in the courts continue.

an abortion is deemed justifiable by doctors, it is sometimes prejudiced by insufficient facilities which are needed for more urgent operations.[50] Ultimately, at present, the abortion decision as such is not far removed from the principles enunciated by the United States Supreme Court in that it is a personal decision that is upheld or rejected on medical judgment. No doubt many will dispute this appraisal of present Canadian abortion laws in action, but it is submitted that it is accurate when applied to the majority of instances.

It is felt therefore that the United States Supreme Court decisions will, at least in the present foreseeable future, have little or no impact on the Canadian situation apart from providing more fuel for the interminable arguments over the subject. In the meantime,

[50] The author is of the opinion that a state of affairs more acceptable to the majority of people in Canadian society can be achieved within the framework of present Canadian law. This can be done, first, by the organising of a massive but well-planned programme to forthwith disseminate the various facets of sex education: in particular birth control. Prevention is always better than the cure. With our facilities of mass media and comprehensive educational systems today, there should be no difficulty in educating not only the young, but also the mature adult. Apart from education of the general public as to the basic facts relating to human sexuality, there should perhaps be an all-out endeavour to try to educate the public that a person who needs an abortion should not be a social outcast; rather, she is a fellow human being, who at this time more than any other time, needs the comfort, sympathy and solace of fellow human beings. Religious bodies could well rethink their present attitudes and practice the charity that is preached rather than adopt a "holier than thou" approach and be the first to cast stones.

Based on this broad foundation of mass education, we should perhaps consider the setting up of Mothers' Aid Centres like those set up in Denmark since 1939 and which now are in existence in Sweden and Finland. These centres, (otherwise referred to as Abortion Consultation Centres) are comprised of a staff of experts in many fields including social workers, lawyers, doctors (principally gynaecologists and psychiatrists) who work in close co-operation with each other in counselling the pregnant woman as to the pros and cons of abortion apropos her particular case. Further, as part of the Scandinavian system of comprehensive social welfare, there is also economic and practical help available in addition to the personal-psychiatric-medical help. Generally an effort is made to establish constructive, active co-operation with the person concerned and self-help is encouraged. After the basic medical examinations and tests, as well as the series of counselling, the choice is left to the woman to decide herself whether, given all the factors put forward to her, she desires to carry the pregnancy to term or abort. If it is the former, she is assisted by special programmes which help her through the pregnancy as well as after in her physical, mental as well as economic needs. If it is the latter, the abortion is performed, usually free of charge, by competent personnel under suitable conditions. Again, there is after-care provided to ensure that the need to abort will not arise again.

It is submitted that a system based on the Mothers' Aid Centre concept can be created and utilised within the present framework of our social and judicial system.

perhaps the more interesting drama will be the plethora of litigation south of the border.

K. W. CHEUNG*

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INSURANCE—SUBROGATION—UNSATISFIED JUDGMENT FUND.—In *Re Ledingham et al.* v. *Di Natale; Re Amodeo et al.* v. *Di Natale*,[1] released September 15th, 1972, the Ontario Court of Appeal would appear to have ignored both the concept of equity and the general principles applicable to insurance in interpreting the rights of subrogation enjoyed by the Ontario Hospital Services Commission (now incorporated as part of the Ontario Health Insurance Plan).[2] From the reasons given, it would seem that the decision was based primarily upon procedural requirements set up in The Hospital Services Commission Act[3] and the regulations thereunder.

The decision in question was an appeal from a judgment of Keith J.,[4] regarding the apportionment of funds available to satisfy awards in two previous actions in which the plaintiff in each recovered damages for personal injuries suffered in a motor vehicle accident caused by the negligence of the same defendant. The total amount awarded at the two trials was $63,496.81 of which $15,543.72 was found to be the value of insured services rendered to the plaintiff by the Ontario Hospital Services Commission. The complicating factor was that the only foreseeable source of recovery of any part of these awards was the fund created under The Motor Vehicle Accident Claims Act[5] which at that time provided for a maximum amount of $35,000.00. The question, therefore, was whether the sum of $35,000.00 was distributable amongst the plaintiffs *pro rata* in relation to the amount of the judgment entered in their favour or whether the Commission as well was entitled to a share to the extent of the value of the insured services provided.

Keith J. directed that the entire $35,000.00 available was payable only to the plaintiffs under these circumstances.[6] In reaching

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[1] [1973] 1 O.R. 291 (C.A.).

[2] The Health Insurance Act, S.O., 1972, c. 91.

[3] R.S.O., 1970, c. 209.

[4] [1972] 1 O.R. 785 (H.C.).

[5] R.S.O., 1970, c. 281.

[6] This decision was cited with approval in the Nova Scotia Supreme Court, Trial Division, in the case of *Grandy* v. *MacKinnon* (1972), 28 D.L.R. (3d) 710. In his reasons for judgment, Cowan C.J.T.D. reiterated his earlier statement in *MacDonald et al* v. *Parrish* (1971), 24 D.L.R. (3d) 467 where at p. 474 he stated that:

"I am of the opinion that, in the circumstances, the amounts recoverable by the respective plaintiffs include the amounts paid respectively on their behalf by the Hospital Insurance Commission. The obligation under

this decision, Keith J. considered The Health Insurance Registration Board Act,[7] The Hospital Services Commission Act and regulation 443[8] under The Hospital Services Commission Act, all of which refer to the services to be provided by the Commission as "insurance" or "insured services".

The learned trial judge concluded as follows:[9]

> The answer to the problems before the Court depends on the interpretation to be given to the words "subrogating the Commission to any right of recovery" in s. 20(1)(*h*) of the *Hospital Services Commission Act* and the words "The Commission is subrogated to any right of an insured person to recover all or any part of the cost of insured services from any other person" as contained in s. 55(2) of Reg. 443.

In discussing the problem, Keith J. refers to the case of *Dias* v. *Ontario Hospital Services Commission*[10] since, up to that date, it was the only case in which the words in question had been the subject of a judicial interpretation and because in reaching the decision in that case, Morand J. was compelled to deal at length with the doctrine of subrogation. Keith J., however, realized that Morand J. was dealing with an entirely different facet of the problem in that case and would appear to have kept this in mind in his analysis. The *Dias* case was decided on the basis that it would be contrary to the clear intention of the legislature not to interpret the term "subrogation" in those particular circumstances in a way in which the Commission would be protected and plaintiff not unjustly enriched.

Since the circumstances of the *Dias* case were not present and since there would appear to be no other circumstances to justify a different result, it is contended that the standard rule of statutory construction should have been applied in the case of *Re Ledingham*

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s. 13(2) to pay any sum recovered to the Commission depends upon recovery of that amount by that person in respect of "insured services received by him under this Act". Her Majesty the Queen, in the right of the Province, is subrogated to the rights of the plaintiffs but, in my opinion, Her Majesty cannot compete in the division of the amount in Court, namely, $40,000, unless and until there has been a complete recovery by the respective plaintiffs of all other amounts recoverable by them from the defendant.

"I am of the opinion, therefore, that the amount in Court should be divided among the various plaintiffs pro rata, based on the amounts of their respective recoveries, excluding, for this purpose, the amounts recoverable with respect to payments made on their behalf by the Hospital Insurance Commission. If and when the respective plaintiffs recover additional amounts from some other source, they will be under an obligation to pay over to the Commission the amount of any recovery representing the recovery of amounts paid by the Commission with respect to insured services."

[7] R.S.O., 1970, c. 199.

[8] R.R.O., 1970.

[9] *Supra*, footnote 4, at p. 790.

[10] [1969] 2 O.R. 447, 5 D.L.R. (3d) 594.

et al. v. *Di Natale*. This rule is succinctly summed up in the following quotation cited by the learned judge:[11]

> In *Maxwell on Interpretation of Statutes*, 11th ed., p. 3, it is said:
> "The first and most elementary rule of construction is that it is to be assumed that the words and phrases of technical legislation are used in their technical meaning if they have acquired one, and, otherwise, in their ordinary meaning . . . ."

Another rule of statutory construction which would appear to have been ignored by the Court of Appeal is that stated by Lord Coleridge C.J. in *Jay* v. *Johnstone*[12] where he states that:[13]

> There is a well-known principle of construction . . . that where the legislature uses in an Act a legal term which has received judicial interpretation, it must be assumed that the term is used in the sense in which it has been judicially interpreted.

That particular case dealt with the meaning to be attributed to the word "judgment" in the Real Property Limitation Act[14] but the occurrence of the term "subrogation" has not been exempt from judicial interpretation.[15]

The Court of Appeal, however, reached a different conclusion than the judge of first instance although it was agreed that the decision required the interpretation of the rights of subrogation enjoyed by the Commission. The court, consisting of Mackay, Kelly and Brooke JJ.A., found that the Commission ranked as a judgment creditor of equal priority with the named plaintiffs and was, therefore, entitled to share in the available funds *pari passu* on a *pro rata* basis.

Early in the reasons for judgment, Kelly J.A., speaking for the court, criticizes the decision of Keith J. in the following curiously worded paragraph:[16]

> Keith J., directed that the whole of the said sum of $35,000 payable out of the Fund should be paid *pro rata* to the plaintiffs holding that the language of the Act and the Regulations, although being the language of insurance, should be interpreted to give a meaning to subrogation to make it only applicable to prevent an insured person from being unjustly enriched.

This comment does not appear justified on the basis of a careful consideration of the judgment being appealed from.

In dealing with the primary ground of appeal, Kelly J.A. states as follows:[17]

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[11] *Supra*, footnote 4, at p. 791.
[12] [1893] 1 Q.B. 25.
[13] *Ibid.*, at p. 28.
[14] (1874), 37 & 38 Vict., c. 57.
[15] See, for instance, *Hutton* v. *Toronto Railway Company* (1919), 45 O.L.R. 550 (App. Div.) and (1919), 59 S.C.R. 413 and also the cases cited in footnote 28 *infra*.
[16] *Supra*, footnote 1, at p. 293. [17] *Ibid.*, at p. 295.

> The principle of subrogation as developed in the Courts of Equity, applied in respect of all indemnity insurance quite apart from any express contract affecting that right but, of course, it was subject to its application to any specific provisions relating thereto contained in the contract between the insurer and any insured. If the *Hospital Services Commission Act* and Regulations had been silent as to the rights of the Commission, I am prepared to assume that the nature of the relationship created by or under the statutes would have given rise to the right of the Commission to be subrogated to any rights of the insured, in which event an examination of the legal implications of the doctrine of subrogation would have been necessary during the course of which the technical acceptance and application of a definition dealing with the technical term would have been appropriate.

He concludes, however, that a discussion of the technical implications of the doctrine of subrogation are unnecessary since the rights of the Commission and the obligations of the insured party are spelled out in the statutes and regulations cited earlier in this article. He finds these rights and obligations spelled out in subsections 2 and 4 of section 55 of regulation 443:[18]

> 55(2) The Commission is subrogated to any right of an insured person to recover all or part of the cost of insured services from any other person, including future insured services, and the Commission may bring action in the name of the insured person to enforce such rights.
>
> . . .
>
> (4) An insured person, who commences an action to recover for loss or damage arising out of the negligence or other wrongful act of a third party to which the injury or disability in respect of which insured services have been provided is related, shall include a claim on behalf of the Commission for the cost of the insured services.

It would seem clear that the foregoing regulations were made under the authority conferred in The Hospital Services Commission Act, section 20(1) (h):[19]

> 20(1) Subject to the approval of the Lieutenant Governor in Council, the Commission may make regulations,
>
> . . .
>
> (h) subrogating the Commission to any right of recovery of past hospital expenses and future hospital expenses by an insured person . . . in respect of any injury or disability, and providing the terms and conditions under which an action to enforce such rights may be begun, conducted and settled and the terms and conditions under which the proceeds of the settlement or a judgment to which the Commission is entitled shall be paid to the Commission, and prescribing security therefor; . . . .

It is contended that the power to make regulations in this area was intended merely as a method of providing the procedure for enforcing this right of subrogation by providing the terms and conditions applicable to a legal action in which the problem arises. Section 55

[18] *Supra*, footnote 8.
[19] *Supra*, footnote 3.

of regulation 443, therefore, should be regarded as purely procedural and as, in itself, having no effect on the substantive rights of either the insured parties or the Commission.

Kelly J.A., however, asserts that because these two actions were carried on by one solicitor as solicitor for the named plaintiffs as well as for the Commission (as provided for in the regulations) and because the total award included the expenses incurred by the Commission (also as provided for in the regulations), therefore the Commission should rank as a judgment creditor of equal priority. It is contended that this is a prime example of procedural requirements governing the substantive result.

Kelly J.A. correctly notes that "Had sufficient funds been available for the payment of the full amount of the judgment, no question would have arisen. . ."[20] and surely this situation is what the procedure set out in the regulations was designed to cover. There seems little justification for Kelly J.A.'s later statement that: "Had it been intended that the right of recovery should be deferred in favour of or preferred over other amounts for which the third parties would be liable, it surely would have been so provided.",[21] especially when the basic rule of statutory interpretation discussed earlier and the usual meaning attributed to the term "subrogation" is considered. It would seem more sensible to place the onus on the legislature to express their intention clearly if they wished a different meaning to be attributed to the term "subrogation" especially in circumstances where there is no justification, either legal or equitable, for reaching a different conclusion.

In the *Dias* case, cited earlier, Morand J. was clearly justified in reaching a different conclusion in light of the circumstances of that particular case. Had the word "subrogate" been given a technical meaning there, the intention of the legislature would have been clearly frustrated and the result reached inequitable. In *Re Ledingham et al.* v. *Di Natale*, there is no such justification for interpreting the right of subrogation in a non-technical way.

If the benefits provided by The Ontario Hospital Services Commission Act and the regulations thereunder are, as they clearly seem to indicate, a form of insurance, then it is relevant to consider some of the principles applicable to insurance policies. For a definition of "insurance" we can look to The Insurance Act where the term is defined as follows:[22]

> "insurance" means the undertaking by one person to indemnify another person against loss or liability for loss in respect of a certain risk or peril to which the object of the insurance may be exposed, or to pay

[20] *Supra*, footnote 1, at p. 295.
[21] *Ibid.*, at p. 296.
[22] R.S.O., 1970, c. 224, s. 1(30).

> a sum of money or other thing of value upon the happening of a certain event; . . . .

MacGillivray on *Insurance Law* notes that insurance policies are to be construed in the same way as other written instruments:[23]

> The true construction of a document means no more than that the court puts on it the true meaning, and the true meaning is the meaning which the party to whom the document was handed or who is relying on it would put on it as an ordinarily intelligent person construing the words in the proper way in the light of the relevant circumstances.

MacGillivray goes on to say that "if there is any ambiguity in the language used in a policy, it is to be construed more strongly against the party who prepared it, that is in the majority of cases against the company"[24] (and therefore in this case against the legislature?).

In interpreting insurance policies, the courts have always placed emphasis on the maxim *verba chartarum fortius contra proferentem accipiuntur* which means that any expression introduced or put forward by one of the contracting parties is in case of its ambiguity to be resolved against or to the disadvantage of that party.[25] The logical result of these precepts is that Keith J. was correct in placing the onus on the legislature to make its intention clear if it wished the results contended for by the Ontario Hospital Services Commission.

The result of the Court of Appeal finding that the Commission is a judgment creditor of equal priority is that the share of the Amodeos in the available fund would drop from approximately $2,500.00 to approximately $1,920.00, the share of the Ledinghams would drop from approximately $32,500.00 to about $24,450.00 and the Commission would recover the balance, approximately $8,630.00. This latter sum is, therefore, deducted from amounts awarded to the plaintiffs pursuant to other heads of damages. The plaintiffs are, in effect, compelled to supply funds of their own for the very services for which they had been paying premiums in order to be insured against. If the question of unjust enrichment can be said to arise in any way in this case, it can only be with regard to the claim of the Ontario Hospital Services Commission.[26]

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[23] (5th ed., 1961), Vol. 1, p. 340, as per Lord Greene M. R. in *Hutton* v. *Watling*, [1948] Ch. 398, at p. 403.

[24] *Ibid.*

[25] Maurice H. Fyfe, Q.C., Interpretation of Insurance Contracts, Law Society of Upper Canada Special Lectures (1962), p. 19, at p. 21.

[26] It may be interesting to speculate on the view which would be taken by the Department of National Revenue in light of the provision in section 110(7) of the Income Tax Act, S.C., 1970-71, c. 63, relating to the deductibility of medical expenses:

110(7). Medical expenses where right to reimbursement. "Notwithstanding anything in this Part, there shall not be included in computing the medical expenses paid by or on behalf of a taxpayer or his legal representative any expenses for which the taxpayer or such representative has

In the earlier case of *Glynn* v. *Scottish Union & National Insurance Co. Ltd.* the same Kelly J.A., speaking for the Court of Appeal, stated:[27]

> Speaking generally with respect to all insurance other than life, the purpose of insurance is to relieve the insured in whole or in part from the financial impact of some contingent event, by shifting the risk of the insured's possible loss to the shoulders of the insurer, a person who for a pecuniary consideration is willing to assume the risk, up to a maximum amount stated in the contract, of the peril insured against. Channell J., in *Prudential Ins. Co.* v. *Commissioners of Inland Revenue* [1904] 2 K.B. 658, at p. 664, expressed it as follows:
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> > A contract of insurance, then, must be a contract for the payment of a sum of money, or for some corresponding benefit such as the rebuilding of a house or for the repairing of a ship, to become due on the happening of an event, which event must have some amount of uncertainty about it, and must be of a character more or less adverse to the interest of the person effecting the insurance.
>
> This statement, as it affects contract of insurance other than life insurance, was approved by Buckley L. J., in *Gould* v. *Curtis, supra,* at p. 95.
>
> This being the purpose of insurance, it follows that indemnity, unless expressly excluded, is a controlling principle by reference to which the respective rights of the parties are to be determined; unless where the terms of the insuring agreement make it conclusive that the intention of the parties was not to enter into a contract of indemnity, a contract of insurance is to be construed as a contract of indemnity.

The primary consideration is to see that the insured gets full compensation for his injuries, any property destroyed and the expenses incurred in making good his loss. The next thing is to see that he holds any surplus for the benefit of the insurance company. It is contended that the regulations, as promulgated by the Ontario Legislature, are no more than a means of seeing that this basic principle is carried out in as convenient a manner as possible.

Next we must turn to the doctrine of subrogation itself. There is ample authority in Ontario for the proposition that there can be no such thing as subrogation to the right of a party whose claim is not wholly satisfied.[28]

It is true that we are dealing here with a *statutory* right of subrogation which, insofar as details are provided, determines the rights of the parties. However, there would seem to be nothing in the statutory material which clearly alters the usual meaning to be

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been or is entitled to be reimbursed."

There would seem to be a legitimate argument that the plaintiffs in this case were not, in fact, reimbursed for the $8,630.00 sum.

[27] [1963] 2 O.R. 705, at p. 711.

[28] *National Fire Ins. Co. et al.* v. *McLaren* (1886), 12 O.R. 682; *Crown Bank* v. *London Guarantee & Accident Co.* (1908), 17 O.L.R. 95; *Globe & Rutgers Fire Ins. Co.* v. *Truedell*, 60 O.L.R. 227, [1927] 2 D.L.R. 659; see also *Pacific Coyle Navigation Co. Ltd.* v. *Ruby General Ins. Co. Ltd.*, 12 W.W.R. (N.S.) 715, [1951-55] I.L.R. 1015 (B.C.).

attributed to the term. It is contended that it should take more than somewhat ambiguous procedural regulations to overthrow a long established common law principle.

This basic proposition in regard to subrogation was established in Ontario as early as 1886 in the case of *The National Fire Insurance Company et al.* v. *McLaren*[29] in a decision by Boyd C. An analogy may be found in the facts of that case and the ultimate results in *Re Ledingham et al.* v. *Di Natale*. In *The National Fire Insurance* case, the defendant took out insurance in the amount of $50,000.00 on some lumber which he owned. The lumber was subsequently destroyed in a fire and the defendant collected the $50,000.00 insurance and commenced an action for damages against the railway which was responsible for the fire and recovered a judgment for $100,000.00. The insurance company then brought an action to recover the $50,000.00 on the ground that the defendant's entire loss had been compensated for by the recovery of the $100,000.00 in the legal action. The defendant was able to show, before Boyd C., that his actual loss was in excess of $150,000.00 rather than the $100,000.00 assessed in the previous legal action. On this basis, Boyd C. denied the insurer's right to subrogation since the defendant had not been fully compensated:[30]

> The doctrine of subrogation is a creature of equity not founded on contract, but arising out of the relations of the parties. In cases of insurance where a third party is liable to make good the loss, the right of subrogation depends upon and is regulated by the broad underlying principle of securing full indemnity to the insured, on the one hand, and on the other of holding him accountable as trustee for any advantage he may obtain over and above compensation for his loss. Being an equitable right, it partakes of all the ordinary incidents of such rights, one of which is that in administering relief the Court will regard not so much the form as the substance of the transaction.

The applicable analogy, if one is to be found, is that, although the plaintiffs in *Re Ledingham et al.* v. *Di Natale* were initially compensated for their hospitalization costs, in the end result they were in fact deprived of in excess of $8,600.00 out of monies awarded by the court for other purposes. Thus the result of permitting subrogation is to deny the plaintiffs the full indemnity upon which the subrogation should be founded. The inequity of the result, reached in this circular manner, is clear.

As Boyd C. puts it:[31]

> In other words, when the assured is put in as good a position by the recovery from the wrongdoer, as if the damage insured against had not happened, then for any surplus of money or other advantage recovered over and above that, the insurer is entitled to be subrogated into the

[29] *Ibid.*, at p. 687.
[30] *Ibid.*, at p. 687.
[31] *Ibid.*, at p. 688.

right to receive that money or advantage to the extent of the amount paid under the insurance policies.

The decision of the Court of Appeal must be taken as wrong on two grounds. Firstly, it reverses the normal onus in statutory construction that it is a general rule that words must be taken in their legal or technical sense unless a contrary intention appears by asserting that the Commission's right of subrogation is to be interpreted in a non-technical manner since a contrary intention was not clearly indicated by the legislature. Secondly, the Court of Appeal's decision subverts the basic doctrine of insurance in that the plaintiffs are compelled to supply funds of their own for the very services for which they had been paying premiums in order to be insured against.

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BILLS OF EXCHANGE ACT—PROMISSORY NOTES—LIABILITY OF SIGNATORIES — EXTRINSIC EVIDENCE — AMBIGUITY — ROLE OF JUDGE.—Unfortunately Canadian judges do not seem to write learned articles on the law. Their reluctance to do so probably stems not only from lack of time but also from an unwillingness to prejudge cases. However, this leaves conscientious judges with no place to point out anomalies and inconsistencies in the law. No place, that is other than in the occasional dicta which they can fit into more or less relevant cases. The unfortunate aspect of this is that what should be the initiation of open discussion becomes instead, quite often, more or less binding judicial fiat. When such dicta are combined with unusually subtle irony the result may be quite dangerous.

An example of this can be found in the recent case by Mr. Justice Wright of *Glatt* v. *Ritt*.[1] The case involved the liability *inter se* of three individuals who had signed a promissory note below the rubber stamped name of a corporation. In the end, Mr. Justice Wright ruled that the individual's liability *inter se* did not depend upon section 52 (1) of the Bills of Exchange Act and the rule for exclusion of evidence applied in *Daymond Motors Limited* v. *Thistle Town Developments Limited*.[2] However, the argument of counsel and the recent Court of Appeal decision of Mr. Justice Arnup in *Albert Pearl Management Ltd.* v. *J. D. F. Builders Limited et al.*[3] seems to have prompted him to write a summary of the present law relating to section 52 (1) and the present law on

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[1] [1973] 2 O.R. 447 (H.C.).
[2] [1956] O.W.N. 867 (C.A.).
[3] [1973] 1 O.R. 594, 31 D.L.R. (3d) 690 (C.A.).

ambiguity—that is on the circumstances in which extrinsic evidence will be allowed to show that individuals signing a promissory note have done so in a representative capacity and not in such a way as to make themselves personally liable. This summary attempts to reconcile all the Ontario cases by distinguishing between one or more individual signatures following a corporation's name. According to Mr. Justice Wright's view of the cases, one signature can be explained by extrinsic evidence while two or more signatures cannot.

Since we must assume such a learned judge as Mr. Justice Wright would not lapse into such silliness, his summary must be subtle irony. Unfortunately, less learned judges or perhaps even busy judges with little time for reflection may pick up this distinction and use it in subsequent cases, not just in harmless dicta but in deciding the cases before them. Mr. Justice Wright would have performed a more valuable service if he had pointed out that the judgment in *Albert Pearl* is either just wrong or that it overrules *Daymond Motors*.[4] There is really no way to reconcile the two cases which will stand up to close analysis. While Mr. Justice Arnup referred to *Daymond Motors* and several western cases and concluded, "none of these cases is identical with the present case", he did not really analyze the reasoning of *Daymond Motors*. In fact, he referred to two partially conflicting British Columbia cases whose facts seem to be indistinguishable. In both *Mauch* v. *Burt*[5] and *Beaver Lumber Company Limited* v. *Denis and Denis Sawmills Limited*[6] promissory notes were signed by one individual following a corporate name. In *Mauch* v. *Burt* the court looked at the extrinsic evidence and found the individual personally liable. On the other hand, in *Beaver Lumber* the court refused to look at extrinsic evidence in finding the individual personally liable. Of those two cases, Mr. Justice Arnup mentioned *Mauch* as perhaps coming closest to the case he was deciding. In *Mauch* the court looked at extrinsic evidence because they felt that a stamped corporation name without more was unusual. Therefore the corporation's name followed by a signature was ambiguous. In fact, a stamped corporation name is used quite frequently to endorse negotiable instruments. However, if Mr. Justice Ruttan in *Mauch* is right that a stamped corporation name as maker is unusual, it really makes no difference whether it is followed by one or more signatures. In any event, Mr. Justice Arnup does not specifically

[4] A similar inconsistency between *Alliston Creamery* v. *Grosdanoff and Tracey*, [1962] O.R. 808 (C.A.) and *H. B. Et lin Co. Ltd.* v. *Asselstyn*, [1962] O.R. 810, 34 D.L.R. (2d) 191 (C.A.) in the Division Court was pointed out by the editors of the Ontario Reports who printed them back to back.

[5] (1964), 45 D.L.R. (2d) 187, 47 W.W.R. 696 (B.C.S.C.).

[6] (1963), 41 W.W.R. 570 (B.C.S.C.).

refer to the reasoning in *Mauch*. Instead he mentions the grave doubts of the court as to how a signature can be used in two capacities—that is, how a single signature can be both the signature on behalf of the corporation and the signature of the individual himself. Mr. Justice Wright has no difficulty in dismissing this nonsense. He states that he is not "oppressed" by these grave doubts and rightly points out that section 52 (1) of the Bills of Exchange Act deals with that very occurrence. However, if these doubts were to be taken seriously in an attempt to reconcile *Albert Pearl* with *Daymond Motors*, once again the fact that there is one individual signature rather than two would seem to be irrelevant. With two signatures the same grave doubts would exist as to whether the two individuals could sign with one signature both on behalf of the corporation and on behalf of themselves. If the grave doubts are to be taken seriously the only way that an individual could be held personally responsible would be if he signed his name twice to the promissory note. Such a rule would be a strange interpretation of section 52 (1). It would still not reconcile *Albert Pearl* with *Daymond Motors*.

One can only hope that no court will take Mr. Justice Wright's tongue-in-cheek analysis seriously and that the Court of Appeal will take the first opportunity to either overrule *Albert Pearl* as an unintentional lapse from the long established rule in section 52 (1) of the Bills of Exchange Act, or to reaffirm *Albert Pearl* and specifically overrule *Daymond Motors* and thus extensively qualify section 52 (1).

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CONTRACTS—SALE OF GOODS—PROBLEMS OF "UNCERTAINTY".—Parties to commercial dealings have considerable freedom to phrase their communications as they wish. This freedom of expression in the negotiating process results in the use of expressions which fail to express the parties' obligations either with sufficient definiteness or with sufficient completeness.[1] The basic argument of this note is that, although indefiniteness and incompleteness are both problems which arise from the freedom of expression allowed to the contracting parties, it is wrong to regard the difficulties to which each gives rise as the same problem and as being capable of solution by applying identical principles.

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[1] See *infra*, in relation to the use of the word "sufficient" under the heading of "Certainty of terms", where it is submitted that the courts do not apply an objective standard of definiteness or of incompleteness.

The way in which incompleteness and indefiniteness tend to be confused is reflected in such statements as, "The agreement of the parties may not contain all the essential terms of their bargain. This creates gaps which, unless filled in by law, will make the agreement unenforceable for want of definiteness of terms"[2]. The phrase "want of definiteness of terms" would appear to be appropriate only where the language used is itself indefinite, whereas the contract which contains gaps rather creates a problem of incompleteness. In the first case, the task of the court is to give a sufficiently definite meaning to the parties' expressions by interpreting the words used in the light of the surrounding circumstances. Where, however, the parties have failed to provide for all the terms which would be regarded as usually necessary, but the court is satisfied that the parties intended to deal, the task of the court is again one of "interpretation" but this time in the broader sense of giving effect to the parties' intention to contract by filling gaps in their contract where possible. This is clearly a very different function from that required of the court where it has to determine whether the parties' expressions are, in the circumstances, sufficiently definite.

If the court cannot give a particular meaning to the words used, either because they are meaningless to the court[3] or, alternatively, are capable of a variety of meanings, the court cannot determine the parties' intention at all. The principles applicable to cases of indefiniteness of expression are stated by Viscount Maugham in *G. Scammell and Nephew Ltd.* v. *H. C. and J. G. Ouston*:[4] "In order to constitute a valid contract the parties must so express themselves that their meaning can be determined with a reasonable degree of certainty. It is plain that unless this can be done it would be impossible to hold that the contracting parties had the same intention; in other words the *consensus ad idem* would be a matter of conjecture." In the absence of evidence of a previous course of dealing or performance of the contract there

[2] Schlesinger, Formation of Contracts (1968), Vol. I, p. 469.

[3] The court may be able to assist as in *Nicolene Ltd.* v. *Simmonds*, [1953] 1 Q.B. 543, by severing the meaningless clause.

[4] [1941] A.C. 251. See also the observations of Megarry J. in *Brown* v. *Gould*, [1971] 2 All E.R. 1505, at p. 1512: "A provision may be void for uncertainty because it is devoid of any meaning. As some critics of certain modern writings may testify, there may be mere gibberish, such as the phrase '*fustum funnidos tantaraboo*' cited in the *Fawcett* case." *Fawcett Properties Ltd.* v. *Buckingham County Council*, [1961] A.C. 636, at p. 647: "The other main head is where there is a variety of meanings which can fairly be put on the provision, and it is impossible to say which of them was intended. Mere ambiguities may sometimes be resolved by the application of legal presumptions, and so on: but where the language used is equally consistent with a wide range of different meanings, it may be impossible to discern the concept which the provision was intended to enshrine."

is no basis upon which the court can prefer one party's meaning to that suggested by the other and, because there would be no justification for the court to impose its own meaning, it would be compelled to hold that no contract had been formed.[5] With indefiniteness of expression the court is, therefore, trying as best it can to give a particular meaning to the phrases used, by a process of "interpretation in the light of the surrounding circumstances".[6]

Where, however, the parties have either deliberately or inadvertently left gaps in their contract, it has already been pointed out that the court will endeavour to fill these gaps if satisfied that the parties intended to contract. The courts appear to proceed in a vague way towards the filling of gaps by a process of "implying" "reasonable" terms. However unsatisfactory this approach may be, as compared with the deliberate gap-filling techniques used by American courts, it is clearly a very different process from that used by the courts where the parties have used indefinite language. There is, therefore, a clear distinction which must be drawn between "indefiniteness" and "incompleteness".

It is submitted that it is equally important to distinguish both indefiniteness and incompleteness from the problem facing the court where the parties have expressly provided for further agreement as, for example, in *Loftus* v. *Roberts*[7] ("at a West-end salary to be mutually arranged between us") or *May and Butcher* v. *The King*[8] ("the prices to be agreed upon"). It is clear that there was nothing vague or incomplete in either case; merely that the parties had provided that a term was to be agreed upon in the future and, since the parties may never agree upon the term and are under no obligation to do so, there cannot be a breach of an obligation for which the court could award damages. The court would normally be reluctant to attempt to preserve these agreements to negotiate by means of the usual gap-filling devices, which can be used with open terms, because this would override the expressed intention of the parties.[9]

It is now proposed to identify the particular problems created by some "leading cases" in this area of the law. They are invariably cited together as illustrations of the problem of "Certainty" and an

[5] Where A's promise is indefinite. B cannot enforce it because a particular meaning cannot be ascribed to it and A cannot enforce B's promise because he has not furnished consideration for it.

[6] I Corbin on Contracts (1950), p. 67.

[7] (1902), 18 T.L.R. 532.

[8] [1934] 2 K.B. 17n.

[9] However, exceptional circumstances may exist as in *Foley* v. *Classique Coaches*, [1934] 2 K.B. 1 where the price term was subject to further agreement but the parties had performed the contract for a period of three years. The court used a gap-filling device and implied a term that the price should be a "reasonable" one.

attempt is made to "explain" them as part of that single problem.[10] However, it is submitted that the correct approach is not to attempt to reconcile these cases at all but to recognise the fact that they are illustrations of different problems. A correct categorization of these cases will help to emphasize the importance of separating problems of incompleteness, where the parties have left gaps in their contract which can usually be filled by reference to the standard of what is reasonable, from the difficulties associated with either indefiniteness or agreements to negotiate.[11] Each problem requires its own analysis and the use of appropriate judicial techniques for the solution of the difficulties that it creates.

One of the problems of indefiniteness of expression occurs where a phrase is used which is capable of a variety of meanings and there is no basis upon which the court can select a particular meaning. *G. Scammell and Nephew Ltd.* v. *H. C. and J. G. Ouston Ltd.*[12] is a good illustration of this difficulty where an order for a vehicle contained the words: "This order is given on the understanding that the balance of purchase price may be had on hire-purchase terms over a period of two years." The court could not uphold this arrangement because there was no basis, in the absence of a previous course of dealing, upon which they could select particular hire-purchase terms. Other leading cases, falling within the category of the indefinitely expressed term, are *Love and Stewart Ltd.* v. *S. Instone and Co. Ltd.*[13] ("subject to strike and lock-out clause"), *Bishop and Baxter Ltd.* v. *Anglo-Eastern Trading Co.*[14] (a purported acceptance "subject to war clause") and *British Electrical etc. Industries Ltd.* v. *Pately Pressings Ltd.*[15] ("subject to *force majeure* conditions"). The indefinitely expressed terms in these cases, each having a variety of meanings, prevented the court from upholding the contract.

An important point to appreciate, however, is that the principle laid down in *G. Scammell and Nephew Ltd.* v. *H. C. and J. G. Ouston Ltd.*,[16] relating to indefinitely expressed terms, may be of little value where the issue before the court is whether the subject-matter of the dealing was described adequately enough to enable the court to identify the goods. *Hillas and Co. Ltd.* v. *Arcos*

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[10] See, for example, Samek, The Requirement of Certainty of Terms in the Formation of Contract (1970), 48 Can. Bar Rev. 203, at pp. 213-233; Cheshire & Fifoot, The Law of Contract (8th ed., 1972), pp. 33-35; Treitel, The Law of Contract (3rd ed., 1970), pp. 52-54 and Anson's Law of Contract, (23rd ed. by Guest, 1969), pp. 23-26.

[11] For a discussion of the "agreement to agree", see Ellinghaus, Agreements which Defer "Essential" Terms (1971), 45 A.L.J. 4.

[12] *Supra*, footnote 4.

[13] (1917), 33 T.L.R. 475.

[14] [1944] K.B. 12.

[15] [1953] 1 All E.R. 94.

[16] *Supra*, footnote 4.

Ltd.[17] is a good example of the latter problem where the House of Lords was satisfied that the subject-matter of the contract ("buyers shall also have the option of entering into a contract with sellers for the purchase of 100,000 standards for delivery during 1931") was described sufficiently, in the light of the previous course of dealing, to enable the timber to be identified. Where the court is faced with an indefinitely expressed term, no doubt the discussion of general principle in *Hillas and Co. Ltd.* v. *Arcos Ltd.* may be of some value but it is submitted that the principle laid down in *G. Scammell and Nephew Ltd.* v. *H. C. and J. G. Ouston Ltd.*[18] would be applied as the correct authority to deal with the particular problems of the indefinitely expressed term and the decision in *Hillas and Co.* v. *Arcos Ltd.*, concerned as it was with the adequacy of the description of the subject-matter, would not be relevant. Yet Cheshire and Fifoot attempt a comparison between these cases and then state that the judge ". . . will follow, if this is at all possible, the example of *Hillas* v. *Arcos* rather than *Scammell* v. *Ouston*".[19] This is only true if the statement is merely an attempt to re-affirm the notion that the courts will uphold a contract if they possibly can. From any other point of view it is clearly misleading because if the problem relates to indefinitely expressed terms, and not inadequately described subject-matter, then *G. Scammell and Nephew Ltd.* v. *H. C. and J. G. Ouston Ltd.*[20] will still be the appropriate authority.

It is further submitted that no useful purpose at all can be served by attempting to reconcile either *G. Scammell and Nephew Ltd.* v. *H. C. and J. G. Ouston Ltd.* or *Hillas and Co. Ltd.* v. *Arcos Ltd.* with *May and Butcher* v. *The King*,[21] where the contract provided for future agreement as to the price of the goods, and the basis of the decision was that there was an "essential term" which required further agreement, as in *Loftus* v. *Roberts*.[22] *Foley* v. *Classique Coaches*[23] (the sale of petrol "at a price to be agreed") falls within the same category, although the circumstances surrounding the contract in *Foley's* case (the presence of an effective arbitration clause and the fact that the parties thought they had a contract and had performed it for a period of three years) can be used to distinguish it from *May and Butcher* v. *The King*. However, the principles applicable to the usual case of the agreement to negotiate can surely have no application to cases like *G. Scam-*

[17] [1932] All E. R. Rep. 494.
[18] *Supra*, footnote 4.
[19] *Op. cit.*, footnote 10, p. 35.
[20] *Supra*, footnote 4.
[21] *Supra*, footnote 8.
[22] *Supra*, footnote 7.
[23] *Supra*, footnote 9.

mell and Nephew Ltd. v. *H. C. and J. G. Ouston Ltd.* or *Hillas and Co.* v. *Arcos Ltd.*

It is now proposed to comment upon three "principles" which are invariably referred to in any consideration of the problems of uncertainty. The first is the requirement of "certainty" of terms, the second is that "the courts will not make a contract for the parties" and the third which suggests that the courts will construe "commercial contracts" liberally.

Certainty of terms

It is submitted that it is important to appreciate that, considering the basic distinction which has been made between indefiniteness and incompleteness, the phrase "certainty of terms" has no relevance at all to problems of incompleteness. Further, its only application to indefiniteness is in the sense that the court will be able to uphold a contract where its terms are sufficiently definite to enable it to give a particular meaning to the language used. In other words, with open terms the problem is one of incompleteness, not "certainty of terms", and the ways in which the court can fill gaps, if satisfied that the parties intended to contract. In relation to indefiniteness, it has already been pointed out that the applicable principle is that: "In order to constitute a valid contract the parties must express themselves that their meaning can be determined with a *reasonable degree* of certainty."[24] Thus a degree of definiteness is required which will enable the court to give a particular meaning to the words used in the light of the surrounding circumstances so that the parties' obligations can be determined.

However, it has been stated[25] that: ". . . even if the parties have not expressed their agreement with precision, as long as they have come within a reasonable distance of certainty, the contract will be upheld; and a reasonable distance appears to be settled as one which the courts can bridge without difficulty by putting into exact words what the parties have expressed inexactly." The notion that the parties must come "within a reasonable distance" of some objective standard of "certainty" and the suggested willingness of the court to uphold a contract if they can "bridge" this reasonable distance "without difficulty" (when in fact the court must try as hard as it can to give a particular meaning to the indefinite language used by the parties or, with open term problems, to do the best it can to fill the gaps where there is an intention to contract) expresses, it is submitted, a total misconception of the way in which the courts must approach difficulties of this nature.

[24] *Supra,* footnote 4, at p. 255, per Viscount Maugham. (Italics mine).
[25] Fridman, Construing, Without Constructing, a Contract (1960), 76 L.Q. Rev. 521, at p. 524.

In relation to the cases, all that can be said is that in some the terms were, and in others the terms were not, too indefinite for the court to give them a particular meaning. There is no evidence, however, of the courts in any of the cases using an objective standard of "certainty" in an attempt to deal with the difficulties. All they were concerned with was to try and give a particular meaning to the indefinitely expressed terms. The idea of coming "within a reasonable distance of certainty" has even less meaning in relation to open terms, where the primary concern of the court is to be satisfied that the parties intended to deal. If satisfied of this, it will then attempt to fill the gaps in the contract.

Professor Samek rightly rejects, it is submitted, the idea of an objective standard of "certainty".[26] However, it is further submitted that his own attempt to apply what he calls a "quantitative approach" is equally inappropriate to deal with problems of either indefiniteness or incompleteness. It is stated[27] that: "This standard is itself relative and not absolute; it need not enable the open terms to be filled in with absolute certainty as long as it enables them to be filled in within a quantum of certainty which is reasonable in the particular circumstances of the case." In relation to open term contracts it is clear that the court will be able to fill most gaps once it is satisfied that the parties intended to deal. In the light of this gap-filling process, where the function of the court is to help the parties to fulfil their intention to contract, it is submitted that it is quite meaningless to talk in terms of a "quantum of certainty which is reasonable". With problems of indefiniteness the court is trying to give a particular meaning to the language used. It has already been noticed that the court was unable to do this in *G. Scammell and Nephew Ltd.* v. *H. C. and J. G. Ouston Ltd.*[28] because the phrase used was capable of a variety of meanings and there was no basis upon which the court could select a particular meaning. However, Professor Samek, again applying his "quantitative approach", explains this case by saying that the court could not help because "the quantum of certainty here was too great, since on the respondent's own showing there was no objective standard of what was reasonable with reference to which the open term could be filled in".[29] Apart from this reflecting a confusion between problems of indefiniteness and incompleteness, it is suggested that the use of a "quantum of uncertainty" as a method of dealing with problems of indefiniteness has as little to recommend

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[26] *Op. cit.*, footnote 10.

[27] *Ibid.*, at p. 204, and see at p. 208 where the same statement is repeated.

[28] *Supra*, footnote 4.

[29] *Op. cit.*, footnote 10, at p. 228.

it as has Fridman's test[30] of the parties coming within a "reasonable distance of certainty" which "the courts can bridge without difficulty . . .".

The court will not make a contract for the parties

The theory behind this statement that the courts will not make a contract for the parties and it is for them to make their own contracts would appear to be that the special contractual relationship results from the intention and acts of the parties themselves and that "freedom of contract" requires that they, and not the courts, should fix the terms of the contract. It is submitted that, in relation to the indefinitely expressed terms, this states a very sound principle. Where, for example, the phrase which the parties have used is (1) meaningless to the court or (2) capable of a variety of meanings, in the first case there is no way in which the court can give meaning to the expression[31] and in the second case there is usually[32] no basis for preferring either party's explanation of what the indefinite language means. In either case there would certainly be no justification for the court to impose its own ideas of what it thinks the parties might have intended. This would clearly amount to "making a contract for the parties" which the court would be unable to say expressed the parties' initial intentions because it was unable to ascertain them in the first place. However, this principle has no relevance where there are gaps in the parties' contract and it in no way conflicts with the willingness of the courts to fill gaps where it is satisfied that the parties intended to contract but have left terms open. Here the court is not making a contract for the parties but merely enabling them to carry out their own intentions.

The "commercial nature" of the transaction

"The courts, it appears, will construe commercial contracts liberally."[33] In relation to the vague or ambiguous phrase ("Businessmen often record the most important agreements in crude or summary fashion. . . .")[34] it seems clear that it may be easier for the court to determine the meaning intended by the parties if they are businessmen contracting against a trade background because it is more likely that there will be evidence of what these expressions mean to the parties who are in the particular trade. Again,

[30] *Op. cit.*, footnote 25, at p. 524.

[31] The court may, however, be still able to uphold the contract if it can sever the meaningless clause as in *Nicolene Ltd.* v. *Simmonds, supra,* footnote 3.

[32] There may be evidence of a previous course of dealing which shows the particular meaning which the parties had given to the phrase in the past.

[33] Schlesinger, *op. cit.*, footnote 2, Vol. I, at p. 476.

[34] *Hillas and Co. Ltd.* v. *Arcos Ltd., supra,* footnote 17, at p. 503, per Lord Wright.

with an "open term" problem, the court is likely to be able to assist businessmen more easily because it is again likely that there will be evidence of a trade usage, or a previous course of dealing, which will help to fill the gap in the contract.[35]

In both cases the "commercial" nature of the transaction enables the court to assist because it involves dealings between parties who are familiar with a particular trade or course of dealing. In both cases, therefore, the word "commercial" has been given a particular meaning. In a non-technical sense, however, most contracts are *commercial* transactions. As far as contracts containing open terms are concerned there can be no reasons why ordinary contracts entered into by ordinary people should be treated differently from the same type of contract entered into by merchants. The gaps in the latter case may be able to be filled more easily by evidence of a trade usage or course of dealing but apart from this there ought to be no distinction drawn. It is submitted that the same argument is true where there are indefinite expressions.[36]

Conclusion

It is apparent that the three "principles" which have been considered are of little value in dealing with problems of "uncertainty". They suffer from the same defects as some of the cases themselves—vagueness and ambiguity. It is submitted that, although problems of uncertainty have a common source; the freedom of the parties to phrase their communication as they wish, it is essential to distinguish between difficulties relating to indefiniteness and problems of incompleteness. In turn it is necessary to distinguish both from the difficulties associated with "agreements to agree". Each requires its own analysis and appropriate judicial techniques for upholding the contracts where possible.

M. HOWARD*

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STATUTES — INTERPRETATION — SECURITIES — INSIDER TRADING LIABILITY LEGISLATION.—*Green* v. *The Charterhouse Croup Canada Ltd. et al.* is the first reported decision under the insider trading liability legislation which came into effect in Ontario in May,

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[35] See Viscount Maugham in *G. Scammell and Nephew Ltd.* v. *H. C. and J. G. Ouston Ltd., supra,* footnote 4, at p. 255.

[36] It is, therefore, difficult to comprehend the reasoning behind a statement such as this: "Commercial contracts are more likely than others to be given an interpretation which effectuates and validates them. . . ." in Fridman, *op. cit.,* footnote 25, at p. 526.

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1967.[1] Mr. Justice Grant of the Supreme Court of Ontario dismissed with costs Green's suit alleging insider trading by the defendants and claiming recovery of his loss suffered in selling his shares to them.[2] This judgment sketches out some important inter-

[1] April 27th, 1973, not yet reported. The core liability provision, s. 113(1) of The Securities Act, 1966, R.S.O., 1970, c. 426, as am. 1971, c. 31, 1972, c. 1, hereinafter "the Act", reads:

> "(1) Every insider of a corporation or associate or affiliate of such insider, who, in connection with a transaction relating to the capital securities of the corporation, makes use of any specific confidential information for his own benefit or advantage that, if generally known, might reasonably be expected to affect materially the value of such securities, is liable to compensate any person or company for any direct loss suffered by such person or company as a result of such transaction, unless such information was known or ought reasonably to have been known to such person or company at the time of such transaction, and is also accountable to the corporation for any direct benefit or advantage received or receivable by such insider, associate or affiliate, as the case may be, as a result of such transaction."

A similar provision was inserted in Ontario corporations legislation, currently s. 150 of The Business Corporations Act, R.S.O., 1970, c. 53, as am. 1971, c. 26, 1972, c. 138. Parallel provisions were subsequently introduced in securities and corporations legislation in British Columbia, Alberta and Manitoba, securities legislation in Saskatchewan and the Canada Corporations Act, currently S.B.C., 1967, c. 45, as am.; R.S.B.C., 1960, c. 67, as am. 1961, c. 59, 1962, c. 11, 1965, c. 4, 1966, c. 10, 1967, c. 12, 1968, c. 9; R.S.A., 1970, c. 333, as am.; R.S.A., 1970, c. 60; R.S.M., 1970, c. S-50, as am.; R.S.M., 1970, c. C-160; S.S., 1967, c. 81, as am.; R.S.C., 1970, c. C-32, as am.; 1970 (1st Supp.) c. 10; S.C., 1970-71, c. 1 Since the parallel and somewhat enlarged insider liability provisions of the Canada Corporations Act came into effect subsequent to the defendants' conduct here complained of in the shares of Imbrex a federally incorporated company, those provisions were not pleaded and a possible constitutional issue was avoided. Quebec has recently given first reading to Bill 6, An Act to amend the Securities Act (1973, Fourth Session, Twenty-Ninth Legislature) which substantially conforms to the securities legislation of the five provinces to the west and adopts the parallel and somewhat enlarged insider liability provision of the Canada Corporations Act. The three Maritime provinces of New Brunswick, Nova Scotia and Prince Edward Island have recently considered amending their securities legislation, and insider trading liability provisions would likely be included in any changes.

An earlier insider liability suit had been launched in Ontario arising from trades in shares of Clairtone Ltd., but it was settled before coming to trial. On February 6th, 1973, Addy J. of the Ontario Supreme Court entered an order under s. 114 of the Act requiring the Ontario Securities Commission ("OSC") to commence an action on behalf of Multiple Access Ltd. against certain of its insiders for an alleged breach of s. 113. In *Farnham et al.* v. *Fingold et al.*, [1973] 2 O.R. 132 (C.A.) a preliminary motion to strike out an insider liability suit was dismissed and left to be determined at trial. There the suit sought, *inter alia*, sharing of a premium for and damages allegedly arising from the sale of the controlling interest of a corporation. Finally in *La Reine* v. *Edmund Littler*, Case No. 580/69, Cours des sessions de la paix, Montréal, Juge Loranger, December 6th, 1972, unreported (Globe and Mail and Toronto Sun, December 7th, 1972) an insider was convicted of criminal fraud for purchasing shares in anticipation of a takeover bid. The conviction is being appealed.

[2] As well as invoking s. 113, Green also unsuccessfully alleged a conspiracy to deprive him of his securities unlawfully, and fraudulent and

pretive criteria for the novel insider liability provisions.

Green was a director and senior officer of Imbrex Ltd. and of one of its subsidiaries Green Ltd. until December, 1967. He then resigned from both offices in both companies under a negotiated severance agreement. Imbrex was a federally incorporated company listed on the Toronto[3] and Canadian and Vancouver Stock Exchanges. It was formed in 1965 to merge Green's carpet distributorship company in Ontario with two similar companies in Quebec and the Maritime provinces. The latter two brought to Imbrex exclusive franchises to distribute Harding carpets, the product of a well-known Canadian manufacturer, in Quebec and the Maritimes. Subsequently Imbrex acquired Jordans Rugs Ltd. which held a similar franchise west of Ontario. The franchise agreement was somewhat precarious, capable of termination by either party on three months notice.

Green and the principal shareholders of the Quebec, Maritime and Western constituent companies in the amalgamation which gave birth to Imbrex, along with Charterhouse Group Canada Ltd., a venture capitalist which had supplied equity financing, were parties to a shareholders' buy-sell agreement. Under the terms one party was obliged to give the others a right of first refusal before selling his shares. All these parties were insiders[4] of Imbrex and all but the Maritime group and Green himself were subsequently defendants in the insider suit.

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negligent misrepresentation by the defendants numbering twelve in all, several of whom were not insiders within the statutory definition. The award of costs to the defendants is probably the result of the plaintiff's alternative claim of conspiracy to defraud which Mr. Justice Grant found to be entirely unfounded and which caused the trial to last double the normal time (Judgment of Grant J., p. 155. The isolated page references hereafter are to the judgment itself unless otherwise identified). The matter of costs concerned the law reform Committee which recommended the legislation (Report of the Attorney General's Committee on Securities Legislation in Ontario, Toronto, March, 1965, called after its Chairman, "the Kimber Report", paras 2.24 and 2.29) and consequently the legislation (S. 114) provided that the OSC may be required to pursue an action on behalf of the corporation against an insider on application by one of the corporation's securities holders. *Farnham et al.* v. *Fingold et al.*, (*ibid.*, which will probably be among the most expensive suits in Canadian history now on appeal to the Supreme Court of Canada) decided that the regulatory agency could only be required to act in the corporation's suit against insiders and not in one by a securities holder for recovery of *his* loss from insiders. In the order entered with respect to Multiple Access Ltd., the complainant shareholder was required to indemnify the OSC and the company for costs on a solicitor-client basis if the action were unsuccessful. This is perhaps the beginning of a costs trend which will discourage private suits against insiders and may create pressure for greater regulatory intervention.

[3] Hence subject to the Act (s. 109(1)(b)) for purposes of insider trading reporting and liability.

[4] Defined to include directors, senior officers and 10% equity shareholders of a corporation (s. 108(1)(c)).

Commencing in the spring of 1967 Green gave notice of his desire to sell 20,000 of his approximately 100,000 Imbrex shares. When the parties to the shareholders' agreement failed to exercise their rights he sold the 20,000 through the market at prices of $5.25 to $6.00. At the time of his severance from Imbrex in December, 1967 he indicated his desire to dispose of the remaining 80,000. Negotiations with the other parties to the agreement commenced culminating in Green's offer to sell all at $6.00 a share on May 3rd, 1968 and his acceptance of a counter offer to purchase all at $5. 7/8 on May 6th, the transaction which spawned this suit.

At the time of his severence from Imbrex, Green had unsuccessfully offered his shares to Harding Carpets Ltd. Imbrex' President, Godbout, early in January, 1968 began discussions with Harding officers with a view to a merger of the two companies. After several meetings, they concluded by mid-February that each company should consider its position and renew discussions on April 1st. This they did and Godbout notified Imbrex directors that Harding welcomed a merger but how and when to do it was subject to further consideration. On May 1st Harding postponed a meeting with Godbout proposed for the same day to May 21st. It was further postponed until Godbout told Harding on June 9th of another potential acquirer of Imbrex and the next day Godbout offered all Imbrex shares to Harding at $8.50-$8.75. Harding refused. Godbout concluded that the possibilities of merger with Harding were very slim, believing that Harding was angered at Godbout's apparent desire for Imbrex to acquire control of Harding through the merger and at his discussions with a potential acquirer which had a wide variety of product lines. Godbout then knew that Harding would almost certainly sever the franchise arrangement which was Imbrex' principal asset.[5]

Godbout immediately contacted Neon Products Ltd., a Vancouver based conglomerate, and they quickly agreed on a Neon share exchange take over bid for Imbrex which at the then market price for Neon valued Imbrex at $12.00 per share.[6] The Neon-Imbrex relationship had its birth in an investment dealer's exploratory letter to Godbout in late February, 1968 followed by several

[5] Some months after the Neon take over discussed below Harding terminated the franchise. Imbrex tried to carry on several other distributorships unsuccessfully and does not carry on business now. Grant J. concluded that "the purchase of [Imbrex] turned out to be a very poor venture for Neon". (p. 100).

[6] It was conditional on a Neon audit of Imbrex' books, on 90% acceptance of the subsequent Neon public take over bid so it could exercise the compulsory acquisition powers under the Canada Corporations Act for the balance (now R.S.C., 1970, c. C-32, as am., s. 136) and a large part of the Neon shares received by Imbrex directors being escrowed for eighteen months.

meetings in March and April, with Neon suggesting on April 29th that Imbrex was worth $10.00 a share in Neon stock and Godbout countering he would only consider reporting a price of $12.50 a share to the Imbrex board. Neon's analysts were permitted access to Imbrex to make an appraisal on the promise that Neon would make an offer by May 16th if satisfied. The Neon discussions were reported to the Imbrex board with some concern expressed that Neon stock was inflated in price.[7]

Green had been advised orally by several of the Imbrex directors of the possibility of an offer for Imbrex. He interpreted that the offeror was Harding. On April 30th, six days before the disposition of his 80,000 shares, the Imbrex board authorized the advice to be crystallized in a confidential letter from one of its directors to Green. It stated "that preliminary discussions have taken place which conceivably might result in an offer being made for Imbrex shares at a price in excess of" their current market price and concluding "it is expected that the matter will be resolved within the next two weeks".[8]

The Imbrex shares ranged in price from $4.00 to $5.00 in March, 1968 trading, reached a peak of $5. 1/8 for April on the last day of the month with heavier trading in May peaking at $6. 2/8. By June 10th the price reached $7.00 and following the announcement of the Neon offer on June 12th gradually increased to a high of $16. 3/8 on June 28th. Neon's high was $16. 1/2 in January, 1968 remaining stable until it reached peaks of $25.00 in April and $26.00 in May. In June its high was $43. 5/8 and its low $23. 1/2 and for the rest of 1968 its high ranged between $36. 1/4 and $44. 3/4. It declined through 1969 with a high at year end of $21.00 dropping to $7.40 in 1970 and reviving somewhat to a high of $10. 2/8 and a low of $8.80 at the end of 1972.

The great bulk of Grant J.'s 158 page judgment is a discussion of the evidence and findings of fact. The analysis of applicable legal principles is by contrast, brief and therefore tantalizing. The first of these concerns interpretive tools. In construing the insider trading liability provision of the Act the judgment quotes one paragraph of the *Kimber Report*[9] styling it as relevant "for the limited purpose of determining what was the defect or evil which the legislation intended to remedy" but making it clear that "the rec-

[7] It was then trading at a multiple of twenty times earnings contrasted to Imbrex' multiple of ten and was characterized as a conglomerate which purchased companies having a lower earnings multiple with the objective of applying those added earnings to the acquirer's multiple to increase its stock price geometrically. This coupled with the escrow requirement had significance for a determination of what was the "true cash equivalent" price for Green's Imbrex stock.

[8] P. 71.

[9] *Op. cit.*, footnote 2.

ommendations of such *Report* cannot be referred to directly to determine the intention of the legislature in enacting the insider trading provisions".[10] Since that *Report* is such a clear statement of the objectives for reformed securities and corporations legislation in Ontario from 1967 forward, it is most desirable that it not be ignored by courts interpreting that legislation.

The use of interpretative jurisprudence is also somewhat restrictive. Mr. Justice Grant's comparison of United States with Canadian and English insider case law and his consideration of the *Kimber Report* causes him to conclude that "our court ought not to rely on American case law under Rule 10b-5 [one of the two United States federal securities statutory liability provisions impinging on insider trading] as a guide to the interpretation of [section 113] but should rather look to the words of our statute and interpret them in their plain and ordinary meaning".[11] This is an unfortunate conclusion because, if applied broadly, with one bold stroke of the pen it forecloses Canadian courts and tribunals from the rich resource of American jurisprudence interpreting the seminal United States federal securities legislation on which the prospectus, annual and semi-annual financial statements, proxy, timely disclosure and insider trading provisions of the Act are largely modelled.[12] A more extensive reading of the *Kimber Report's* chap-

[10] P. 109. Recently there had seemed to be a salutary weakening in Canada of the resistance to admitting law reform reports and legislative debates as guides to legislative intent, a practice which is commonplace in United States courts. See *e.g. Re Lambert Island Ltd. and Attorney-General of Ontario,* [1972] 2 O.R. 659, at p. 669; *Gaysek* v. *The Queen,* [1971] S.C.R. 888, at p. 902, 18 D.L.R. (3d) 306, at p. 317; *Re Alberta Ombudsman Act* (1970), 72 W.W.R. 167, at p. 180, 10 D.L.R. (3d) 47, at p. 51 (Alta S.C.) and the culminating incident, insofar as the Kimber Report and the Act are concerned, *Re Maher Shoes Ltd. No. 1,* [1967] 2 O.R. 684, at p. 689 (S.C.) where the Report was quoted without comment on the issues of admissibility or probative value in a sales disclosure exemption case.

[11] P. 111.

[12] See the Kimber Report, *op. cit.,* footnote 2, at paras 2.10, 2.45, 2.18, 2.24, 2.28, 3.05, 4.01, 5.04-5.09, 5.11-5.13, 5.17-5.18, 5.21, 5.28, 6.04, 6.07, 6.13, 6.17-6.23, 7.18. Consider the rather more generous attitude of Professor Loss whose six volume treatise is the seminal United States work on securities regulation. In introducing that section of his treatise which casts "A Comparative Glance At The British Commonwealth Legislation" (1960 ed., pp. 427-428) he states:

> "At least a nodding familiarity with the regulatory approach to the distribution of securities in the principal jurisdictions of the British Commonwealth is desirable for several reasons apart from the pure science aspects of comparative law: The Securities Act of 1933, though it is not so close to the prospectus provisions of the English Companies Act as are the prospectus provisions of the other Commonwealth jurisdictions, is basically in the English disclosure tradition. . . . This makes judicial precedent under all these statutes interchangeable to some extent. And, apart from these considerations, the Canadian legislation is of particular interest to the American lawyer, not only because the close relations between the two countries may actually throw him into contact with Canadian companies and Canadian offerings, but also

ter on insider trading would have made it clear that the insider trading provisions of the Act borrow from the basic principles of the 1934 United States Securities and Exchange Act and to some extent the 1962 *Report* of the United Kingdom Company Law Committee which in turn was influenced by the United States model.[13]

Some light is shed on procedure in insider suits. Grant J. concludes that once it is established that an insider "buys from one who has no knowledge of the events that constitute . . . specific confidential information" then "an onus of explanation devolves upon"[14] the insider to establish he did not use specific confidential information. Unhappily nothing more is said to anchor this shifting burden of proof. Must the plaintiff prove the existence of certain specific confidential information before the burden of disproving use crosses to the defendant insider? Or is there a presumption of use by an insider of specific confidential information any time he trades, regardless of the proved existence of specific confidential information, which the insider must rebut in any suit?[15]

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because the blue sky laws of the Canadian provinces are very similar to those of the states and once again a Canadian precedent may be available when none can be found on the other side of the border."

Nor have the United States courts been reluctant to take up this invitation. See for example the leading American case on the concept of public offering, *S.E.C.* v. *Ralston Purina Co.* (1953), 346 U.S. 119, 73 S. Ct 981, where the U.S. Supreme Court said "Decisions under comparable exemptions in the English Companies Acts and state 'blue sky' laws, the statutory antecedents of federal securities legislation have made one thing clear—to be public an offer need not be open to the whole world" and then applied the House of Lord's broad definition of "the public" in *Nash* v. *Lynde*, [1929] A.C. 158.

In *Escott* v. *Bar Chris* (1968), 283 F. Supp. 643 the classic United States authority on director's liability for a false statement in the prospectus the United States federal court applied the English case of *Adams* v. *Thrift*, [1915] 1 Ch. 557, aff'd [1915] 2 Ch. 21 on director's duty of diligence in relying on statements of officers. For an early recognition of the parallels between the Canadian and United States practices and jurisprudence in securities transactions by a Canadian court see *Clarke* v. *Baillie* (1912), 45 S.C.R. 50, per Anglin, J., at p. 76.

[13] See the Kimber Report, *op. cit.*, footnote 2, paras 2.10, 2.18, 2.24 2.28.

[14] P. 114.

[15] A subsequent statement in the judgment suggests that the latter interpretation was not intended (at pp. 121-122): "Section 113 has application only when the knowledge of the facts in question have attained the quality of constituting specific confidential information. It is only then that the insider who makes use thereof for his own benefit or advantage attracts the liability of the section to compensate anyone who suffers direct loss thereby. There is no compulsion in the section requiring an insider to make such information public or known to anyone. It only renders him liable to compensate to [sic] the person who has suffered such loss if liability thereunder is present. Neither is there any specific prohibition against the insider trading in such circumstances but he attracts liability of the section thereby if he does." It is submitted that an interpretation

The major substantive finding of the judgment deals with what is specific confidential information. The court concludes that the possibility of the Neon take over, information available only to the purchasers of Green's shares at the time they bought, was not specific confidential information.[16] It distinguished between an insider's ability to analyze facts generally available on the one hand and knowledge of specific events or probability of future events arising through insiders' access to the corporation's business on the other hand, a distinction which is easy to state but hard to make. Stirring to the task it employed a dictionary definition of specific—"having a special determining quality—precise or exact in respect of fulfillment, conditions of terms; definite, explicit"[17] but then abandoned the phrase-parsing exercise and commenced to explore the purpose for which the liability provision was enacted, producing a "corporate purpose" test:[18]

> The purpose of attaching liability to an insider who offends against the section is to dissuade such a person who has information of the type described therein from taking advantage thereof in his dealings with an outsider who has no knowledge thereof. It is the type of knowledge that is acquired for corporate purposes and not for the personal benefit of the insider. The requirement that the information if generally known, might reasonably be expected to affect materially the value of the securities provides some protection against the claim of an outsider who is dissatisfied with his bargain for other reasons and uses the section as a means to his own advantage.

The section on its face does not require that the information has a "corporate purpose". Has this test narrowed the section's ambit? Is it not the use of specific confidential information whether or *not* it has a corporate purpose that the section proscribes subject to a market test of materiality? And if the section is now circumscribed by a "corporate purpose" test, what does that test mean? What if, for example, one of the insiders of Imbrex learned privately

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requiring the plaintiff first to prove the existence of specific confidential information is clearly preferable as a matter of policy. The insider should not be discouraged from trading by the threat of having to disprove in court that he used inside information without at least a *prima facie* case of use first established against him. The Kimber Report intimated that the insider should not suffer this disability. Although it is not conclusive evidence, the Report rejected the United States 1934 Act, s. 16(b) "short-swing" provision which rendered an insider liable without regard for use of inside information if he bought and sold or sold and bought within a six month period (para. 2.24). It also articulated its policy choice that absent use of inside information the insider should be encouraged to trade in securities of his company (para. 2.02).

[16] Grant J. also observed that (at p. 127): "I take it that it is not contended on behalf of the plaintiff that the Harding discussions standing by themselves could be properly described as specific confidential information".

[17] A fuller definition is set out in the judgment, at p. 123.

[18] Pp. 123-124.

that the Canadian Government had agreed to a tariff reduction on carpets which would drastically affect Imbrex's competitiveness in Canada. Does the fact that this event will affect the external environment which is beyond the corporation's control permit it to be categorized as an event which defies a corporate purpose entitling the insider to sell without penalty? Or can it be said that because this event may for instance, force Imbrex to diversify out of carpets it relates to a corporate purpose? Does it make any difference whether or not the insider acquired the information during his course of duty? The judgment does not explore the nature and scope of specific confidential information further but simply makes the finding of fact that discussions with Harding and Neon were too inconclusive at May 6th to be specific.

The finding is buttressed by reference to the timely disclosure policy on take over bids of three Canadian stock exchanges:[19]

> When talks are proceeding which may lead to an offer being made, it is important to do everything possible to maintain secrecy. It is not easy for a Board to decide when to make a public announcement. Whilst the ideal should be that the first announcement should include the terms of the offer, it may nevertheless be necessary, if there are signs of a speculative market arising in the shares concerned, for a preliminary announcement to be made. It is normally unwise, however, to make any announcement until it seems certain that an offer will in fact be forthcoming.

Grant J. concluded that it would have been improper for Imbrex or Neon to have made any announcement of their discussions prior to June 10th because the discussions had not attained a state whereby there was any certainty that an offer would be made. As further reinforcement of his position he raised the danger of a premature statement causing the public to purchase and suffer loss if an offer was not made.[20] Mr. Justice Grant cautions that while the conclusion would not itself afford a defence to the defendants if otherwise liable, it is one of the elements to be considered in deciding whether there was a breach of the statute.

This caution is crucial. Reliance on a negative inference from timely disclosure policy designed to remove the opportunity for insider trading is troublesome to say the least. The current timely disclosure policy of the Toronto Stock Exchange and the Ontario Securities Commission[21] contains a release mechanism by which companies which experience a material change or event are enabled

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[19] P. 100.

[20] A similar test is applied to the discussions with Harding with the conclusion that while they had proceeded "much further" as of May 6th Harding's attitude was that any announcement would have been premature and unjustified. One may fairly ask whether Harding's attitude should be conclusive of the matter.

[21] See CCH Canadian Securities Law Reporter, Vol. 2, para. 54-882, Vol. 3, para. 92-004.

to withhold public disclosure for a period if they determine that disclosure at that time would be injurious to the company. However, the policy then states that if stock movements suggest insiders are trading or the news has leaked, then immediate disclosure is required. It contemplates that insiders will refrain from trading during this period that material information is withheld from the market.[22] In this judgment Grant J. refers to the celebrated United States case *S.E.C.* v. *Texas Gulf Sulphur*[23] which aptly illustrates this point. There the company completed one drill hole on a mineral prospect in November, 1963. Encouraged by the core results, it refrained from further drilling and public disclosure of its findings until April, 1964 so that it could purchase surrounding mining claims. The United States Court of Appeal held there was material information in November, 1963 even though the company was entitled to maintain secrecy until its land purchase programme was completed, but that insiders trading in the interim were liable.

Grant J. also cautions that if the negotiations did constitute specific confidential information as of the first week of May, the warning letter would not have negatived liability. And he concludes that the letter could not be more explicit "for fear" of "breaking regulations of the Securities Act in respect of disclosure".[24] Thus the insiders were steering a somewhat precarious course between the Scylla of using specific confidential information and the Charybdis of premature disclosure, an uncomfortably narrow passage. In retrospect it is impossible to resist the conclusion that they were better advised to have delayed dealing with Green until matters had become more clarified or public and run the risk of Green placing the shares on the market. And it is hard to imagine legal counsel giving any other advice than to delay the voyage.

[22] This is the flaw, it seems, in the judgment of Swinfen Eady J. in *Percival* v. *Wright*, [1902] 2 Ch. 421 the case which stultified the development of a common law (director) insider liability to (shareholders) outsiders. There he concluded that directors did not have a fiduciary duty to shareholders from whom they purchased shares because this "view would place directors in a most invidious position, as they could not buy or sell shares without disclosing negotiations, a premature disclosure of which might well be against the interests of the company". Surely the answer to this proposition of two extremes is simply this. Do not buy then. Wait. Even that position is not as onerous as the classic duty of the trustee which suggests he never buys without a release from his trust. (See *Keech* v. *Sandford* (1726), Sel. Cas. Ch. 61; *Boardman* v. *Phipps*, [1967] 2 A.C. 46 (H.L.).)

[23] (1968), 401 F. 2d 833.

[24] P. 128. This gives the OSC's timely disclosure policy statement a status more elevated than it deserves. It is neither statute nor regulation nor does it flow directly from any such provision (although it can be indirectly founded on the Commission's power to suspend trading in the public interest where disclosure is lacking). Bill 154, The Securities Act, 1972, first reading, June 1st, 1972, 2nd session, 29th Legislature, Ontario, s. 66, will rectify this deficiency.

The second substantive finding is that the defendants did not *make use* of the information relating to a Neon take over. Grant J. examined their motivation in purchasing the shares. He observed that the buy-sell agreement was the framework for the transaction and that their primary motivation was to keep such a large block of stock off the market because it would have depressed the market price and therefore caused injury to the company.[25] Two other factors were important to this finding. The first was the unwillingness of the defendant buyers to purchase the Green shares through earlier stages of the negotiations and the payment of a lower price ($5. 7/8) than Green desired ($6.00) coupled with the warning letter by one of the insiders to Green suggesting that merger discussions were taking place and that he should hold for at least two weeks. The second fact was the post purchase history of the shares. In the case of one defendant the shares were resold into the market immediately at a small loss. In the case of another an attempt was made to sell the shares into the market at a small profit within days of their acquisition but without success, although persistent efforts resulted in sales at substantial profits after the Neon offer was announced. Another of the defendants continued to hold his purchase as a long term investment through the shares' peak period and to the point of trial where it stood in a significant loss position. Thus the court apparently will examine the entire pattern of an insider's behaviour in determining whether he has abused his privileged position.

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[25] This is a somewhat specious proposition unless it is equally pointed out that it would injure the insiders by substantially reducing the value of their holdings. Having first declared that, it is then fair to observe that the company's merger possibilities or ability to raise new capital at a fair price would be jeopardized by Green "unloading" his shares onto the market. However, concern for the company did not prevent the defendants from selling a substantial portion of the Green bloc into the market shortly after the purchase.

The shareholders buy-sell agreement covered approximately 635,000 of the 800,000 shares issued and outstanding. The "thinness" of the public float, approximately 165,000 shares, ensured a depressing effect on a public sale by Green. Lack of liquidity of particular securities is a common feature of Canadian equity markets and one which has concerned law reform groups (See *e.g.* the Report of the Committee of the Ontario Securities Commission on the Problems of Disclosure Raised for Investors by Business Combinations and Private Placements, Ontario Securities Commission (1970), p. 12).

The holdings of the insiders, founders of Imbrex, who were parties to the buy-sell agreement which governed approximately 80% of the outstanding shares might be holdings of a combination of persons materially affecting control of the company and thus requiring qualification of a prospectus for sale under the Securities Act (ss 1(1)6b ii and 35) absent an exemption. While the sale by Green to the defendants was probably exempt if sold through the Exchange (s. 58(2)(b)), the earlier sale by Green of 20,000 shares and the subsequent resales of the 80,000 shares by some of the defendants, into the market, may have required a prospectus which would have ensured disclosure.

The conclusion that the defendants did not make the use of information was also supported by an assessment of the plaintiff's own motivation in selling. This assessment is of some legal significance. Section 113 specifically invites an assessment of the plaintiff's knowledge.[26] Here the plaintiff was hoisted on his own petard. His own background with Imbrex and personal relationship with Imbrex insiders coupled with their warning letter specially qualified him to make an assessment of the state of merger negotiations concerning Imbrex. Grant J. concludes Green was correct in his appraisal in the first week of May that a merger (he thought with Harding) was improbable and that a significant increase in Imbrex stock price was unlikely. Ironically it was the subsequent "souring" of relations with Harding that precipitated the Neon take over bid and though it had a dramatic short term inflationary impact on Imbrex' stock its ultimate consequence was the loss of Imbrex' principal asset and the demise of the company.

Several *obiter* observations are pertinent to the development of insider law. Grant J. seems to eschew a dissemination or digestion period once material information has been disclosed. He concludes that once the first quarter earnings of Imbrex which showed a significant rise were announced both by the Dow Jones and the newspapers, it could not thereafter be said to be confidential. This statement is *obiter* dictum, made cryptically, and it may imply a dissemination period. But on the face of it one may conclude that the mere release by the news service was sufficient to avoid subsequent insider liability.[27]

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[26] The insider is liable to compensate the plaintiff "unless such [specific confidential] information was known or ought reasonably to have been known to such person". In Bill 154, *supra,* footnote 24, s. 150, the subjective test "ought reasonably to have been known" is curiously omitted. It is hoped that this is merely drafting oversight and the phrase will be restored in the subsequent revision of the Bill.

[27] The judgment reads (at pp. 130-131): "An additional reason for the admission of the Dow Jones report was to establish that the plaintiff ought reasonably to have known of such [favourable] first quarter results prior to the date of his sale, and as well to establish that such information had then ceased to be confidential by reason of its release. When the information lost its confidentiality by reason of publication, it mattered not then whether the plaintiff knew of it or not because at that point it ceased to be the subject of s. 113." It is possible to read this dictum as strictly limited to the plaintiff's own position as a specially aware Imbrex shareholder who "ought to have known" of the first quarter results as soon as they were released on the Dow Jones news service, a tape of which appears almost immediately in all brokers' offices, although such an interpretation strains the language. It would be most unfortunate if this dictum were used to permit insiders to trade within moments of the first publication of inside information before outsiders (or their advisers) have had a reasonable opportunity to become alerted to the information. Contrast the *Texas Gulf Sulphur* decision where an insider trade within several hours of a Dow Jones news service announcement attracted liability because it was executed before the information was generally known.

Grant J. also by way of *obiter* dictum contrasts the liability to an outside security holder with the liability to the corporation and notes the differing language of the two liabilities. The first limb deals with direct loss and the second limb deals with the accountability for benefit received. He observes that the "rights of recovery of the corporation appear to be much broader than the rights of the person who is confined to compensation for direct loss suffered by him".[28] Nothing more is said with respect to the double liability but the *obiter* statement may subsequently be taken to mean that not only is there a double liability but there can be double recovery. Thus the corporation in a subsequent suit could recover the benefit at one time received (though not sustained) by the insider even where that insider had been forced to compensate an outsider for the latter's loss in an earlier suit. What is the position if the corporation sues first to recover the benefit and the outsider sues subsequently for any direct loss suffered. Is there an obligation on the corporation to restore the benefit to the in-

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The most recent S.E.C. gloss on dissemination period comes from a consent judgment, *In the Matter of Certain Trading in the Common Stock of Faberge, Inc.* (Securities Exchange Act of 1934, Rel. No. 10174/May 25th, 1973) where certain broker-dealers and investment advisers had violated Rule 10b-5 by trading before news of Faberge's third quarter loss appeared on the Dow Jones broad tape. In suggesting the news was public when it appeared on that tape the S.E.C. raises the same problem as Grant J. did. However the test the S.E.C. suggests for dissemination after the information appeared on the Aut Ex wire service, a limited institutional investor service for reporting block trading, buy and sell interests and market and research information, is helpful. The Commission stated:

> "The non-public nature of the information is . . . clear from the facts. The information was not disseminated in a manner making it generally available to the investing public until [Faberge's] press release appeared on the broad tape. The message on the Aut Ex wire service did not constitute public disclosure inasmuch as it was transcribed to a limited number of institutional subscribers. In order to effect a *meaningful* public disclosure of corporate information, it must be disseminated in a manner calculated to reach the securities market in general through recognized channels of distribution, *and public investors must be afforded a reasonable waiting period to react to the information.* Obviously what constitutes a reasonable waiting period must be dictated by such surrounding circumstances as the form of dissemination and the complexity of the information, *i.e.* whether it is 'readily translatable into investment action'. Disclosure by a corporate officer during the course of a number of phone calls does not under any circumstances constitute public disclosure. Public dissemination of information also cannot be accomplished by disclosure to or through a favoured analyst or group of analysts. On the contrary, this facilitates improper use of non-public information. Proper and adequate disclosure of significant corporate developments can only be effected by a public release through the appropriate public media designed to achieve a broad dissemination to the investing public generally and without favouring any special person or group. To hold otherwise would be to sanction competition for tips in which the ordinary individual investor would inevitably be at a serious disadvantage."

[28] P. 122.

sider so that he may use that sum of money to compensate the outsider for loss?[29]

The final principle of importance relates to the measure of damages that is used in fixing the amount of loss. Grant J. adopts without quarrel the American standard affirmed in the *Texas Gulf Sulphur* litigation although there is no legislative analogue between the two jurisdictions and the applicable criteria are creatures of the common law.[30] First there is a burden on the plaintiff to mitigate his loss by replacing stock as soon as he reasonably could after learning of the non-disclosure. Then an assessment must be made of the length of time in which a similar number of shares could be purchased in the market without undue price rises. From this a precise sum is determined. The principle is aptly illustrated in Grant J.'s quote[31] from *Reynolds* v. *Texas Gulf Sulphur Co.*,[32] one of the first private civil suits riding on the coat tails of the Securities and Exchange Commission's injunction against Texas Gulf:

> It seems to this court that the true and just measure of damages in these cases should be, with some qualification, what long ago came to be called the New York Rule. Of necessity, it was unthinkable that the common law rule in trover for the conversion of ordinary chattels, *i.e.* fair market value at time of conversion, should be applied in the case of corporate shares with rapidly changing values. So the rule evolved that the measure of damages in stock transactions is the highest intermediate value reached by the stock between the time of the wrongful act complained of and a reasonable time after the injured party received, or should have received notice of it, a time within which he has a reasonable opportunity to replace the stock. This was announced by

[29] The strikingly different language used in the section to establish liability to compensate an outsider for direct loss and accountability to the corporation for direct benefit received suggests that double recovery is contemplated. However that was not the hope of the Kimber Committee which set out that language in its report, *op. cit.*, footnote 2 (para. 2.26) and at the same time specifically recommended (para. 2.30) "that the legislation be drafted so as to avoid double liability" "in view of the novelty in Ontario law of the legal principles underlying the recommended causes of action". But perhaps the Kimber Committee contemplated a separate section specifically excluding double recovery, which the Legislature for policy reasons chose to ignore. Furthermore it is submitted that policy considerations which have developed since the Kimber Report *viz*, the infrequent invocation of the liability provision warrant double recovery as a deterrent to insider trading. Otherwise, absent consideration of court costs and the stigma of an action the insider abusing his position can do no worse than find his profit neutralized. Compare American anti-trust suits where treble damages are permitted for deterrent purposes.

[30] This is a trifle ironic. American jurisprudence is adopted for the measure of damages issue—an area in which there is considerable Canadian and English jurisprudence but American jurisprudence is rejected on the issues of insider liability even though there is virtually no Canadian and English case law and in spite of there being an American legislative analogue.

[31] P. 153.

[32] (1970), 309 F. Supp. 548, at p. 563.

> the United States Supreme Court in a case decided in 1888 which arose in the Territory of Utah, *Gallagher* v. *Jones*, 129 U.S. 193, 194, 200-202, 9 S. Ct. 335, 32 L. Ed. 658.
>
> . . .
>
> We must draw the line somewhere, and this is an attempt to give a twenty trading day period within which the average of the highest daily prices is the measure of damages, and a period within which the shareholders received, or should have received, notice of the Texas Gulf Sulphur announcement of April 16.
>
> A few days is too short a time reasonably to expect stockholders to make a judgment and sell their stock, and much too early to let the New York market reflect the true value, overstimulated upward or downward. The average of the highest daily sales for the 16th of April and 19 trading days subsequent thereto allows the market reactions more truly to reflect actual value and allows a more reasonable period of time within which to require the shareholders, in the exercise of ordinary diligence and prudence, to learn of the Texas Gulf Sulphur announcement of April 16 and to protect their interest.

Justice Grant concludes that the plaintiff could reasonably have replaced his shares in the nineteen days of June commencing with his knowledge on June 12th of the Neon take over.

The summary conclusion from this first insider trading case is obvious from the comment as a whole. We shall need a considerably larger body of jurisprudence, in the absence of more detailed legislation, before the nature and scope of insider liability is fully understood, and unfortunately this first case does not advance our understanding very far.

DAVID L. JOHNSTON*

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CONFLIT DE JURIDICTIONS—CONFLIT DE LOIS—RESPONSABILITÉ DU PROPRIÉTAIRE D'UNE AUTOMOBILE—QUALIFICATIONS.—La décision bien motivée de la Cour d'Appel dans *Gauthier* c. *Bergeron*[1] soulève d'importants problèmes en droit international privé québecois car elle fait ressortir les difficultés de la qualification d'une règle de droit afin d'en arriver au système juridique applicable. Elle soulève en outre le problème du facteur de rattachement applicable à la catégorie du "statut réel mobilier *ut singuli*". Le conflit de juridictions résolu dans la décision appelle lui aussi quelques commentaires.

Il s'agissait d'un accident d'automobile survenu au Québec. Alors que Bergeron (demandeur en Cour supérieure et intimé en

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[1] [1973] C.A. 77. Voir critique par Groffier (1973), 33 R. du B. 362.

Cour d'appel et son épouse se promenaient, ils furent heurtés par une automobile conduite par le fils de l'appelant Gauthier; Bergeron fut grièvement blessé tandis que son épouse était tuée, d'où la poursuite contre le conducteur de l'automobile (Gauthier fils) et le propriétaire (Gauthier père). Les victimes étaient domiciliées au Québec, alors que les deux défendeurs résidaient en Ontario et y avaient leur domicile. Gauthier fils n'avait que dix-sept ans lors de l'accident et il n'avait pas encore obtenu de permis de conduire. Profitant de l'absence de ses parents, il avait pris l'automobile de son père dont ce dernier avait laissé les clefs dans le coffre à gant quelques jours auparavant. Les parents ignoraient donc tout de la promenade de leur fils, d'autant plus que le père avait toujours défendu à son fils de se servir de l'automobile sur la voie publique. Il faut dire que c'était la première fois qu'il conduisait sur un chemin public, même s'il avait la permission de conduire sur la ferme de son père.

L'action fut intentée au Québec contre Gauthier fils en tant que conducteur, et contre l'appelant comme propriétaire de l'automobile et comme père d'un mineur auteur d'un quasi-délit. Le juge saisi du litige avait donc à résoudre deux problèmes de droit international privé:

1. Le tribunal québecois était il compétent? (problème de la compétence juridictionnelle internationale du tribunal québecois)
2. Dans l'affirmative, quelle était la loi applicable? (conflit de lois).

(i) La base de la compétence internationale des tribunaux québecois est déterminée par l'article 68 du Code de procédure civile.[2] Comme le domicile de l'appelant était en Ontario, il fallait d'abord savoir, si *toute la cause d'action* avait pris naissance au Québec.

(ii) Le choix de la loi applicable était aussi important parce que le droit dans les deux systèmes pouvait être différent.

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[2] Art. 68: "Sous réserve des dispositions des articles 70, 71, 74, et 75, et nonobstant convention contraire, l'action purement personnelle peut être portée:

1. Devant le tribunal du domicile réel du défendeur, ou, dans les cas prévus à l'article 85 du Code civil, devant celui de son domicile élu. Si le défendeur n'est pas domicilié dans la province, mais qu'il y réside ou y possède des biens, il peut être assigné soit devant le tribunal de sa résidence, soit devant celui où se trouvent ces biens, soit devant celui du lieu où la demande lui est signifiée en mains propres;
2. Devant le tribunal du lieu où toute la cause d'action a pris naissance; ou, dans le cas d'une action fondée sur un libelle de presse, devant le tribunal du district où réside le demandeur, lorsque l'écrit y a circulé; devant le tribunal du lieu où a été conclu le contrat qui donne lieu à la demande."

En Ontario, "le père n'est pas responsable du quasi-délit commis par son fils mineur sans le consentement de son père et alors que le fils n'est pas le préposé du père"[3] tandis qu'au Québec, c'est l'article 1054, alineas 2 et 6, du Code civil qui régit la situation[4] et il incombe au père de prouver qu'il n'a pu empêcher, par des moyens raisonnables, le fait qui a causé le dommage. Si on appliquait la loi de l'Ontario, l'appelant devait être exonéré car le fils conduisait sa voiture sans sa permission et à l'encontre de sa défense, mais si c'était la loi du Québec qui s'appliquait, il était responsable car il ne pouvait prétendre qu'il n'avait pu empêcher le fait qui avait causé le dommage, selon la preuve faite "d'où l'intérêt de choisir celle qui doit recevoir application".[5]

Quant à la responsabilité comme propriétaire d'automobile, les lois du Québec et de l'Ontario sont sensiblement différentes. Au Québec, c'est l'article 3 de la Loi de l'indemnisation des victimes d'accidents d'automobile qui s'applique:[6]

> Le propriétaire d'une automobile est responsable de tout dommage causé par cette automobile ou par son usage, à moins qu'il ne prouve . . .
> b) que lors de l'accident l'automobile était conduite par un tiers en ayant obtenu la possession par vol . . . .

En Ontario, l'article 105(1) du Highway Traffic Act de 1960 prévoit:[7]

> The owner of a motor vehicle is liable for loss or damage sustained by any person by reason of negligence in the operation of the motor vehicle on a highway unless the motor vehicle was without the owner's consent in the possession of some person other than the owner or his chauffeur, and the driver of a motor vehicle not being the owner is liable to the same extent as owner.

L'appelant rencontrait les conditions d'exonération de la loi de l'Ontario puisque l'auto avait été conduite en violation de sa défense expresse mais il n'était pas certain qu'il en fût ainsi selon la loi du Québec, tout dépendant du sens donné au terme "vol" dans cette loi.

Pour le juge Casey[8] il n'y avait pas de conflit de lois puisque l'appelant devait être exonéré par application des lois du Québec et de l'Ontario.

Cependant, pour le juge Deschênes, il en était autrement:[9]

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[3] *Supra*, note 1, à la p. 80.
[4] Art. 1054, al. 2 et 6: "Le père et après son décès, la mère, sont responsables du dommage causé par leurs enfants mineurs; . . . La responsabilité ci-dessus a lieu seulement lorsque la personne qui y est assujettie ne peut prouver qu'elle n'a pu empêcher le fait qui a causé le dommage."
[5] *Supra*, note 1, à la p. 80. [6] S.R.Q., 1964, c. 232.
[7] R.S.O., 1960, c. 171, s. 105(1).
[8] L'opinion du juge Casey n'est pas rapportée.
[9] *Supra*, note 1, à la p. 79.

> Le sort de la cause tournera donc éventuellement sur le choix du système légal que le tribunal doit appliquer au litige.

Il fallait donc qualifier les deux genres de responsabilité pour déterminer la loi applicable.

La responsabilité de l'appelant en tant que père d'un mineur pouvait être classée soit dans le statut personnel (état et capacité)[10] soit parmi les faits juridiques.[11] Quant à sa responsabilité en tant que propriétaire de l'auto, il pouvait s'agir du statut réel mobilier[12] ou de la responsabilité extra-contractuelle.

La Cour supérieure s'attribua compétence sur la base de la naissance de toute la cause d'action au Québec[13] et qualifia la responsabilité de l'appelant comme relevant du domaine des faits juridiques:

> L'état et la capacité du plaideur sont régis par la loi de son domicile, mais pour le surplus, et dans la sanction du quasi-délit commis chez-nous, par usage de l'auto dont il est propriétaire, c'est la loi de notre province, "la lex loci delicti commissi" qui s'applique en faveur de la victime qui peut invoquer la loi du pays où le quasi-délit source de la réclamation s'est produit.[14]

Jugeant qu'il n'y avait pas eu vol, la Cour supérieure tint Gauthier père responsable selon l'article 3 de la Loi de l'indemnisation du Québec[15] puisque le quasi-délit s'était produit au Québec et que la règle de conflit québecoise désignait la loi du Québec. Elle condamna l'appelant et son fils conjointement et solidairement à payer au demandeur personnellement la somme de $29,731.90 et au demandeur en sa qualité de tuteur la somme de $21,025.00, d'où l'appel du père.[16]

A la Cour d'appel, les juges Tremblay, Casey et Deschênes

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[10] L'art. 6, al. 4 du Code civil concernant le statut personnel édicte: "L'habitant du Bas Canada, tant qu'il y conserve son domicile, est régi, même lorsqu'il en est absent, par les lois qui règlent l'état et la capacité des personnes; mais elles ne s'appliquent pas à celui qui n'y est pas domicilié lequel reste soumis à la loi de son pays quant à son état et à sa capacité."

[11] L'art. 6, al. 3 du Code civil relatif aux faits juridiques édicte: "Les lois du Bas-Canada relatives aux personnes sont applicables à tous ceux qui s'y trouvent, même à ceux qui n'y sont pas domiciliés; sauf, quant à ces derniers, l'exception mentionée à la fin du présent article."

[12] Statut réel mobilier: "Les biens meubles sont régis par la loi du domicile du propriétaire. C'est cependant la loi du Bas-Canada qu'on leur applique dans les cas où il s'agit de la distinction et de la nature des biens, des privilèges et des droits de gage, de contestations sur la possession, de la juridiction des tribunaux, de la procédure, des voies d'exécution et de saisie, de ce qui intéresse l'ordre public et les droits du souverain, ainsi que dans tous les autres cas spécialement prévus par le Code". Art. 6, al. 2 du Code civil.

[13] Art. 68, al. 2, du Code civil.

[14] Jugement de la Cour supérieure non rapporté.

[15] *Supra,* note 6.

[16] L'appel ne concerne que la responsabilité du père et non celle du fils.

cassèrent ce jugement et Gauthier père fut exonéré de toute responsabilité.

Ce commentaire examine seulement l'opinion du juge Deschênes puisqu'il est le seul à traiter du conflit de juridictions, des problèmes de qualification et du facteur de rattachement applicable au statut réel mobilier *ut singuli*.[17]

a) *Compétence du tribunal.*

La seule base pouvant fonder la compétence du tribunal dans cette cause était l'article 68, alinea 2 du Code de procédure civile, c'est-à-dire le lieu où toute la cause d'action avait pris naissance. Pour le juge Deschênes, toute la cause d'action quant à l'appelant n'avait pu prendre naissance au Québec car les deux éléments nécessaires à l'établissement du lien de droit, sur lesquels reposait l'action (lien de parenté avec le conducteur et lien de propriété avec l'automobile), échappaient au Québec et ne relevaient que de l'Ontario. Il accepta cependant la compétence car il ne s'agissait que de compétence *rationae personae* et comme Gauthier n'avait pas soulevé de déclinatoire, "il y a donc lieu de conclure que le conflit possible de juridictions est résolu en faveur de la reconnaissance de la compétence des tribunaux du Québec".[18]

Le jugement est-il conforme au droit positif sur ce point? Pour soutenir que toute la cause d'action n'avait pas pris naissance au Québec, le juge Deschênes cita trois décisions. Dans *Lewis Bros. Ltd.* c. *Groulx*[19] il s'agissait d'une action en responsabilité où le tribunal précisait le sens des mots "cause d'action":

> C'est évidemment le fait générateur du droit d'action. . . . C'est cette dénonciation, faite dans le district de Montréal, qui a déclenché le mécanisme de la justice (même si l'arrestation avait eu lieu en Abitibi). . . .
> Le fait générateur de la responsabilité de la défenderesse se serait donc produit au lieu où la dénonciation malicieuse reprochée a été faite. La cause d'action, s'il y en a une, aurait pris naissance dans le district où la dénonciation a été faite.

Dans *Landry* c. *Hurdman*[20] il s'agissait d'une action pour bris de contrat qui avait eu lieu à l'extérieur du Québec. Toute la cause d'action n'avait donc pas pris naissance dans notre province. Il en était de même dans *Trower and Sons Ltd.* c. *Ripstein*[21] où le contrat avail été passé à l'étranger.

Dans *Gauthier* c. *Bergeron* il en était autrement: l'accident constituait le fait générateur du droit d'action, et cet accident avait

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[17] Le juge Tremblay partage l'avis du Juge Deschênes.
[18] *Supra,* note 1, à la p. 79.
[19] (1937), 62 B.R. 448.
[20] (1903), 5 R.P. 273.
[21] [1944] B.R. 254, voir aussi *Sorel Industries Ltd.* c. *Rhoades,* [1945] B.R. 247.

eu lieu au Québec. C'est à ce moment que le droit d'action avait pris naissance contre le père et le fils. Il est impossible de penser qu'il puisse y avoir deux causes d'action survenant à deux endroits différents, l'Ontario pour le père et le Québec pour le fils, alors qu'il n'y avait qu'un seul fait générateur du droit d'action contre les deux défendeurs, même si le régime de la responsabilité contre l'appelant nécessite la présence d'autres éléments comme le lien de paternité ou le lien de propriété. Comme le disait Johnson:[22]

> Thus, the whole cause of action, may be deemed to have arisen in Québec when it consists of an act which though it began beyond the province, has continued to completion within the province.

Il semble donc que la Cour supérieure aurait eu compétence même si Gauthier avait soulevé une exception déclinatoire.

b) *La loi applicable.*

Comme le soulignait très justement le juge Deschênes, c'est la loi du for qui seule doit servir à qualifier un problème juridique:[23]

> Ce serait en effet ouvrir un cercle vicieux et prêter le flanc à l'illogisme que d'entreprendre de qualifier un problème en vertu de la loi étrangère alors qu'on ignore encore si celle-ci doit s'appliquer. . . .

i) *La responsabilité de Gauthier en tant que père d'un mineur auteur d'un quasi-délit.*

Il s'agit ici de la qualification de l'article 1054, alineas 2 et 6 du Code civil.[24] Voici comment il qualifie le problème:

> Les parties sont domiciliées en Ontario. Leur relation s'est nouée en Ontario. C'est également en Ontario que le fils a violé l'injonction paternelle et s'est sauvé avec l'automobile. *Seule la loi d'Ontario* est compétente pour régler cette situation, qu'il s'agisse d'une question de *loi relative aux personnes,* ou, comme je le crois plutôt, d'une question d'état et de capacité.[25]

Donc, même en classant cette responsabilité dans la catégorie des faits juridiques, il applique la loi de l'Ontario puisqu'il considère que le lieu de commission du quasi-délit, pour l'appelant, est l'Ontario, même si l'accident s'est produit au Québec. Mais, comme il pense qu'il s'agit plutôt d'une question d'état et de capacité, c'est encore la loi de l'Ontario qui détermine la responsabilité, car le facteur de rattachement pour cette catégorie est le domicile.

Le jugement ne contient aucun argument justifiant une telle

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[22] Conflicts of Laws (2e éd., 1962), p. 1028. Voir aussi Castel, Private International Law (1960), p. 244.

[23] *Supra,* note 1, à la p. 79. Castel, Propos sur la structure des règles de "rattachement" en droit international privé québecois (1967), 21 R. du B. 101, à la p. 194.

[24] *Supra,* note 4.

[25] *Supra,* note 1, à la p. 81. Voir aux arts 6, als 3 et 6, et al. 4 du Code civil pour les règles de conflits de ces catégories.

qualification. Quoique la littérature québecoise soit muette sur la qualification de ce problème précis en droit international privé, il semble que cette responsabilité doit être soumise au régime de la responsabilité extra-contractuelle et non à celui du statut personnel.

En droit interne québecois, la présomption de responsabilité du père est-elle basée sur une faute qu'il aurait commise ou sur la puissance paternelle? Je pense que cette présomption est basée sur le prétendu défaut de surveillance et sur la mauvaise éducation donnée par les parents dans le cas où un enfant cause par sa faute un dommage. Il est vraisemblable que le quasi-délit ne se serait pas produit si l'enfant avait été mieux éduqué ou mieux surveillé. C'est cette probabilité qui sert de fondement à la présomption. La doctrine et la jurisprudence sont d'accord avec ce rattachement. Voici comment s'exprime le juge André Nadeau dans son *Traité*:[26]

> La faute, prouvée ou présumée reste indéniablement la base de tout notre système de la responsabilité. Nous voudrions suivre certains juristes français sur leur terrain d'une responsabilité fondée sur le risque que nous ne le pourrions pas, les textes de nos articles 1053 et s. C.c. y faisant invinciblement obstacle. . . . La loi présume qu'elle a mal exercé son devoir de garde et de surveillance de la personne dont elle a le contrôle.

La Cour suprême s'est également prononcée en ce sens en 1951 dans *Alain* c. *Hardy*:

> Il doit y avoir plus de flexibilité et ce qu'il faut rechercher, c'est toujours la faute et s'il y a eu surveillance, bonne éducation. . . . on peut dire que le père a agi comme un homme prudent et il est alors exempt de responsabilité.[27]

Examinons comment les auteurs français ont qualifié cette responsabilité en droit international privé.[28] Le Code civil français édicte contre les parents une présomption semblable à celle que nous connaissons au Québec.[29]

En 1963, le tribunal de Grande Instance de la Seine[30] a classé la responsabilité du fait des choses et la responsabilité du fait

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[26] André Nadeau, Traité pratique de la responsabilité civile délictuelle (1971), p. 352, no 353. Voir aussi Mignault, Droit civil canadien, t. 5 (1901), p. 335; P. G. Jobin, La responsabilité présumée du père pour les dommages causés par son enfant mineur (1969), 29 R. du B. 570.

[27] [1951] S.C.R. 540. Aussi *Cutman* c. *Léveillé* (1957), 37 R.L. 84 (C.A.); *Labonté* c. *Cantin* (1932), 70 C.S. 114; *Morency* c. *Roberge*, [1946] C.S. 306.

[28] Batiffol, Traité élémentaire de droit international privé (8è éd., 1967), p. 610 et ss; Bourel, Les conflits de lois en matière d'obligations extracontractuelles (1961), p. 216 et ss; Dalloz, Répertoire de droit international (1969), t. 2, p. 775 et ss.

[29] "Le père et la mère, en tant qu'ils exercent le droit de garde, sont solidairement responsables du dommage causé par leurs enfants mineurs habitants avec eux". Art. 1384, al. 4.

[30] Discuté dans Dalloz, *op. cit.*, note 20, p. 775, no 57.

d'autrui dans le domaine des faits juridiques et non dans celui de l'état et de la capacité; par conséquent, la *lex loci delicti commissi,* désignée par la règle de conflit française fut appliquée.

Batiffol abonde dans le même sens, tout en soulignant la possibilité de confusion entre une qualification rentrant dans le statut personnel et celle relevant des faits juridiques. Voici comment il s'exprime:

> Le terme capacité appelle évidemment la loi personnelle, mais il ne s'agit là que d'une coincidence de mots: la capacité au sens propre est l'aptitude à s'engager par acte de volonté; la "capacité délictuelle" concerne les conditions relatives à la personne auxquelles la loi subordonne la responsabilité; il s'agit là d'un élément d'organisation de la responsabilité qui relève de la loi locale. On en dira de même pour la responsabilité des pères et mères du fait de leurs enfants. L'obligation de surveillance tient plus à l'organisation de la responsabilité qu'à celle de la puissance paternelle; la preuve en est dans le fait que la loi l'exige aussi des artisans qui n'ont pas la puissance paternelle.[31]

En droit québécois, les artisans et les maîtres sont aussi responsables bien qu'ils n'aient pas la puissance paternelle.[32]

Je suis donc d'avis que cette responsabilité devrait être soumise au régime des faits juridiques ou quasi-délits et non à celui du statut personnel (état et capacité).

La règle de conflit québecoise[33] nous commande d'appliquer la loi du Québec, lieu du quasi-délit. Ici, il ne peut être question de la règle du double critère, "actionnable" selon la loi du for et punissable selon la loi du délit. Cette règle d'inspiration de Common Law qui est utilisée par nos tribunaux, à tort peut-être, pour régir les délits et quasi-délits commis à l'étranger n'a aucune application ici, puisque la *lex fori* et la *lex loci délicti commissi* se confondent. Elle n'est applicable que pour les délits et quasi-délits commis à l'étranger. En l'occurence, je pense que le quasi-délit avait été commis au Québec et non en Ontario comme l'a soutenu le juge Deschênes, car il ne peut y avoir deux lieux de commission du quasi-délit, un pour le fils (Québec) et un autre pour le père (Ontario). Le quasi-délit en vertu duquel le père était responsable par le jeu de la présomption avait été commis au Québec, au moment de l'accident, et non lors de la désobéissance du fils en Ontario; la responsabilité du père fut engagée au moment de la faute commise par son fils et non avant. Comme, selon le juge Deschênes, Gauthier n'avait pas repoussé la présomption, on devait le tenir pour responsable.

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[31] *Op. cit.,* note 28, p. 610, no 563. Voir aussi en ce sens: Bourel, *op. cit.,* note 28, p. 219 et ss; Dalloz, *op. cit.,* note 29, p. 797. Niboyet, Traité de droit international privé français (1938-1950), t. 5 (1948), no. 1427. De Vos, Le problème des conflits de lois (1947), t. 2, no. 721.

[32] Art. 1054, al. 5, du Code civil.

[33] Art. 6, al. 3, du Code civil.

ii) *La responsabilité de Gauthier en tant que propriétaire de l'automobile.*

Pour le juge Deschênes, il n'y avait pas de conflit de lois quant à cette responsabilité puisque la solution était identique dans les deux systèmes juridiques en présence: l'appelant devait être exonéré car il avait prouvé vol. Il procéda pourtant à la qualification car: ". . . d'aucuns pouvaient opiner en sens contraire et soutenir que l'appelant n'a pas réellement prouvé le vol[34]. . . .
La véritable question est donc la suivante: 'Quelle loi régit la responsabilité de l'étranger propriétaire d'un meuble, en l'espèce une automobile qu'un tiers importe au Québec sans la permission et hors la connaissance du propriétaire, et par l'usage duquel ce tiers cause un dommage?' "[35].

Selon lui, cette responsabilité tombe dans la catégorie du "statut réel mobilier"[36]. Ici aucun argument n'est avancé justifiant cette qualification. Le juge Deschênes soutient aussi que l'on entre dans le domaine des conflits mobiles dans l'espace sans pourtant apporter de solution à ce nouveau problème:

> Les conflits mobiles dans le temps ont suscité de nombreuses études et une jurisprudence abondante. Il n'en va pas de même des conflits mobiles dans l'espace, où la doctrine et la jurisprudence sont des plus rares et des moins assurées.[37]

Ce sont là ses seuls propos sur le supposé conflit mobile, d'autant plus qu'il est difficile de voir ici un conflit mobile dans l'espace alors qu'il n'y a pas eu changement dans la localisation du facteur de rattachement qui est le domicile.

> The connecting factor is still the same, but its localization is different. . . .
>
> In a "conflit mobile" the laws successively applicable are enacted by two different legislatures and remain in force simultaneously . . . the courts must determine to what extent the question under litigation is governed by the new law.[38]

Comme le domicile de Gauthier n'avait jamais changé, il ne pouvait y avoir de conflit mobile dans ce cas. Par contre, si le facteur de rattachement est la loi de la situation du bien, un conflit mobile aurait pu surgir car il y avait eu changement dans la localisation du facteur de rattachement, le "situs" de l'automobile ayant passé de l'Ontario au Québec.

Le juge Deschênes examine cette possibilité de rattachement à la loi de la situation, mais il rejette cette théorie:

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[34] *Supra*, note 1, à la p. 84.
[35] *Ibid.*, à la p. 82.
[36] *Ibid.* L'art. 6, al. 2, du Code civil donne la règle.
[37] *Ibid.*, à la p. 85.
[38] Castel, Conflict of Laws in Space and in Time (1961), 39 Can. Bar Rev. 604. Voir aussi Battiffol, *op. cit.*, note 28, p. 363.

> On a tenté d'introduire cette distinction chez-nous mais outre la difficulté d'application qu'elle présente souvent dans la pratique, il importe encore de rappeler que nous avons au Québec un texte de loi qui prévoit expressément la solution au problème des lois applicables aux meubles qui ne distingue pas dans la façon dont on doit les considérer.[39]

Il me semble que malgré tout le respect que l'on peut avoir pour l'opinion contraire, c'est la *lex situs* qui doit s'appliquer. Le juge Deschênes a rejeté l'opinion des auteurs qui favorisaient la *lex situs* en droit québécois[40] ainsi que *Neugent* c. *Canadian Rock Products Ltd.*[41] la seule cause où le tribunal s'est prononcé sur la question, en appliquant la loi de la situation à un bien *ut singuli*:

> It appears to me that article 6 c.c. is to be applied when a conflict of laws arises as to moveables. The article enacts that the law of the domicile of the owner is to apply. This would not help us; we would turn in a circle; who are the owners of the bonds is the question we are presently trying to solve. However, a reading of article 6 discloses so many exceptions to the *lex domicilii* that it is easy to conclude these exceptions vary another general rule; otherwise why bring under the *lex domicillii* what was already formulated, generally for all moveables? Our commentator, Mignault, declares that the formule *mobilia sequuntur personam* meets many exceptions (art. 6). Our other commentator, Langelier (art. 6) finds it to be erroneous to conclude that moveables are governed by the law of the owner's domicile; he would apply the *lex situs*. . . . The situs of the bonds was in New-York.[42]

Nous ne développerons pas, dans le cadre de ce bref exposé, tous les arguments qui militent en faveur de l'application de la *lex situs*, qu'il s'agisse de l'ordre public, du concept de la territorialité des lois ou du contrôle effectif du bien lui même, sans compter les arguments que nous fournit le droit comparé. D'ailleurs, l'interprétation logique de l'article 6, alinea 2 du Code civil ne permet pas d'appliquer une autre loi que celle de la situation.

Argument de texte:

Il est vrai qu'à la lecture de l'article 6, alinea 2 du Code civil tout porte à la conclusion que la loi du domicile du propriétaire est applicable dans tous les cas où la loi du Québec ne peut être

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[39] *Supra,* note 1, à la p. 85.

[40] L. A. Jetté, Statuts réels et personnels (1923), 1 R. du D. 197; P. A. Lalive. The Transfer of Chattels in the Conflict of Laws (1955), p. 84; P.-A. Crépeau, Cours de Doctorat de l'Université de Montréal (Janvier 1964); M. Guy, La capacité d'aliéner les biens et d'en disposer en droit comparé et en droit international privé (1970-71), 73 R. du N. 257, à la p. 281; et la thèse de doctorat de l'auteur intitulée The Law Governing the Domain of the *Statut Réel* in Contracts for the Transfer of Moveable Property *ut singuli* in Québec Private International Law (1970), et Johnson, *op. cit.*, note 22, pp. 509-518.

[41] Cour d'Appel, no. 1001, 29 fév. 1936, jugement non rapporté, juges Dorion, Walsh, Barclay et Surveyer (dissident) discuté par l'auteur dans (1970-71), 73 R. du N. 356.

[42] *Ibid.*, juge Walsh.

appliquée en vertu de l'une des exceptions. Cependant, certaines d'entre elles sont des règles de droit international privé québecois indépendantes du statut réel mobilier (par exemple juridiction des tribunaux, procédure, ordre public). Ces exceptions ne se rattachent pas exclusivement au statut réel mobilier. La loi du Québec s'applique à ces exceptions à cause du principe de la souveraineté territoriale. Et quant aux autres exceptions, la distinction et la nature des biens ainsi que les privilèges qui relèvent du statut réel, serait-il logique que la loi du Québec les régisse quand le meuble est situé en dehors du Québec? Ou encore les règles de juridiction des tribunaux étrangers? Par conséquente il me semble que pour les exceptions touchant aux biens meubles (nature des biens, privilèges, et ainsi de suite), on devrait considérer le bien individuellement (*ut singuli*); si le bien qui est l'objet du litige est situé au Québec, le législateur semblerait exiger l'application de la loi du Québec, mais s'il est localisé à l'extérieur, il faudrait bilatéraliser la règle de conflit et appliquer cette loi étrangère.

Argument historique:

Les codificateurs nous fournissent encore un autre argument en faveur de la distinction entre les biens meubles considérés *ut universi* et *ut singuli* et de l'application de la *lex situs* à la catégorie *ut singuli*. Sur dix-neuf auteurs cités par les codificateurs, douze font la distinction entre le statut réel mobilier *ut universi* et *ut singuli* et appliquent le *situs* comme rattachement pour cette dernière catégorie. Les six autres sont en faveur du domicile, mais ne distinguent pas entre *ut universi* et *ut singuli*. De plus, les exemples donnés par ces derniers auteurs ne concernent que le domaine des successions, donc le statut réel mobilier *ut universi*, pour lequel le rattachement est le domicile.[43]

Pour ces raisons, j'estime que la *lex situs* doit être appliquée même si cela peut présenter des difficultés pratiques.

Avec le *situs* comme rattachement surgit le problème du conflit mobile lorsqu'il y a eu changement dans la localisation de l'automobile.

Quelle *lex situs* doit-on maintenant appliquer à la responsabilité? Celle de l'ancienne localisation (Ontario) ou celle de la situation au moment de l'accident (Québec). Il me semble que seule la loi du Québec doit régir cette situation: la loi qui gouverne la condition juridique du bien meuble dans le futur est celle de sa nouvelle localisation sous réserve des droits acquis qui sont régis par le droit de l'ancienne localisation.

[43] Pour étude complète, voir J. A. Talpis, *op. cit.*, note 40. Aussi (1970-71), 73 R. du N. 275, 356; (1972-73), 74 R. du N. 5; (1972), 13 C. de D. 305.

> This is due as much to the territoriality of the old statute as to the generality of the actual statute. The old statute being territorial, its dispositions ceased to affect the moveable once it left its jurisdiction, while the actual statute being general, applies indiscriminately, both to the moveable previously situated there as to the one recently introduced into the territory.[44]

Donc, même en laisant la responsabilité du propriétaire de l'automobile dans le statut réel mobilier, c'est encore la loi du Québec qui aurait dû régir le problème et non celle du domicile.

Mais, la responsabilité du propriétaire entre-t-elle vraiment dans la catégorie "statut réel mobilier" comme l'a décidé le juge Deschênes? Ne pourrait-on pas la classer plutôt parmi les quasi-délits et appliquer la *lex loci delicti commissi*?

La nature et le fondement de la présomption édictée contre le propriétaire par l'article 3 de la Loi de l'indemnisation des victimes d'accidents d'automobile sont des plus controversées. Le législateur n'ayant pas précisé son intention à ce sujet, la doctrine et la jurisprudence émettent souvent des opinions tout à fait opposées sur plusieurs points litigieux soulevés par cette loi.[45]

Pour qualifier le problème, il faut se demander si la responsabilité édictée contre le propriétaire résulte du seul fait de la propriété de l'automobile, ou bien de la notion de faute dans la garde. S'il est responsable en tant que propriétaire, en l'absence de faute, il faut rattacher la responsabilité au statut réel mobilier, mais si la faute dans la garde en est le fondement, il faut alors rattacher cette responsabilité au régime des faits juridiques.

Une position minoritaire estime que le propriétaire est responsable parce qu'il est propriétaire. Ainsi le juge Owen déclare: "The basis of this liability is ownership of the automobile not any personal fault or vicarious liability based on the legal relationship between the owner and the driver of the automobile."[46]

Pour la majorité des auteurs et des juges,[47] le législateur est

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[44] Mon article (1972), 13 C. de D. 305, aux pp. 386-387.

[45] *Supra*, note 6. Voir Yves Mayrand, Responsabilité civile extracontractuelle, [1972] R.J.T. 409; Michel Pourcelet, La responsabilité du propriétaire d'automobile au regard de la loi du 10 mai 1961 (1962), 22 R. du B. 104, à la p. 108; Jean Paul Verschelden, La loi sur l'indemnisation des victimes d'accidents d'automobile, [1969] R.L. 457; Claude-Armand Sheppard, La loi d'indemnisation des victimes d'accidents d'automobile (1962), 22 R. du B. 73. Quant à la jurisprudence: *Imbault* c. *Desjardins*, [1971] C.A. 180; *Murray Bay Motor Co. Ltd.* c. *Dame Leduc*, [1971] C.A. 203, (1971), 12 C. de D. 339, note Tancelin.

[46] *Imbault* c. *Desjardins*, *ibid.*

[47] Juge André Forget, La loi sur l'indemnisation des victimes d'accidents d'automobile et son art. 3 (a), [1969] R.L. 468; Antaki, Nature et fondement de la responsabilité automobile, [1966] R.J.T. 339; *Beaudoin* c. *Gendron*, [1963] C.S. 475; *Nadeau* c. *Gareau*, [1967] R.C.S. 218 et les décisions récentes *Freedman* c. *Coté St-Luc*, [1972] R.C.S. 216; *Simard* c. *Soucy*, [1972] C.A. 640.

demeuré fidèle aux concepts traditionnels de la faute, et n'a pas imposé de responsabilité objective en l'absence de faute personnelle. Pour Camille Antaki, le propriétaire est responsable parce qu'il a commis une faute dans la garde juridique de l'automobile. La propriété ne peut constituer le fondement de la responsabilité, car l'acquéreur d'une automobile en vertu d'une vente à tempérament est responsable même si la propriété de l'automobile demeure entre le mains du vendeur.[48] Si la responsabilité est basée sur la faute, le rattachement ne pose aucun doute. Ce n'est que dans l'hypothèse de l'adoption de la conception de la responsabilité objective appliquée à l'automobiliste que le problème de rattachement se pose à cause du renvoi à la responsabilité du propriétaire de l'automobile. Si la responsabilité objective tient à sa qualité de propriétaire, la qualification du juge Deschênes peut se justifier.

Le problème du fondement de la responsabilité est trop contreversé à l'heure actuelle pour nous permettre de prendre parti.

Même si la responsabilité est imposée, abstraction faite de toute faute, c'est-à-dire en cas de responsabilité objective, on ne peut conclure que la question relève d'un autre domaine que de celui des "faits juridiques". Que la responsabilité soit objective ou basée sur la faute de quelqu'un, l'article 3 relève de la catégorie des délits et quasi-délits.

Le seul argument en faveur du statut réel est d'ordre exégétique ("le propriétaire"), donc faible. Il est peu souhaitable de faire dépendre la solution du problème de rattachement du fondement de la responsabilité de l'automobiliste. La responsabilité du propriétaire de l'automobile est un problème de responsabilité délictuelle quelle soit ou non basée sur la faute.

La majorité des auteurs français[49] favorise une qualification délictuelle; malgré la force d'attraction du statut réel, il ne faut pas oublier qu'il s'agit d'un élément d'organisation de la responsabilité qui relève de la loi du lieu du délit.[50]

Par conséquent le conflit entre le régime du statut réel et celui des faits juridiques aurait dû être résolu en faveur de ce dernier. Le lieu de commission du quasi-délit étant le Québec, le juge

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[48] *Op. cit., ibid.* Art. 2, al. 10, *supra,* note 6: "Est propriétaire toute personne qui a acquis une automobile et la possède en vertu d'un titre soit absolu soit conditionnel qui lui donne le droit d'en devenir propriétaire ou d'en jouir comme propriétaire, à charge de rendre."

[49] Batiffol, *op. cit.,* note 29, p. 610; Bourel, *op. cit.,* note 29, p. 216 et ss; Niboyet, *op. cit.,* note 29, p. 171; Bartin, Principes (1931-35), t. 2, p. 433; Savatier, Traité de la responsabilité civile (2è éd., 1953), t. 2, p. 204; Dalloz, *op. cit.,* note 29, p. 776.

[50] Dalloz, *op. cit., ibid.*

Deschênes aurait dû apprécier la responsabilité de Gauthier selon notre loi et non celle de l'Ontario.[51]

JEFFREY TALPIS*

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THE FRUSTRATED VACATIONER—GERMAN SOLUTION.—The English case of *Jarvis* v. *Swan Tours Ltd.*,[1] noted in an earlier issue of the *Canadian Bar Review*,[2] had its counterpart in a German case decided by the *Oberlandesgericht* of Cologne, on January 17th, 1973,[3] the main difference between the two cases being that whereas the plaintiff in *Jarvis* was disappointed in his package tour because his hotel was devoid of the cheerful social life which he had been promised, the complaint of the plaintiffs in the German case was that they were surrounded by more lively cheer than they were able to absorb.

In the German case, the plaintiffs, a married couple who owned and managed a medical massage institute, booked with the defendant travel bureau a three weeks' holiday tour to the Spanish island of Formentera for themselves and their five year old son, at a total price of 2063DM (approximately $880.00). In the defendant's prospectus, from which the plaintiff chose their tour and their hotel ("Pension" or private boarding house), the island of Formentera and the available accommodation were described in some detail. An introductory paragraph, under the heading of "Formentera" stated:

> Still outside the main tourist stream. A good hour by boat from Ibiza and not exactly easy to reach. Wide, white beaches and lonely bathing bays make Formentera a favourite resort for fishermen who want to take a vacation far away from tumult, and escape from their usual routine (have a "vacation from self" or "*Ferien vom Ich*", as it was put in the prospectus).[4]

The hotels enumerated in the prospectus were not classified according to the village to which they belonged, but the situation of each hotel relative to the beach and the services provided by it were described.

The prospectus contained various "general conditions", one of them to the effect that claims or complaints could only be enter-

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[51] Il n'entre pas dans le cadre de ce travail d'analyser l'opinion du juge Deschênes à l'effet qu'il y aurait un vol et que d'après la loi du Québec, Gauthier aurait dû être exonéré.

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[1] [1973] 1 All E.R. 71 (C.A.).

[2] (1973), 51 Can. Bar Rev. 507.

[3] [1973] *Neue Jur. Wochenschrift* 1083.

[4] My own rather free translation.

tained if they were lodged with the person in charge of the tour at the point of destination. Another condition limited the liability of the defendant travel agency to the price paid for the tour.

If the plaintiffs had looked forward to a restful holiday, far away from the aggravations of urban life, they were in for a surprise. There were three discotheques in the immediate vicinity of their hotel which, doors and windows wide open, shattered the stillness of the night with recorded music, played at top level until the small hours of the morning. Moreover, to fill the plaintiff's cup of woe, right under the window of their room there was a parking place, which was patronized by the customers of the discotheques. The sounds of arriving and departing vehicles, some of them with no or defective exhausts, contributed substantially to the noise level.

The plaintiffs immediately complained to the person in charge of the tour, and even sponsored a petition to the Mayor of the village, but found that nothing could be done about the noise, nor was it possible to provide them with suitable alternative accommodation in a quieter neighbourhood. They stayed in Formentera until the scheduled end of the trip but formally reserved themselves all claims against the defendant. When after their return to Germany, their demand for refund of the price and damages was not met, they instituted against the defendant action for 1733 DM, being the price of 2063DM paid by them, less 330DM saved by their not living at home (twenty-two days at fifteen DM each), plus 6600DM damages for breach of contract, being lost income during their absence on holiday. Their action was dismissed by the *Landesgericht,* court of first instance, but on appeal the *Oberlandesgericht* reversed. Holding that the action was well founded, it remitted the case to the *Landesgericht* for the assessment of damages.

The *Oberlandesgericht* did not agree with the court of first instance that the description of Formentera in the defendant's prospectus amounted to no more than a laudatory statement ("puff"), without legal effects as far as particular hotels were concerned. It held that, since persons interested in finding a suitable holiday place must needs rely on the prospectus of the travel agency, they are entitled to assume that every hotel mentioned in it, unless there is an express statement to the contrary, conforms to the general description of the place. Reading of Formentera as being "outside the main tourist stream" and "not exactly easy to reach", of "lonely bathing bays", and "vacations from Self", the plaintiffs had no grounds to think that they would have to stay in a hotel situated in an excessively noisy locality, with an active night life. The argument of the defendant that everyone knew that

Formentera, being Spanish, would probably be noisy, and that the plaintiffs, instead of complaining, should have joined in the joyful life typical of a southern country, received short shrift from the court. In Spain, as elsewhere, the court said, there are quiet places and quiet hotels, and, in any case, it was the defendant who by its prospectus had induced the plaintiffs to believe that they could have in Formentera a restful holiday, away from the noises of the big town.

Holding that owing to the defendant's breach of contract, the tour had proved a total loss for the plaintiffs, the court had no difficulty in deciding that the plaintiffs were entitled to a refund of the price paid by them (less savings, of course). As regards the claim for damages, the court arrived, along a different route, at substantially the same result as the English Court of Appeal in *Jarvis* v. *Swan Tours Ltd.* It will be remembered that in *Jarvis,* the Court of Appeal held that this was one of those rather exceptional cases in which damages can be awarded on breach of contract for immaterial loss. The German court also held that a person's holiday is essentially an immaterial benefit, but considered that nevertheless a "lost vacation" represents a material loss, which is capable of being assessed in terms of money. It was well recognized by medical science that every working individual stands in need of regular vacations if he is to recuperate from the stresses and strains of the daily routine and maintain his working strength. If self-employed, he paid for his vacation with the temporary loss of earnings, if employed, with his work during the year (no mention is made of the "playboy" who is on perpetual vacation, but this is a rather exceptional case). Since, owing to the defendant's breach of contract, the plaintiffs' stay on Formentera had proved useless to them for recuperative purposes, the plaintiffs were entitled to repeat their vacation at the expense of the defendant. Their damages therefore included, apart from the price paid, the earnings they would lose if they were to repeat their trip. That they would, probably, not do so, but rather go on working for another year before setting out again, was irrelevant.

The *Oberlandesgericht* considered that the fact that the plaintiffs had not cut their stay on Formentera short but had stayed on until the bitter end, did not amount, in the circumstances, to an implied renunciation of their claims, but directed the *Landesgericht* to consider whether it justified a reduction in the quantum of damages. Another question which the *Landesgericht* was asked to consider was whether the clause in the prospectus which limited damages to the price paid was valid, or had to be struck down as

being unconscionable and opposed to the fundamental concept of a contract of this sort.

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