COMMENTS
COMMENTAIRES

RESPONSABILITÉ DIRECTE DU FABRICANT VIS-À-VIS DU CONSOMMATEUR—GARANTIE.—Dans *Gougeon* v. *Peugot Canada,*[1] la Cour d'appel accueille l'action intentée par l'acheteur d'une voiture contre le fabricant, sur la base de la garantie conventionnelle et de la garantie légale des vices cachés. Le vendeur-concessionnaire avait été ajouté comme défendeur par amendement en cours d'instance, apparemment pour établir la chaîne des garanties. Cette concession aux solutions traditionnelles en matière de garantie ne parvient pas à cacher le point essentiel de la décision: le fabricant est lié directement au consommateur par un contrat de garantie. L'action intentée contre lui aurait eu pour effet, selon la Cour, d'interrompre la prescription à l'égard du concessionnaire déclaré solidairement responsable.

Cette décision marque une étape importante de la jurisprudence sur plusieurs points: le fondement de la responsabilité du fabricant non vendeur; l'existence d'un lien juridique direct entre le fabricant et le consommateur, nonobstant l'intervention d'un intermédiaire entre les deux; le caractère non exclusif de la garantie conventionnelle par rapport à la garantie légale.

1. *Le fondement de la responsabilité du fabricant non vendeur, vis-à-vis du consommateur.*

Pour accorder une injonction à un fabricant contre le tiers-revendeur d'un produit, qui ne respectait pas les conditions de vente de ce produit acquis par lui d'un grossiste, cocontractant du fabricant requérant l'injonction, le juge Mayrand avait contourné l'obstacle de l'effet relatif du contrat intervenu entre le fabricant et le grossiste, en recourant à la responsabilité délictuelle.[2] Ce faisant, il apliquait une jurisprudence constante depuis la célèbre affaire de la carabine *Ross.*[3] Car, il faut souligner que, si dans cet arrêt, la Cour suprême déclare bien le fabricant directement

[1] [1973] C.A. 824.
[2] *Clairol* v. *Trudel* (1971), 56 Can. Pat. Rep. 179, aux pp. 183, 184; confirmé par., [1972] C.A. 53.
[3] *Ross* v. *Dunstall* et *Ross* v. *Emery* (1921), 62 R.C.S. 393.

responsable vis-à-vis de la victime de la carabine, qu'il la lui ait vendue directement ou par l'intermédiaire d'un représentant, c'était par application du principe de responsabilité délictuelle.[4] L'opinion du juge Anglin sur la responsabilité du fabricant en vertu de l'article 1527 du Code civil était donnée *obiter*.[5]

En accueillant une action fondée sur la garantie conventionnelle et légale du fabricant *non vendeur* vis-à-vis de l'usager, la Cour d'appel semble donc innover par rapport à ces précédents.

A vrai dire, sa position est encore mal assurée. A propos de la solidarité, le juge Deschênes se réfère subsidiairement à l'article 1106 du Code civil relatif à la solidarité délictuelle et à l'arrêt *Ross,* après avoir motivé sa décision par l'article 1105 du Code civil, édictant la solidarité en matière commerciale. Le juge Kaufman estime que le choix du fondement de la responsabilité du fabricant est peu important, en s'appuyant sur l'opinion du juge Mignault dans l'affaire *Ross*. Donc, l'application des règles de la garantie est mal dissociée de l'arrière-plan délictuel que l'on trouve habituellement en la matière depuis l'arrêt *Ross* confirmé par une nombreuse jurisprudence.[6]

Néanmoins, le fait que l'on n'ait pas eu recours en l'espèce aux règles de la responsabilité délictuelle contre le fabricant est à lui seul un évènement qui confirme une tendance récente de la jurisprudence[7] à utiliser davantage les règles de la responsabilité contractuelle, à la suite sans doute des efforts de la doctrine.[8]

2. *Le lien direct entre la fabricant et le consommateur.*

L'action du propriétaire de l'automobile était dirigée à l'origine uniquement contre le fabricant. La mise en cause du vendeur-concessionnaire n'a été faite que pour répondre à une objection du défendeur-fabricant, relative à l'absence de lien contractuel avec la demandeur.

L'action originaire contre le fabricant n'a donc pas paru suffisante au premier juge puisqu'il a autorisé la mise en cause du

[4] *Ibid.* Juge Anglin, à la p. 401; Juge Mignault, à la p. 422. *Cf.* Juge Carrol (1920), 29 B.R. 476, aux pp. 484-485 et juge Dorion (1920), 58 C.S. 123, à la p. 128.

[5] *Ibid.*, à la p. 400, juge Anglin: "The responsibility of the manufacturer where he has himself sold to the plaintiff, either directly or through an agent, for injuries occasioned to the purchaser by hidden defects in the thing sold is clearly covered by Arts 1522 and 1527 C.C. . . ."

[6] *Drolet* v. *London Lancashire,* [1944] R.C.S., 82; *Modern Motor Sales* v. *Masoud et al.,* [1953] 1 R.C.S. 149, à la p. 157; *Cohen* v. *Coca-Cola,* [1967] R.C.S. 469.

[7] *Kaupman-Yaphe* v. *Poly,* [1970] C.S. 468; *Rioux* v. *General Motors,* [1971] C.S. 828.

[8] P.-A. Crépeau, Des régimes contractuel et délictuel de responsabilité civile en droit civil canadien (1962), 22 R. du B. 501, cité dans *Surprenant* v. *Air Canada,* [1973] C.A. 107.

vendeur avant de se prononcer sur la responsabilité du fabricant. Cela implique qu'il ne considérait pas le fabricant comme tenu par une garantie légale ni conventionnelle vis-à-vis du propriétaire. Il a d'ailleurs rejeté l'action pour un motif erroné censuré par le juge Deschênes.

La Cour d'appel avait donc à juger une action intentée à la fois contre le fabricant et contre le vendeur-concessionnaire mis sur le même plan et non pas une action contre le vendeur avec recours de ce dernier contre le fabricant. En accueillant cette action et en condamnant solidairement les défendeurs, la Cour d'appel admet nécessairement l'existence d'une garantie du fabricant vis-à-vis du consommateur, et par conséquent, celle d'un contrat entre eux. Le progrès réalisé par rapport à l'analyse ancienne de l'action en garantie principale suive d'actions récursoires en garantie, est considérable.

La nature de la garantie que la Cour d'appel déclare exister entre le fabricant et le consommateur n'est pas précisée. On a vu que les juges ne s'en souciaient pas. Ce laxisme enlève évidemment beaucoup de poids à la décision.

Il aurait pourtant été facile de motiver de façon convaincante la solution adoptée, en lui choisissant un fondement légal. Les juges n'avaient que l'embarras du choix.

Dans une décision non publiée rendue sur un litige semblable, la Cour supérieure de Montréal avait accueilli conjointement et solidairement une action rédhibitoire intentée contre le vendeur et le fabricant d'une automobile.[9] Le fondement de cette décision résidait dans la garantie légale du fabricant non vendeur, vis-à-vis du consommateur. En l'espèce, à la différence de l'arrêt commenté, la compagnie Ford défenderesse n'invoquait aucune garantie conventionnelle pour limiter sa responsabilité pour les vices cachés. La garantie retenue contre le fabricant non vendeur, par le juge Challies, était donc clairement une garantie légale analogue à celle édictée par l'article 1527 alinéa 2 du Code civil contre le vendeur-fabricant.

A cette solution on pouvait évidemment objecter que le texte de l'article 1527 vise uniquement le vendeur et que l'interprétation donnée au texte était *praeter legem.*

Dans l'arrêt commenté, les circonstances de l'espèce permettaient facilement à la Cour d'appel d'échapper à cette objection,

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[9] *Lazanik* v. *Ford Motor Cy of Canada,* 15 juin 1965, C.S. Montréal, no. 623, 504, juge en chef adjoint G. S. Challies; cité également dans *Duhamel* v. *Lanrol Motors (1960) Ltd. & Chrysler Canada Ltd.,* C.C.H. Canadian Sales & Credit Law Guide, par. 21-028 (Qué. C.S., 5 mai, 1971), d'après le Report on Consumer Warranties and Guaranties in the Sale of Goods, Ontario Law Reform Commission (1972), p. 90.

en reconnaissant l'existence d'une garantie conventionnelle fournie par le fabricant au consommateur, qui était applicable dans les faits de la cause. En effet, la demanderesse se prévalait de la garantie écrite que le fabricant d'automobile remet à l'usager, par l'intermédiaire du concessionnaire. Il s'agit d'une pratique commerciale bien établie, dont il est possible de tirer les conséquences juridiques, sans nécessiter l'intervention du législateur. En effet, la garantie écrite[10] est constitutive d'un contrat de garantie entre le fabricant et l'usager, contrat indépendant des contrats de vente intervenus entre le fabricant et le concessionnaire d'une part, et entre le concessionnaire et l'usager, d'autre part.

Juridiquement, la reconnaissance d'un contrat entre le fabricant et le "consommateur" du produit acheté d'un tiers, ne présente aucune difficulté. Ce contrat répond à toutes les exigences de l'article 984 du Code civil. Son régime est calqué sur l'obligation de garantie dans la vente.[11] L'existence de contrats innommés, c'est-à-dire non réglementés en détail par la loi, n'a jamais fait de doute en droit civil. C'est une conséquence du principe fondamental de la liberté contractuelle.

Cette solution tient compte de la réalité commerciale, à savoir la proclamation d'une garantie du fabricant, qui constitutue un argument publicitaire bien connu. Elle s'inscrit dans l'évolution de la nature des rapports existants entre le fabricant et le concessionnaire. Il n'est plus possible aujourd'hui de soutenir que le consessionnaire avec lequel le client contracte fasse obstacle à l'établissement d'un lien juridique direct entre le consommateur et le fabricant, étant donné l'intégration poussée du système de production et de distribution. Il est inadmissible que les fabricants continuent à se prévaloir de schémas juridiques archaïques pour se mettre à l'abri de leurs responsabilités en se cachant derrière leurs concessionnaires.

Ici, la manoeuvre a été déjouée par la Cour d'appel grâce à une répudiation du formalisme juridique, au nom des nécessités de la société moderne. La Cour d'appel donne un exemple remarquable d'interprétation large des prétentions des parties, qui est tout à fait dans l'esprit du nouveau Code de procédure. Devant une telle décision, on mesure le pouvoir des tribunaux de faire évoluer le droit, nonobstant la paralysie du législateur par les groupes de pression. Mais, il ne peut s'agir là que d'une solution transitoire, car il existe des décisions contraires, qui adhèrent toujours aux vieux dogmes, sans tenir compte des réalités.[12] Le législateur sera donc quand même appelé à intervenir.

[10] Pièce essentielle au dossier en l'espèce.
[11] Articles 1522 et suiv. du Code civil.
[12] *St-Hyacinthe* v. *General Motors,* [1972] C.S. 799.

3. *Le cumul des régimes de garantie légale et conventionnelle.*

La livraison de la voiture avait été faite le 15 février 1965 et l'action contre le manufacturier intentée un an et une semaine plus tard. L'écoulement du délai de garantie conventionnelle lors de l'institution de l'action ne faisait cependant pas obstacle à la mise en jeu de la garantie contre le fabricant, car il est de jurisprudence constante que tant en matière de garantie conventionnelle que de garantie légale, il suffit que le droit à la garantie se manifeste pendant le délai pour que la garantie puisse jouer. Le fait que la longueur du délai soit différente en matière de garantie légale[13] et conventionnelle,[14] n'empêche pas que les règles de computation du délai soient identiques dans les deux cas. En droit civil, il est établi que les régimes de garantie légale et conventionnelle ne s'excluent pas systématiquement mais seulement sur les points précis où la garantie conventionnelle déroge à la garantie légale.[15] C'est donc par application du régime de la garantie conventionelle, tel que complété par les règles supplétives de la garantie légale, quant à la computation notamment, que l'action pouvait être jugée recevable en l'espèce contre le fabricant.

Mais l'application de l'article 1530 faite par le juge Kaufman pour déclarer recevable l'action contre le concessionnaire ne semble pas exacte, non plus que la mention qu'il fait de l'interruption du délai contre le concessionnaire par l'action intentée contre le fabricant.

L'article 1530 édicte en effet un délai préfix, non susceptible d'interruption ni de suspension. En droit strict, l'action en garantie contre le concessionnaire était tardive, à notre avis, puisque la diligence raisonnable en matière de vente d'automobiles se compte en semaines plutôt qu'en mois, d'après la jurisprudence. Or, un délai de plus de deux ans s'était écoulé entre la découverte des vices et la mise en cause du concessionnaire.

En couvrant la tardivité de la mise en cause du concessionnaire par la prétendue interruption d'un délai préfix, la Cour d'appel rend donc une décision d'équité relativement au concessionnaire. Mais, ce qui importe c'est le motif pour lequel l'irrégularité de la mise en cause du concessionnaire a été ainsi couverte. A notre avis, c'est l'incertitude qui règne encore sur l'existence même d'un lien direct de garantie entre le fabricant et le consommateur[16] qui explique mais ne justifie pas ce retour instinctif au schéma traditionnel de la garantie passant par le cocontractant direct du

[13] Art. 1530 du Code civil, diligence raisonnable laissée à l'appréciation des tribunaux.

[14] En l'espèce, 1 an ou 12,000 milles.

[15] *Lamer* v. *Beaudoin*, [1923] R.C.S. 459, aux pp. 465 et 473, *re* art. 1526 du Code civil.

[16] *Supra*, note 12.

consommateur. La garantie légale du fabricant est encore trop étroitement associée dans la loi au contrat de vente, pour qu'on ose s'en éloigner trop pour engager sa responsabilité lorsqu'il n'est pas vendeur. Seul le vendeur-fabricant tombait jusqu'ici sous le coup de la présomption, irréfragable[17] ou simple[18] selon les arrêts, de l'article 1527 alinéa 2, qui est au même effet que la *strict enterprise liability* appliquée par les tribunaux américains. Le fabricant non-vendeur n'avait jamais été atteint par ceux qui n'avaient pas contracté directement avec lui, que par la voie délictuelle,[19] encore que l'arrêt *Ross* réservait *obiter* la possibilité d'un recours en garantie même contre le fabricant qui ne vend pas directement.[20] C'est cette voie indiquée par l'arrêt *Ross* qui commence maintenant à être exploitée par les tribunaux. La règle n'est donc pas nouvelle; ce qui l'est, c'est son application. C'est ce qui explique la mise en cause, purement superflue, du concessionnaire, à titre de sécurité, au cas où l'emploi nouveau d'une règle ancienne risquait de heurter des "habitudes" dont on sait l'importance dans les milieux juridiques. Mais, cette précaution si contestable soit-elle en droit, ne diminuait en rien la valeur de la règle de droit appliquée en l'espèce.

Il reste donc une étape essentielle à franchir par la jurisprudence: reconnaître la garantie du fabricant, en dehors de toute mise en cause du concessionnaire. Rien ne s'oppose à une telle solution dans l'état actuel du droit positif au Québec. C'est déjà au fond la solution de la Cour d'appel dans l'arrêt commenté avec, en plus, les faux-semblants concernant la responsabilité du concessionnaire.

Une comparaison des résultats obtenus dans les différents systèmes juridiques sur cette question d'actualité montre que deux droits procurent une protection efficace aux consommateurs contre les malfaçons: ce sont le droit américain, qui, avec la *strict enterprise liability*, s'est affranchi de la *privity of contract*, et le droit français, qui a utilisé les dispositions d'un Code civil avec lequel celui du Québec a beaucoup de points communs en la matière.

Dans cette perspective, la décision commentée prend toute sa signification et elle devrait inciter le législateur du Québec à développer les potentialités énormes du droit civil, plutôt que de continuer à mettre le droit privé de cette province à la remorque d'une *common law* qui en est encore à se doter de moyens lui

[17] *Samson & Filion* v. *Davie Shipbuilding*, [1925] R.C.S. 202, à la p. 210.
[18] *Touchette* v. *Pizzagalli*, [1938] R.C.S., 433, à la p. 438. L'arrêt *Modern Motor Sales* v. *Masoud et al.*, *supra*, note 6, ne soulève pas la question de la responsabilité du vendeur-fabricant et ne peut donc pas être invoqué comme précédent à ce sujet.
[19] *Supra*, note 6.
[20] *Supra*, note 5.

permettant d'arriver à des solutions semblables à celle-ci, en matière de garantie du fabricant.[21]

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PRODUCTS LIABILITY—DUTY TO WARN—ECONOMIC LOSS.—The recent decision of the Supreme Court of Canada in *Rivtow Marine, Ltd.* v. *Washington Iron Works,*[1] contains three points of considerable importance to the law of products liability. First, the manufacturer of defective goods was held liable for failing to warn of their dangers when knowledge of those dangers reached him, not at the time of distribution of the goods, but some time after they had left his hands. Second, liability was similarly imposed on a distributor who was in no way responsible for the initial defect. Third, and perhaps most important, liability was imposed for losses that were purely economic.

The case arose out of the charter of a barge fitted with a crane for the purpose of loading and unloading logs. The crane was manufactured by the first defendant, Washington Iron Works, an American corporation, and distributed in Canada by the second defendant, Walkem Machinery and Equipment, Ltd. The plaintiff had chartered the barge for use in its business from a company called Yarrows, Ltd., against whom an action, though initiated, had been discontinued.[2] It turned out that the crane had serious structural defects due to what the Supreme Court of Canada described as "negligence in design".[3] Both defendants were aware of these defects by January, 1966, but they took no steps to warn the plaintiff, something that they could have done without difficulty since the cranes had a limited and easily traceable class of users.[4] In September 1966 a crane similar to the plaintiff's collapsed, killing its operator, and, upon investigation ordered by the Workmen's Compensation Board, the plaintiff's crane was discovered to be similarly defective and dangerous. Consequently, it was withdrawn from service for repairs during a period "which was recognized by all concerned as being one of the busiest seasons of the year".[5]

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[21] *Supra,* note 9.

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[1] (1973), 40 D.L.R. (3d) 530, reversing the British Columbia Court of Appeal, [1972] 3 W.W.R. 735, 26 D.L.R. (3d) 559, and restoring the decision of Ruttan J., 74 W.W.R. 110.

[2] See 74 W.W.R., at p. 112.

[3] *Supra,* footnote 1, at p. 533. A subsidiary point worth noting is that the case puts to rest the myth that there is a special difficulty in imposing liability for "design defects".

[4] *Ibid.,* at p. 534.

[5] *Ibid.,* at p. 531.

The plaintiff's claim was not for physical damage for he had suffered none, but for the cost of repairs to the crane and for the loss of profits incurred while the crane was out of service. The trial judge took the view that "the duty of repair, of course, rested with the plaintiff". Later he said: "the cost of repair of the cranes is not the obligation of the defendants, but must be borne solely by the plaintiff as charterer". It is not quite clear to this writer why the judge was so quick to come to this conclusion. The incidence of the duty of repair, as between owner and charterer of the barge, would not necessarily determine, one would think, the question of the defendants' liability. However that may be, the trial judge refused damages for the cost of repair and for the loss of profits that would necessarily have been incurred had the repairs been carried out as they would have been on timely warning, at the slackest time of the year, which was, it appeared, in January and February. But he accepted that the defendants had been in breach of their duty to warn the plaintiff of the defect at their earliest opportunity, and so he allowed damages based on the difference between the loss of profits actually incurred, and that which would have been incurred had the barge been taken out of service in January or February.[6]

On appeal, the British Columbia Court of Appeal[7] reversed this decision, and held that no damages were recoverable at all. In delivering the judgment of the court, Tysoe J.A. said:

> In my opinion the law . . . is that neither a manufacturer of a potentially dangerous or defective article nor other person who is within the proximity of relationship contemplated in *Donoghue* v. *Stevenson* is liable in tort, as distinct from contract, to an ultimate consumer or user for damage arising in the article itself, but only for personal injury and damage to other property caused by the article or its use.[8]

The Supreme Court of Canada sitting as a nine-man court reversed the Court of Appeal and restored the trial judgment. Though all the members of the court agreed in this result, Laskin and Hall JJ. would have gone further, and allowed also the cost of repair to the crane.

The duty to warn

The majority decision of the Supreme Court was firmly based on the breach of the duty to warn. The court stressed the facts that the defendants knew who the users were. and that the plaintiff relied on the defendants for advice in the use of the crane. Consequently, the court held, there was a "clear duty" upon both defendants to warn the plaintiff as soon as they became aware of

[6] 74 W.W.R., at p. 128.
[7] *Supra,* footnote 1.
[8] 26 D.L.R. (3d), at p. 579.

the defect. On the facts, therefore, there was a strong case for imposing a duty. The class of users was limited and easily ascertainable, the user relied on the defendants for advice, and the defendants had actual knowledge of the defective design. One may suggest, however, that the principle will be extended to other cases. What, for example, if the defendants did not have actual knowledge of the defect, but they could and should with reasonable diligence have found out about it? In my view, the principle accepted by the Supreme Court of Canada would apply also to such a case. Whenever an enterprise is said to have actual knowledge, what is really meant is that one or more of its employees or agents had such knowledge; it is never required that the "directing will" or "alter ego" of the enterprise should have the knowledge; it is sufficient to say, if its servant knows, that it ought to have had the knowledge, or that it is deemed to have it. Even in *Rivtow* itself the defendants could not have been sure that the plaintiff's crane was defective. The most that could be said was that they knew (or ought to have known) that it was very likely to be defective. It remains to be seen how far the duty will be extended. Ultimately it may even prove difficult to stop short of the position that the manufacturer's duty to warn arises whenever he negligently manufactures a defective product.[9]

Again, the facts of the plaintiff's reliance on the defendants' advice, though it makes his case a strong one, need not be a limiting factor. The buyer of a motor vehicle, for example, might reasonably expect the manufacturer to take steps to let him know of a defect discovered after the goods are in his hands, and, indeed, that practice is required by statute in Canada in the case of defects affecting safety.[10] There is no reason why the principle should not apply to other products.

In *Rivtow* the class of users was limited and easily ascertainable, but, again, this need not be a limiting factor. Rather it is an illustration of what kind of action may be reasonable in particular circumstances. In *Rivtow* the reasonable response of the manufacturer was clearly to contact the users directly. In some cases of consumer products this may not be reasonably possible; in other cases, such as motor vehicles, it may be. Even where the manufacturer cannot trace each user, it does not follow that he need do nothing. He may have a duty to trace as many as he can through his distributive chain. He may have a duty to advertise.

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[9] The point is significant in considering the scope of liability for economic loss. See *infra*, footnotes 17 *et seq.*

[10] Motor Vehicle Safety Act, R.S.C., 1970, c. 26, s. 8. The decision of the court would extend also to defects whose only propensity is to cause economic loss. It also might extend to some classes of supplier not named in the Act, *e.g.*, retailers.

An important aspect of the duty to warn is that it is not dependent on prior negligence in the manufacture of the defective product, as is clearly shown in *Rivtow* by the imposition of liability on the distributor, who was in no way responsible for the initial defect. It is suggested that this represents a significant step towards strict liability. Under our present law, for example, it would appear that a manufacturer is not liable in respect of hidden defects in a component part of his product that he has obtained from a reputable supplier.[11] But if he subsequently discovers that a component part in a series of products is defectively designed, or inadequate for its purpose, he may now have a duty to take reasonable steps to contact those who might be damaged by the defects. The first person to be injured may not recover, but those injured later may have a case if reasonable steps were not taken to warn them. Similarly, in the case of a drug, for example, the product may be manufactured with all the care that anyone could use at the time of manufacture, but subsequent tests may indicate dangerous side effects. Again, the manufacturer, though not negligent at the time of manufacture and distribution of the product, may well have a duty to warn subsequently. Here again, I would suggest, knowledge of certain danger is not required. It should be sufficient that the manufacturer knew or ought to have known of circumstances sufficiently suspicious that a reasonable user (or his professional adviser) might alter his decision to use the product. In my view, none of these requirements is unduly onerous. A manufacturer who distributes a potentially defective product in the course of his business ought to be responsible for informing the users of that product of anything that may reasonably enable them to avoid the consequences of a defect. It is true that such a conclusion involves the imposition of a positive duty to act, but where the defendant has himself created the danger, and for his business advantage, albeit without negligence, it would not be a radical extension of existing tort law to impose liability for failure to warn.[12]

The liability of the distributor

Another significant step towards strict liability is the imposition of liability on the distributor of the defective product, in this case, the sole representative in British Columbia of a foreign manufacturer. If a distributor knows, or, it is suggested, ought to

[11] See *Taylor* v. *Rover Co.*, [1966] 1 W.L.R. 210, [1966] 2 All E.R. 181; Fleming, The Law of Torts (4th ed., 1971), p. 450. But see *Murphy* v. *St. Catharine's General Hospital* (1964), 41 D.L.R. (2d) 697, at p. 707 per Gale J.; *Ford Motor Co.* v. *Mathis* (1963), 322 F. 2d 267 (C.A. 4th Cir.).

[12] See Fleming, *op. cit., ibid.*, p. 143; *Home Office* v. *Dorset Yacht Co.*, [1970] 2 All E.R. 294 (H.L.).

know of defects in the products he distributes, he has a duty to take reasonable steps to warn users of the products, even though he was in no way responsible for the initial defect. This development also is a welcome one in that it enlarges the responsibility of persons other than the manufacturer in the chain of distribution, a matter of particular importance to the plaintiff when the manufacturer is unknown, insolvent, or beyond the jurisdiction. To put the matter in perspective it may be noted that the American doctrine of strict liability applies to all business suppliers,[13] duties of inspection have already been imposed by the courts on business suppliers,[14] strict liability can be brought home indirectly to such defendants by a series of warranty actions,[15] and the Ontario Law Reform Commission has proposed a direct action by the consumer for breach of warranty against certain distributors (including importers).[16] In my view, the decision of the Supreme Court of Canada is in harmony with those developments, and to be welcomed.

Economic loss

The most interesting and important aspect of the case is its approach to the question of economic loss. This extremely vexed question has led courts in England, Canada, and in various American jurisdictions to contradictory results.[17] In two cases in the English Court of Appeal[18] recovery for purely economic loss caused by negligence was denied, Lord Denning indicating in the latter case that the court should decide the question in each case "as a matter of policy",[19] and implying that in his view the sounder policy was generally to deny liability. The majority of the Supreme Court of Canada indicated that they preferred the dictum of Salmon L.J. in *Ministry of Housing and Local Government* v. *Sharp*,[20] describing it as accurate and succinct:

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[13] Restatement of the Law, Torts (2d) (1966), s. 402A.

[14] *Watson* v. *Buckley*, [1940] 1 All E.R. 174; *Andrews* v. *Hopkinson*, [1957] 1 Q.B. 229.

[15] *Kasler & Cohen* v. *Slavowski*, [1928] 1 K.B. 78.

[16] Report on Consumer Warranties and Guarantees in the Sale of Goods, (1972), pp. 66 and 72.

[17] See *Weller & Co.* v. *Foot and Mouth Disease Research Institute*, [1966] 1 Q.B. 569; *Electrohome, Ltd.* v. *Welsh Plastics Ltd.*, [1969] 2 All E.R. 205; *British Celanese, Ltd.* v. *A. M. Hunt (Capacitors) Ltd.*, [1969] 2 All E.R. 1252; *S.C.M. (U.K.) Ltd.* v. *W. J. Whittal & Son Ltd.*, [1971] 1 Q.B. 337; *Spartan Steel & Alloys Ltd.* v. *Martin & Co. (Contractors) Ltd.*, [1972] 3 W.L.R. 502; *Dutton* v. *Bognor Regis Building Co.*, [1972] 1 All E.R. 462; *Seaway Hotels* v. *Gragg* (1959), 17 D.L.R. (2d) 292, aff'd 21 D.L.R. (2d) 264; *Santor* v. *A. & M. Karaghevsian Inc.* (1965), 44 N.J. 52, 207 A.2d 305; *Seely* v. *White Motor Co.* (1965), 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P. 2d 145.

[18] *S.C.M.* v. *W. J. Whittal & Son, Ltd.*, and *Spartan Steel & Alloys, Ltd.* v. *Martin & Co. (Contractors) Ltd.*, *ibid.*

[19] [1972] 3 W.L.R., at pp. 507-508.

[20] [1970] 2 Q.B. 223, [1970] 2 W.L.R. 802, [1970] 1 All E.R. 1009.

> So far, however, as the law of negligence relating to civil actions is concerned, the existence of a duty to take reasonable care no longer depends on whether it is physical injury or financial loss which can reasonably be foreseen as a result of a failure to take such care.[21]

On this basis the majority had no difficulty in concluding that the measure of damages awarded by the trial judge fell within the test of proximity, and was properly awarded for breach of the duty to warn. The Supreme Court of Canada has, therefore, rejected the position that there is a special rule restricting the recovery of economic loss in negligence cases, and has also rejected the suggestion that has occasionally appeared that the test of liability for economic loss is the foreseeability of physical harm.[22] On both these points the decision of the Supreme Court of Canada is, in my view, sound.[23] The full implication of the decision remains to be seen. If, as suggested above, the manufacturer's duty to warn is extended to any case in which he ought to have known of the defect, it is likely to arise whenever the defect is caused by the manufacturer's negligence, for if the manufacturer ought to have prevented the defect, he ought also, one would think, in case of failure to do so, to have discovered that failure.[24] The position would then be, in effect, that a manufacturer would be liable for all consequential economic loss caused by his negligence in producing defective products. Admittedly, the majority twice disclaimed the intention of reaching that position and it would not be impossible to put a narrow construction on the case, but it is suggested that the logic of what was decided implies the abandonment of economic loss as a category automatically excluding recovery. As I have said elsewhere, I think that this result is sound, at any rate in the case of defective products, subject, as clearly contemplated by the Supreme Court of Canada, to limits of causation and proximity.[25] Certainly there must be a limit to the scope of recovery, and, no doubt, Lord Denning is right in saying that ultimately considerations of public policy must determine the boundaries. It is my contention that these boundaries can be better determined in the context of evolving rules of proximity or remoteness than by a blanket exclusion of economic losses.

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[21] [1970] 2 Q.B., at p. 278.

[22] See Widgery, J. in *Weller & Co.* v. *Foot and Mouth Disease Research Institute, supra,* footnote 17; Atiyah, Negligence and Economic Loss (1967), 83 L.Q. Rev. 248, at pp. 260-261. Laskin J. in his judgment in *Rivtow* makes the same suggestion.

[23] See Waddams, Implied Warranties and Products Liability, in New Developments in the Law of Torts, Law Society of Upper Canada Special Lectures (1973), pp. 171-181.

[24] The failure to warn of danger can frequently be simply an alternative way of stating liability for a defective product, for there are few products that could not be made harmless by adequate warning. See, for example, *Distillers Corporation* v. *Thompson,* [1971] A.C. 458.

[25] See, *supra,* footnote 23.

Laskin, J., with whom Hall J., concurred, agreed with the decision of the majority so far as it went. But he would have gone further and allowed also the cost of repair and (presumably) all the loss of profits.[26] In his view the basis of recovery was not to be restricted to the breach of a duty to warn. The negligent manufacture of the product was sufficient, in his view, to impose liability. However, he restricted the liability to the case of a product that was likely to cause physical damage, expressly leaving undecided the case of a product whose only propensity was to cause economic loss. With all respect, the writer finds it difficult to accept the principle that foreseeability of physical harm should be the criterion of liability for recovery of economic loss, when no physical harm has in fact occurred.[27] On the basis of the importance of deterring acts that endanger the public, one would expect such a principle to be confined to danger of personal injury; once property damage is included it is hard to recognize public policy reasons for distinguishing economic loss.[28] The writer would, therefore, accept the conclusion of Laskin J., as far as it goes, but he would go further in rejecting the proposed limitation of the principle to products likely to cause physical damage.

The question of the repair costs was put by Laskin J. on the basis of mitigation. If the plaintiff was entitled to recover the loss of profits (as Laskin J. thought he was) he was also under a duty to mitigate that loss, and no-one denied that repairing the crane was a reasonable and effective means of mitigation. Consequently, having reduced his loss as the law obliges him to do, he should be entitled to recover the whole of that reduced loss, including the expense incurred in effecting the reduction. In the writer's view this line of reasoning is persuasive. It would seem to be a curious result if the plaintiff should be required to reduce his loss and, at the same time, be penalized for doing so.

In a wider context, however, the question of repair costs presents difficulties. In the case where the plaintiff is the owner of the defective chattel (and not, as here, the charterer), a claim for the cost of repair usually represents a claim for what is, in effect an excessive price paid by the plaintiff, that is, the difference between the value of the goods, and the value they would have had if they had answered to his expectations. In many cases the manufacturer of goods, particularly consumer goods, may be partly or even mainly responsible for the creation of the plaintiff's expectations.[29]

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[26] Curiously enough, Laskin J. says only that he would vary the trial judgment by adding the cost of repair. But the tenor of the judgment seems to indicate that he would also have allowed the full loss of profits.

[27] See *supra*, footnotes 22 and 23.

[28] See Weaver, Note, (1971), 34 Mod. L. Rev. 323.

[29] It is presumably on this basis that the recommendation to hold the manufacturer liable for breach of warranty, made in the Ontario Law Re-

In other cases, however, he may not be, and in such a case one may question the logical basis of holding liable one person simply because expectations created by another were unsatisfied.[30] To put it another way, if the complaint is that the plaintiff has paid too much for the goods (and not that the goods have damaged an independent interest) should not that complaint be made to the person to whom the price was paid?

These questions have given rise to quite exceptional difficulties in English and American jurisdictions, and it is not likely that the *Rivtow* case will represent the last word on the matter. What is encouraging about the case is the willingness of the Supreme Court of Canada to tackle these difficult problems with care, and to depart, when convinced that departure is appropriate, from both English and American approaches. This case, together with the recent decision in *Lambert* v. *Lastoplex Chemicals Co., Ltd.*[31] bodes well for the future development of the law of products liability in Canada.

S. M. WADDAMS*

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INSURANCE—SUBROGATION—PRIORITY BETWEEN INSURER AND INSURED.—*Re Ledingham* v. *Di Natale*[1] recently confronted the Ontario Court of Appeal with a question that, in contrast to other countries, has received little, if any, studied attention in Anglo-American jurisprudence or scholarly writing.[2] In common with certain other intriguing relations, it concerns a triangular situation: a competition between a subrogee insurer and his insured in their recourse against a tortfeasor. Specifically, the problem arises when neither the insurer nor the tortfeasor is required (or

form Commission's Report on Consumer Warranties *op. cit.*, footnote 16 is justified.

[30] See Stamp L.J. in *Dutton* v. *Bognor Regis Building Co., supra,* footnote 17, at pp. 489-490.

[31] [1972] S.C.R. 569. See also *Moran* v. *Pyle National (Canada) Ltd.* unreported, decided December 21st, 1973.

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[1] [1973] 1 O.R. 291, 31 D.L.R. (3d) 18 (C.A.), rev'g, [1972] 1 O.R. 785, 24 D.L.R. (3d) 257 (H.C.).

[2] I have discussed this problem from a comparative point of view, with detailed references to the foreign literature, in International Encyclopedia of Comparative Law, Vol. IX (1971), ch. 11 (Collateral Benefits), pp. 38-43; also more briefly in The Collateral Source Rule and Loss Allocation in Tort Law (1966), 54 Calif. L. Rev. 1478, at pp. 1523-1526.

Most advanced and helpful in this area is the German literature. I recommend especially: Marschall, Reflexschäden und Regressrechte (1967), ch. 15; Sieg, Quotenvorrecht in Sozial- und Privatversicherung, [1968] Juristische Schulung 357; G. & D. Reinicke, Zum Quotenvorrecht der Versicherungs—und Versorgungsträger, [1954] Neue Juristische Wochenschrift 1103.

financially capable) of satisfying the whole of the insured tort victim's loss: has the insurer or the insured then priority in satisfying his respective claim?

There is no problem if either the insurer *or* the tortfeasor covers the whole of the victim's loss. If the insurance cover is 100%, the insured will be satisfied in full and the insurer must content himself with whatever his subrogation claim can wring from the tortfeasor; if the tortfeasor is liable (and financially responsible) 100%, again the plaintiff (insured) will be recompensed in full, even if the insurance cover is incomplete (for instance because of under-insurance or because the insurance does not cover certain losses like loss of profits or non-material injury). Thus the problem is confined to the, however not infrequent, situation when neither the tort recovery nor the insurance cover is by itself sufficient to satisfy the plaintiff's loss in full. That the tortfeasor is not responding *in toto* may be due to either one of two causes: (i) because he is not legally responsible for the whole injury, for instance on account of contributory negligence or by reason of a statutory ceiling on liability (like that of Canadian railroads or automobile owners under American or German responsibility laws); or (ii) because the tortfeasor is unable to respond in full and either manages to settle for less or just plainly defaults on part of his judgment debt.

Three solutions are available, which may be illustrated by assuming that the tort victim's (*P*) loss is $10,000.00, that the insurance (*I*) cover is $6,000.00 and that the tortfeasor (*T*) is good for only $5,000.00:

1) *Priority to the insurer* will result in *P* recovering $6,000.00 from *I* and *I* recovering the whole $5,000.00 from *T*. In the upshot, *I* will bear $1,000.00 and *T* $5,000.00 of *P*'s loss who, himself, will be $4,000.00 short.

2) *Apportioning the shortfall pro rata* between the insurer and the insured. Thus *P*, after recovering $6,000.00 from *I*, may claim from *T*, one half of the remaining $4,000.00 = $2,000.00; while *I* will receive one half of $6,000.00 = $3,000.00. In the upshot, *I* will bear $3,000.00 and *T* $5,000.00 of *P*'s loss who, himself, will be only $2,000.00 short.

3) *Priority for the insured* will result in *P* recovering $6,000.00 from *I* and the remaining $4,000.00 from *T*. Accordingly, *P* will recover $10,000.00 and thus be compensated in full, at the cost of $5,000.00 from *T* and $5,000.00 from *I* (who must content himself with a mere $1,000.00 reimbursement from *T*).

Which is the better solution? If the nature, purpose and function of the particular insurance is at all relevant, we must proceed by dealing separately with private and social insurance.

Private insurance

The purpose of subrogation in case of indemnity insurances[3] is twofold: it prevents the tortfeasor from benefiting from the fact that all or part of the victim's loss has been met from a collateral source; the object of the insurance being to benefit the injured, not the injurer. Secondly, it precludes the insured from any unjust enrichment by limiting him to no more than an indemnity for his loss. However, there is no reason why that loss should not be satisfied in full. Hence, it is generally treated as axiomatic that the private insurer assumes an unqualified obligation to his insured which is incompatible with any posture that would put his right of subrogation in competition with the interest of the insured in full compensation of the loss.

The great weight of opinion therefore, not surprisingly, favours priority for the insured in this situation. Besides overwhelming support in American case law[4] and European Continental authority,[5] it has also long been sanctioned by Canadian courts,[6] although curiously there appears to be no English pronouncement on the question. There are but few discordant voices. True, the intermediate position of apportionment (the "relative theory") has very occasionally been invoked "on equitable grounds" by a few American courts,[7] and was strongly advocated at one time in Germany in opposition to the then current practice favouring priority for the *insurer*; but that has long been lived down, and is now only of historical interest.[8]

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[3] Indemnity insurances cover no more than the actual loss, like collision cover for automobiles, fire and theft policies. In contrast are "sum" insurances, like life and conventional accident policies. Although the distinction often boils down to the difference between property damage and personal injury, this is not a conclusive guide. *E.g.* the common cover in modern accident policies for medical expenses incurred or even loss of earnings is an indemnity insurance which entails the corollary of subrogation: *Glynn* v. *Scottish Union & National Insurance* (1963), 40 D.L.R. (2d) 929 (Ont. C.A.); *Orion* v. *Hicks* (1972), 32 D.L.R. (3d) 256 (Man.). See also Kimball & Davis, The Extension of Insurance Subrogation (1962), 60 Mich. L. Rev. 841; International Encyclopedia of Comparative Law, *op. cit., ibid.*, pp. 20-21.

[4] See Couch, Cyclopedia of Insurance Law (2nd ed., 1966), § 61: 61-63. *E.g. Lyon* v. *Hartford Acc. & Indem. Co.* (1971), 24 Utah 311, 480 P.2d 739.

[5] *E.g.* France: Planiol and Ripert, Traité pratique de droit civil français (2nd ed., 1954), Vol. II, by Besson, no. 1348; Germany: BGH 17 March 1954; BGHZ 13, 28; Hungary: Civil Code, art. 558, para. 3. The major deviants are Italy (with its pronounced bias in favour of insurers) and Sweden, both espousing the relative theory.

[6] *National Fire Ins. Co.* v. *McLaren* (1886), 12 O.R. 682; *Globe & Rutgers Fire Ins. Co.* v. *Truedell* (1927), 60 O.L.R. 227, [1927] 2 D.L.R. 659.

[7] *E.g. Germer* v. *Public Service Mutual Ins. Co.* (1967), 99 N.J. Super. 137, 238 A.2d 713.

[8] See Marschall, *op. cit.*, footnote 2, pp. 265-266.

Social insurance abroad

In contrast, many of the principal European countries accord priority to the social insurer (social security administration, workmen's compensation, and so on).[9] Any one or more of the following reasons have been advanced for this posture: first, as a rule the insurer's right of subrogation is conferred by statute in terms which purport to entitle him to reimbursement from the tortfeasor for the total amount of the benefits conferred on the victim. Secondly, the different treatment of private insurance is explained on the ground that the premiums for social security are not borne by the beneficiary alone or at all (as in the case of workmen's compensation). Thirdly, it is argued to be in the better public interest to economize on the cost of social security, especially when the latter scheme is in part publicly funded.

To all these arguments there are answers which have tended to erode the erstwhile confidence in this particular solution and in some instances have already led to its reversal. Regarding the first, the generality of the statutory language conferring the right of subrogation hardly permits any inference one way or the other as to legislative intent concerning the instant problem. Quite obviously, the draftsman never addressed himself to the problem of an insufficient recovery from the tortfeasor or any resulting problem of priority between fund and beneficiary. As regards the second point, the reason for subordinating the claim of private insurers is not that the insured paid the premiums but that it follows from the purpose and function of private insurance in its relation to tort recovery.

Finally, the last argument is based on the very questionable assumption that fiscal thrift is more exigent than indemnifying the beneficiary. To take, by the way of example, the figures previously used: *P* would be entitled to $6,000.00 from *I* even if he were solely to blame for his own injury. The mere fact that *T* shares half the blame would in any event inure to *I*'s benefit (to the tune of $1,000.00) even if we gave priority to *P*. How then can one justify *I*'s claim to an extra $4,000.00 at the cost of *P* compatibly with the purpose of social insurance? To allow that claim would funnel the whole of *T*'s liability into *I*'s offer and in effect allow *I* to reap substantial profit from the fact that the injury was due not to the sole fault of the beneficiary but also that of a third party. Is it not, here also, the function of subrogation merely, to ensure that the tortfeasor does not escape a portion of his liability and that the victim is not overcompensated?

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[9] Principally France, Germany, Austria and Switzerland. See International Encyclopedia of Comparative Law, *op. cit.*, footnote 2, n. 192.

Besides, it has been pointed out,[10] to accord more favourable treatment to the social insurance than the private insurance carrier may be objectionable also on grounds of social equity. For its effect is to worsen the position of the lower income groups who are the chief beneficiaries of most social security schemes in comparison with the executive classes who, in many countries, take care of the same needs through private insurance.

Two important qualifications should finally be noted which greatly help to attenuate the impact of the priority rule. In the first place, the insurer has commonly no priority if the tortfeasor, though liable for the whole injury, is financially unable to meet his obligation in full. In other words, the risk of the tortfeasor's partial insolvency, unlike his limited liability, is borne by the insurer.[11] This is the burden and ambit of the maxim *Nemo derogat contra se*. How to explain this distinction? To say that in this instance the tortfeasor's *obligation* is not diminished, while in the case of contributory negligence it is, cannot justify the victim's differential treatment in his relation to the insurer. Nor is it sufficient to make the analytical distinction that the question in the one case is whether and in what amount a claim passes to the subrogee, while in the other it is whether a claim that has passed can be enforced in competition with the subrogor. Rather, one might be tempted to suspect that it reflects a moral judgment, namely against permitting a plaintiff to escape the penalty for his contributory negligence. But the logic of this explanation is impaired by the fact that it should apply with equal force to private insurance (which, as we have seen, it does not) and that it cannot account for priority being given in cases where the tortfeasor's liability is curtailed for other reasons, for instance a statutory ceiling on recovery. This distinction therefore remains puzzling.

The second limitation on the insurer's priority consists in restricting his right of subrogation to heads of damages which correspond to like benefits conferred on the beneficiary. This I would call the principle of equivalence.[12] To use the previous example once more: Suppose that *P*'s loss of $10,000.00 comprised $6,000.00 for medical expenses and $4,000.00 general damages and that *I*'s insurance covers $6,000.00 for medical care alone. If the tortfeasor *T*'s liability is reduced by fifty per cent on account of *P*'s contributory negligence, insistence on "equiva-

[10] Marschall, *op. cit.*, footnote 2, p. 276.

[11] Again, France, Germany and the Scandinavian countries. See International Encyclopedia of Comparative Law, *op. cit.*, footnote 2, n. 196.

[12] A similar notion of equivalence is also encountered in the context of whether collateral benefits should be set off against tort damages: see Cooper, A Collateral Benefits Principle (1971), 49 Can. Bar Rev. 501; Fleming, The Law of Torts (4th ed., 1971), p. 211.

lence" would reduce *I*'s claim to $3,000.00, that is one half of $6,000.00, and leave the remaining $2,000.00 on account of general damages untouched. In the result, *P* would recover a total of $8,000.00 or $2,000.00 more than if *I*'s claim had extended to the whole of *T*'s liability.

The priority rule is thus rather in retreat. Where still in force, its scope has been trimmed, and it is reeling under the near-unanimous criticism of commentators (especially in Germany). An increasing number of countries now prefer to give priority to the beneficiary ("the differential theory")[13] or at least recognize his claim *pari passu* ("the relative theory").[14]

Common law countries

At first thought it may seem puzzling that a problem which has persistently engaged the attention of law-makers and commentators abroad, should have evoked so little response in common law countries that one looks in vain for any methodical treatment in the books or more than an occasional and usually policy-unoriented decision in the reports. Two explanations come to mind: first, that the problem could not arise in the context of contributory negligence until the latter ceased to be a complete defence instead of merely reducing damages. True, in Canada this change started in the twenties, but in Great Britain and the rest of the Commonwealth it did not occur until after the Second World War and in the United States of America the big push for reform is only just under way. Nor do we generally favour statutory maxima for damages, comparable for instance to those in the German legal family for strict liability on automobile owners, dangerous enterprises and airlines (Warsaw Convention). This has left us in the past almost exclusively with the problem of the partially judgment-proof defendant, where (as we have seen) other countries almost uniformly favour the beneficiary.

A second reason for the dearth of Anglo-American authority is the infrequency with which social welfare funds have been invested with a right of subrogation. The United Kingdom, it will be recalled, made a principled decision against all subrogation when it recast its social security programme in the image of the Beveridge *Report* in 1946-1948. Notably this involved a break from previous tradition in the important area of industrial accidents: the former right of indemnity which the employer could (and frequently did) exercise against a third-party tortfeasor was

[13] Norway and Switzerland (motor vehicles claims only). See International Encyclopedia of Comparative Law, *op. cit.*, footnote 2, n. 191.

[14] Belgium (workmen's compensation), Netherlands, Sweden, Czechoslovakia (a convert since 1957) and Hungary (permanent incapacity). See International Encyclopedia of Comparative Law, *ibid.*, n. 191.

deliberately rejected as the model when workmen's compensation was absorbed in the new centralized social security system. Instead, the plaintiff need only give credit to the tortfeasor for one half the value of industrial injury or disablement benefits for the first five years.[15] There is nowadays a growing school of skeptics, including the present writer, concerning the value and efficiency of subrogation, in view of its high administrative cost and the fact that its supposedly disciplinary edge on tortfeasors is largely blunted by the interposition of liability insurance, so that in effect subrogation merely shifts the costs from one to another of two, usually equally well-placed, loss distributors. All the same, subrogation has remained a continuing feature of workmen's compensation in Canada, the United States of America and other common law jurisdictions; indeed it has been extended also to many recently instituted social welfare programmes, like the Canadian Medicare Plan.

For all the above-mentioned reasons, guidance on our problem has remained scant. What little there is of it relates mainly to workmen's compensation in the context of a defendant who is liable *in toto* though partly judgment-proof.

United States workmen's compensation

Here, the United States majority rule clearly favours the insurance carrier having a first claim to the proceeds of a third-party recovery, the employee receiving only the excess.[16] In contrast to most other countries, this disposition applies whenever the tortfeasor is financially unable to meet the whole of his liability. This situation is of course very frequent in view, especially, of the prevalence of limited insurance cover by automobilists and others. So harsh is its effect that the injured employee will often derive no benefit whatever from the third-party recovery.[17]

A few states stand out. At one extreme are Massachusetts and New York which go so far as to deny injured employees the whole of the excess recovery, while at the other end of the spectrum Wisconsin insists on the employee receiving as a minimum one third of the damages recovered from the tortfeasor.[18] Only the Florida statute contains an exceptional direction for the court to

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[15] Law Reform (Personal Injuries) Act 1948, s. 2. For this curious compromise see Friedmann, Social Insurance and Tort Liability (1949), 63 Harv. L. Rev. 241.

[16] Larson, The Law of Workmen's Compensation, Vol. II, § 74.31.

[17] *E.g. Johnson* v. *Lee* (1972), 460 F.2d 1053 (5 Cir.); *Railkar* v. *Boll* (1970), 260 N.E.2d 851 (Ill. App.).

[18] The Wisconsin formula has a counterpart in Israel where the National Insurance Institute may never retain more than 75% of the damages: Nat. Insurance (Amendment no. 11) Law 1965, 19 LSI 126, s. 70.

distribute the proceeds on an "equitable" basis. This is apparently interpreted to call for a proportional sharing.[19]

Only occasionally has the question of equivalence cropped up.[20] In a notable Kentucky case,[21] the employer was liable only for $400.00 medical expenses (by reason of a statutory maximum), but the third-party judgment specifically allowed $1,458.00 on that account. It was held that the employee could retain $1,058.00 although disability benefits he had received from his employer substantially exceeded the rest of the personal injury award. On the other hand, his claim to retain one half of the latter as representing an award for pain and suffering which had no counterpart in the disability benefits, failed on the ground that the jury had made no specific segregation in its award. The traditional form of a general jury verdict without specific identification of its elements indeed presents a dominant obstacle to enlisting the equivalence requirement on behalf of the plaintiff. This would at least put the burden on him to procure a segregation, though it has even been held that he cannot defeat his employer's claim by suing separately for his pain and suffering.[22]

Canada

Canadian workmen's compensation legislation has been notoriously skewed in favour of the employer (or his insurance carrier) as regards recourse against third-party tortfeasors. Indeed not only was (and still is) the right to proceed against the latter in most provinces vested exclusively in the employer, but he could keep the proceeds entirely for himself.[23] Only within recent memory has it come true that he must, now everywhere it seems, account

[19] Larson, *op. cit.*, footnote 16, p. 226.117, citing *Southern Farm Bureau Casualty Ins. Co.* v. *Bennett* (1961), 131 So.2d 499. As Larson points out, this can raise serious difficulty in the case of releases, for how can one tell what the dollar amount of the plaintiff's actual injury really was? Surely not necessarily the amount alleged in the plaintiff's complaint. Yet in *National Fire Ins. Co.* v. *McLaren* (1886), 12 O.R. 602 the plaintiff was even allowed to show that the amount of jury verdict against the tortfeasor did not fully indemnify his actual loss.

[20] Larson, *op. cit.*, footnote 16, § 74.34-.35.

[21] *Southern Quarries & Contracting Co.* v. *Hensley* (1950), 232 S.W.2d 999.

[22] *Barth* v. *Liberty Mutual Ins. Co.* (1948), 212 Ark. 942, 208 S.W.2d 455.

[23] See *e.g. Cooper* v. *Can. Northern Ont. Ry.* (1924), 55 O.L.R. 256, at pp. 258-259; *Dickenson* v. *Gollan* (1960), 22 D.L.R. (2d) 636 (N.S.). The last was actually a case of contributory negligence, but the problem of apportionment did not arise because the workman was entitled to no share of the tort proceeds at all under the Nova Scotia legislation. Nor could it arise under the English workmen's compensation legislation (in force until 1948), because the workman could not recover both compensation and damages and the employer was entitled only to indemnity for his outlay.

for the surplus to the employee. Lately he has also been limited to those amounts of the tort award which have their equivalence in compensation benefits, thus excluding general damages for pain and suffering.[24]

The recent spread of social welfare legislation, federal and provincial, is now beginning to raise the question whether the right of subrogation, which seems to have become a frequent concomitant in Canada, should follow the model of private insurance or workmen's compensation. The first fruits of this crop are now being brought to harvest.

In *Re Ledingham* v. *Di Natale*[25] the question was how to apportion a recovery from the Motor Vehicle Accident Claims Fund (which, though maximal, was insufficient to compensate the claimants in full) between the accident victims and the Ontario Hospital Services Commission which asserted a statutory right of subrogation for the value of its services. The trial judge, Keith J., reasoned that "subrogation" was a term of art whose nature and incidents were defined by the law of private insurance and thus entailed the corollary that it could only be exercised to the extent that the insured was fully indemnified for his loss.[26] The Court of Appeal disagreed on the ground that the statutory right of subrogation was unqualified in terms and therefore neither prior to nor to be deferred to the claims of the tort victims, but payable *pari passu.*

This conclusion was criticized by Ronald McInnes in a previous issue of this *Review*[27] in which he sided with Keith J. in arguing that to deny the term "subrogation" its technical meaning (from the context of private insurance) violated accepted canons of statutory construction. I find this contention, with respect, as uncompelling as the pretence by the Court of Appeal to draw an inference from the absence of any statutory provision that "the right of recovery should be deferred in favour of or preferred over" the amounts due to other claimants. For surely, as previously pointed out, it is quite unrealistic to pursue the will-o'-the-wisp of a non-existent statutory intent. But for all that, it does not follow that the model of private insurance is necessarily applicable to a public welfare programme, whether or not the latter can be described as a form of (public) *insurance.* For both private and

[24] *Mingarelli* v. *Montreal Tramways Co.*, [1959] S.C.R. 43 (under the Quebec statute).

[25] *Supra,* footnote 1.

[26] Independently of Keith J., Cowan C.J.T.D. of Nova Scotia had earlier reached the same conclusion in *Macdonald* v. *Parrish* (1971), 24 D.L.R. (3d) 467 and followed it in *Grandy* v. *MacKinnon* (1972), 28 D.L.R. (3d) 710, after the trial decision but before the appeal in *Re Ledingham* v. *Di Natale* had been reported.

[27] (1973), 51 Can. Bar Rev. 657.

public insurance the question is one of legal policy, dependent on the nature and function of the benefit in question. And these benefits are not in all respects alike.

Arguably, it might matter for instance that the Ontario Hospital Commission is subsidized out of general revenue. At least the priority so widely given to the workmen's compensation insurer has often been defended on the ground that the premiums are paid by the employer, not the employee.[28] And in many other countries also, as we have seen, social welfare funds enjoy priority, even though the beneficiaries contribute in whole or in part.

Or is there any other reason for denying the social security beneficiary the compensating concern of private insurance? What justifies treating the fiscal self-interest of a social security fund as paramount to or at least of equal importance, with the welfare interest of the beneficiary? To ask that question would have directed the court's attention to the real crux of the matter—calling for a policy analysis, not a capricious exercise in the canons of statutory construction.[29] In brief, my complaint is not so much with the outcome as with the court's manner of reaching it. And because its decision is not necessarily the last word, the more mature experience of other countries with this problem might yet be of help.

JOHN G. FLEMING*

* * *

BILLS OF EXCHANGE—FICTITIOUS PAYEE—ESTOPPEL.—An interesting decision has been rendered by Nolan J. of the Quebec Superior Court in the case of *Bromont Inc.* v. *Banque Canadienne Nationale*[1] involving two important questions. The first, a novel one, is whether a payee is in law fictitious[2] within the meaning of section 21(5) of the Bill of Exchange Act[3] where the cheque is signed as drawer by two persons, and the payee is fictitious in the mind of one but not the other. The second question concerns the effectiveness of a bank form of receipt for vouchers to estop a customer from claiming.

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[28] But, as Lord Pearce pointed out in *Parry* v. *Cleaver*, [1970] A.C. 1, at p. 36, the employer's contributions are really earned by the employee just as much as those he contributes directly.

[29] Better still, perhaps, if the issue is specifically resolved by the legislature as *e.g.* in France (Code de la Sécurité sociale, art. 470, paras 3 and 4).

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[1] Montreal, October 17th, 1973, No. 754,439. Not yet reported.

[2] The authorities are mentioned and summarized in Falconbridge on Banking and Bills (7th ed., 1969), pp. 480-487.

[3] R.S.C., 1970, c. B-5.

The facts were these. One Racicot was employed by the plaintiff company as bookkeeper; he had served well for some years, and had the complete confidence of his superiors. By appropriate banking resolution, the company's cheques on the defendant bank were to be signed by both Racicot and the president, Désourdy; Racicot alone was empowered to sign the bank's form of receipt for vouchers. Racicot was in charge of accounts payable, and the practice was for him to prepare the cheques for payment, sign them himself, and present them to Désourdy for his signature. During the months before the scheme was discovered, among the cheques thus prepared were several to the order of existing persons, regular suppliers of the company, but who were, to Racicot's knowledge, not then entitled to money. These were countersigned by Désourdy, and endorsed with the name of the payee by Racicot, who then negotiated them and appropriated the money.

There is no doubt that the payees were fictitious *quoad* Racicot; there is equally no doubt that they were not fictitious *quoad* Désourdy, who signed in good faith, believing that the payees were entitled to payment and intending them to get it. This was the nice question presented to the judge; none of counsel at trial could find any pertinent precedent.

In the result, Nolan J. found the payees to be fictitious because of the particular facts involved. Counsel for plaintiff argued that the intention of a president should prevail over that of a bookkeeper, but the evidence showed that Désourdy relied entirely on Racicot's assertion, express or implied; that he never verified the debt; and that he pretty well signed without enquiry everything he was asked to sign. The judge therefore gave precedence to the intention of Racicot.

No doubt he was right on the facts. The question would appear to remain open in a case where two people sign as drawers, the payee is fictitious in the mind of the first but not the second, and the facts require that more weight be given to the intention of the second or equal weight to both.

The other point concerned the bank's receipt form, signed each month by Racicot for the company. It provided that the customer undertook to verify, within eight days, all the vouchers, cheques, and other papers corresponding to debits to the account and that: "At the expiry of that delay, the bank will be freed of all liability and from all claims relating to the said vouchers. cheques and other papers, of which the validity will be automatically admitted, except for errors and discrepancies of which notice is given within the said delay, and the correctness of the balance shown shall be conclusively established."[4]

[4] Translation mine.

Now, a customer can reasonably verify his own signature as drawer, the amount of each item, and other particulars of the account, but there is no practical way in which he can verify the authenticity of the payee's endorsement. Indeed, some bank forms specifically except forged or unauthorized endorsements from the agreement, presumably for that reason.[5] It was argued then, in this *Bromont* case, that the Banque Canadienne Nationale form should be interpreted to exclude forged endorsements, on the principle "à l'impossible nul n'est tenu". Again, "in the particular circumstances of this case", because Racicot was authorized to sign the form alone for the company, and because he *did* know that the endorsements were forged, Nolan J. held the form to be a further bar to the plaintiff's claim.

It is submitted that this question too remains open for a case where the form does not except endorsements but neither the customer nor his authorized representative know of the forgery within the agreed delay. Nolan J. wrote: "The Court sees a distinction between the facts of this case and the facts of a case where the person signing the bank form was not aware and had no reason to suspect that the endorser's signature was not genuine." In *Rutherford* v. *The Royal Bank of Canada,*[6] Smith J. for the Supreme Court of Canada said: ". . . it is therefore unnecessary to discuss here under what state of facts or circumstances a customer of the bank might be relieved from the ordinary effect of such a release."[7]

W. S. TYNDALE*

* * *

TESTAMENTARY TRUST—INTERPRETATION—HUMPTY-DUMPTY ON THE SUPREME COURT.

"When I use a word", Humpty Dumpty said, in rather a scornfull tone, "it means just what I choose it to mean—neither more nor less".

"The question is" said Alice, "whether you can make words mean so many different things".

[5] *E.g.* The Royal Bank of Canada form reproduced in *Arrow Transfer Co. Ltd.* v. *Royal Bank of Canada et al.* (1970), 9 D.L.R. (3d) 693, at p. 696 (B.C.S.C.).

[6] [1932] S.C.R. 131.

[7] *Ibid.*, at p. 133. Since this comment was written there has been reported at, [1973] S.C. 589, a decision of Aronovitch J. in the case of *Harvard Finance Corporation Limited* v. *Bank of Nova Scotia and Toronto Dominion Bank.* In that case, a bank receipt form, with no exception as to forged or unauthorized endorsement, was held to be a bar to the plaintiff's claim based on unauthorized endorsements. Unfortunately, the question is not dealt with in a satisfactory manner; neither the *Bromont* case nor the *Rutherford* case is referred to and I am not satisfied that the *Harvard* case was rightly decided. However, it is *contra* my second submission.

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"The question is", said Humpty Dumpty, "which is to be master— that's all."

Through the Looking Glass.
Lewis Carroll

For several generations the Wills Act[1] has required wills to be in writing and executed with certain formalities. Presumably the object has been to make sure first that testators formulate their ideas with sufficient clarity to enable them to be expressed in comprehensible language and, secondly that they will either so express them themselves or find someone else capable of doing so.

Judging by its recent unanimous decision in *Jones et al.* v. *Executive Officers of the T. Eaton Co. Ltd. et al.*[2] the Supreme Court of Canada finds these requirements too onerous. Henceforth, apparently, all that will be needed is a general desire to be kindhearted and the court can be relied on to supply the words. And to assist it in doing so it will look, not only at any evidence of surrounding circumstances that may catch its fancy, but even at statements of fact made in argument without any evidence to support them.

In the *Jones* case the bequest was "To the Executive Officers of the T. Eaton Company Limited to be used by them as a trust fund for any needy or deserving Toronto members of the Eaton Quarter Century Club as the said Executive Officers in their absolute discretion may decide, the sum of Fifty Thousand Dollars."

There were certain points in connection with this bequest about which there was really no argument. The first was that if this was not a trust for charitable purposes it was invalid. The second was that unless it was a trust for the relief of poverty it was not a trust for charitable purposes since it lacked the element of public benefit essential to the validity of all charitable trusts other than those to help poor people.[3] It was also clear that "needy" means the same as "poor".[4]

The case turned therefore, on what, if anything, the testator meant by the words "or deserving". It is permissible to wonder whether the testator had, in fact, any clear idea of what he meant by these words. A phrase of this kind is customarily employed as a substitute for, rather than the product of, thought. He must have had some people in mind other than those in need, or why use the words at all? As Grant J. said in the court of first instance the testator contemplated two different states of being, the one

[1] R.S.O., 1970, c. 499, as am.
[2] (1973), 35 D.L.R. (3d) 97.
[3] *Dingle* v. *Turner et al.*, [1972] 1 All E.R. 878 (H.L.).
[4] *Re Scarisbrick, Cockshott* v. *Public Trustee*, [1951] Ch. 622 (C.A.).

needy and the other deserving.[5] On this view the trust could not be exclusively for the relief of poverty and was invalid. This was also the approach of Gale C.J.O. in the Court of Appeal.[6] It seems sensible; but it did not appeal to the majority of the Court of Appeal nor to the members of the Supreme Court, who seemed to have a soft spot in their hearts for senior employees of the T. Eaton Co. Ltd.

In the Supreme Court, counsel for those who would take if the bequest failed felt it necessary to produce a list of all the qualities someone could have and still be regarded as "deserving" without being poor. The production of this list was probably unfortunate as it enabled Spence J. to mention one or two possible meanings that were unlikely to be contemplated by the testator. What Spence J. found the words "or deserving" meant was "a person who although not actually poverty-stricken was nevertheless in a state of financial depression perhaps due to a sudden emergency".[7]

This construction showed no lack of imagination. If one may respectfully say so it was little more than a flight of fancy inspired by a desire to do what the testator would have wanted whether or not he had found apt words to express his wishes. There was, of course, never any doubt what the testator would have wanted, he would have wanted the bequest upheld no matter how it was expressed. Otherwise he would not have made the bequest in the first place.

Spence J. supported his construction on two grounds. First by reference to the surrounding circumstances both as proved and as stated by counsel particularly with reference to the membership of the Timothy Eaton Quarter Century Club. He pointed out that they were certainly not young people and referred to *Re Wall*[8] where Kay J. felt obliged to hold that a bequest for "men and women not under fifty years of age" was for the benefit of the "aged" within the meaning of that word in the preamble to the Statute of Elizabeth. The word "deserving" also appeared in that bequest but in a sense clearly conjunctive. Had the bequest been to "men and women not under fifty years of age or deserving" the decision would probably have been the other way.

To suggest that all members of the Quarter Century Club are "aged" would be a bit farfetched and no one tried to do so. Someone who started to work for Eaton when he was eighteen would be eligible for membership at the ripe old age of forty-three.

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[5] *Sub nom. Re Bethel,* [1970] 3 O.R. 745, at p. 753, 14 D.L.R. (3d) 129.

[6] [1971] 2 O.R. 316, 17 D.L.R. (3d) 652.

[7] *Supra,* footnote 2, at p. 104.

[8] (1889), 42 Ch.D 510.

Then Spence J. went on to point out that "illness of the member or of some member of his family, financial misfortune, or family tragedy" might well justify in describing his condition as "deserving". Well, so it might, but is there really anything to indicate that such people were the only ones the testator had in mind. Because of course they have to be the only ones if the bequest is to be upheld. Moreover, are all these people poor? Is it the poor only who have family tragedies? The argument seems to go "if you are needy you are poor"; you may be "deserving" without being "needy"; hence you may be "deserving" without being poor, but nevertheless the bequest is a valid bequest for the relief of poverty. It is a bit confusing.

The second ground was stated as follows "the whole will was very carefully done. Therefore, I think, that a view attributing to the word 'deserving', one of the non charitable meanings which have been suggested throughout the argument here and below, would fail to do justice under these circumstances to the testator's evident ability and intent". This is the reverse of the argument usually advanced to support a construction designed to produce a result it is believed the testator would have approved. Usually it is said that wills made without professional assistance must be treated kindly because of the testator's obvious lack of skill. Incidentally two of the cases quoted by Spence J. in support of a benign construction *Re Wall*[9] and *Bruce* v. *Presbytery of Deer*[10] both appear to have been examples of "home made" wills.

Moreover the statement is inaccurate. No will that requires for its construction the deliberations of the Supreme Court of Canada can properly be described as "very carefully done". If the suggestion is that the draftsman realized the pitfalls of the *Diplock* case[11] followed in *Re Loggie*[12] and deliberately used language to avoid them, the suggestion is absurd. The clause with which the Supreme Court was concerned was one of which the author ought to have been, and if still alive, probably was, thoroughly ashamed.

There is a good deal more jurisprudence touching the meaning to be attributed to the word "deserving" than one would suspect from reading the judgments in the Court of Appeal and the Supreme Court. In particular it is odd the majority of the Court of Appeal did not refer to the previous decision of the old Appellate Division in *Re Orr*.[13] There one of the bequests was "Ten thousand as a fund to be used in lending to deserving people,

[9] *Ibid.*
[10] (1867), L.R. 1 Sc. & D. 96 (H.L.).
[11] *Chichester Diocesan Fund* v. *Simpson*, [1944] A.C. 341.
[12] [1954] S.C.R. 645.
[13] (1917), 40 O.L.R. 567.

men or women, to buy small farms or homes" and the court held it void for uncertainty. The case was appealed to the Supreme Court with respect to other provisions of the will but there was none on this point. The Supreme Court dealt roughly with the will[14] and declared its principal provisions void for uncertainty notwithstanding the will was homemade.

Reference might also have been made to *Harris* v. *Du Pasquier*[15] in which the bequest was to trustees "for such objects as they consider deserving" which Wickens V.C., who has been described as "a most accomplished equity judge", held void for uncertainty.

Finally one might have hoped that so distinguished a graduate of the Harvard Law School as Spence J. would have recalled what Gray C.J. had to say about the word "deserving" in *Nichols* v. *Allen*:[16]

> "Deserving" denotes worth or merit, without regard to condition or circumstances, and is in no sense of the word limited to persons in need of assistance, or to objects which come within the class of charitable uses.

TERENCE SHEARD*

* * *

CONFLICT OF LAWS—RECOGNITION OF FOREIGN JUDGMENTS—FRAUD—FINALITY—PUBLIC POLICY—PROOF OF FOREIGN LAW.—One of the fundamental pretences of the conflict of laws at least since the subject was introduced to the common law world in a systematic way by Story, has been that the subject is insulated from the social, ethical, moral and hence legal milieu of any particular legal system. Various images have been used to indicate that choice of law rules do not directly settle disputes but merely point to a legal system which does, that they are indicative rather than dispositive. In a spirit of internationalism, laws are to be selected and applied without regard to their content. The same notion is applied to the recognition of foreign judgments. The rules for determining whether foreign judgments should be recognized are designed in such a way as to ignore the law and facts found and applied by the foreign court.

The model is that of a two tiered system of law in which the upper tier is insulated from all forces which shape the lower tier. From time to time attempts are made, at least with respect to

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[14] *Sub nom. Cameron* v. *Church of Christ Scientist* (1918), 57 S.C.R. 298.

[15] (1872), 26 L.T. (N.S.) 689.

[16] (1881), 130 Mass. 211, at p. 218.

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choice of law, to explain what forces have or should shape the upper tier.[1] However, no recognition is made that choice of law rules are often manifestations of the same fundamental notions of "oughtness" found in the domestic or dispositive law.

This pretence has come under increasing attack. While perhaps not expressed in quite the same way as here, the common belief of those participating in the conflicts "revolution" in the United States of America is that this approach has led to either arbitrary decisions or decisions prompted by unexpressed reasons.[2] That is, either the insulation cannot be successful (except in the written justification of decisions otherwise arrived at) or if it is, there is nothing left to point to one choice rather than another.

Aside from the vituperative nature of the debunking, two things seem to trouble the seemingly small numbers reluctant to abandon the pretence. One is that for them internationalism is a goal rather than a pretence, and they fear the onset of unfettered parochialism. The second is their belief that the words of indeterminate reference favoured by reformers will lead to a kind of judicial lottery. These apprehensions are reinforced by the failure of some camp followers (although not the leading spokesmen for reform) to appreciate the distinction between judicial and legislative functions. While appellate tribunals can be expected and indeed in some areas of conflicts must engage in a fairly high level of legislating, the same cannot be expected from lower courts. Nor can these courts live with a system which requires a constant high level of legislating in which each case is handled anew and where there is little scope for the doctrine of *stare decisis*. Their apprehensions are also reinforced by a failure on both sides to appreciate the interstitial nature of the problem. We have for so long had the image of conflicts as a shunting system for the whole legal order, that we imagine conflicts problems are myriad and pervasive. In fact, the opposite is closer to the truth. Not only are many areas of the law excluded from the system altogether, but in what remains there are many areas with settled and workable statutory rules.

The recent British Columbia case of *Patton* v. *Reed*[3] aptly illustrates the shortcomings of the pretence and the difficulties involved in creating a rule once it has been abandoned.

The British Columbia Supreme Court was asked to enforce an Idaho judgment which was called a supplemental final judgment

[1] See *e.g.* H. E. Yntema, The Objectives of Private International Law (1957), 35 Can. Bar Rev. 721.

[2] The theories of the main participants in the revolution are set out in Cavers, The Choice of Law Process (1965).

[3] [1972] 6 W.W.R. 208, (1973), 30 D.L.R. (3d) 494, 8 R.F.L. 350 (B.C.S.C.).

and which finally determined the amount of child support due under a divorce decree. The divorce decree was granted in Idaho in 1948 and modified in 1952. The Idaho judgment which the Idaho wife sought to enforce against her former husband now resident in British Columbia was obtained in 1969. It ordered the defendant to pay $5,040.00 due for child support between 1952 and 1968 and $1,890.00 for insurance premiums which the defendant had been ordered to pay by the divorce decree to maintain a policy on the life of the son.

The defendant resisted the British Columbia action on two grounds: (1) that the Idaho judgment was obtained by fraud; (2) that the judgment was not final and conclusive between the parties.

However, what seemed to trouble Chief Justice Wilson was first, the fact that insurance premiums were never paid and hence the Idaho judgment for $1,890.00 was, under British Columbia law, wrong and second, the British Columbia rule that arrears of maintenance for over one year are not generally enforced, being characterized as hoarding.

Unfortunately, what troubled the judge and what should be at the centre of any decision in the case appears under the traditional formulation of the issues accepted by defence counsel, irrelevant unless they can be subsumed under the illusory category of "public policy".

According to traditional statements of the "rules", a foreign judgment of a court of competent jurisdiction is entitled to recognition if it meets general requirements of the administrative law notions of natural justice and is final. Mistakes by the foreign court in its determination of facts or law are not grounds for refusal to recognize. However, a foreign judgment obtained by fraud or which is contrary to public policy may be refused recognition.

Under these rules, the content of the foreign law is almost totally irrelevant except as part of the data in applying the Alberta rules as to finality and public policy.

In examining the issues raised by counsel, Mr. Justice Wilson became hopelessly confused in his references to Idaho law as the following analysis of his treatment of the traditional rules will attempt to show.

Fraud

Unlike the English courts, courts in Canada seem to take an undoctrinaire approach to the question of how the court is to become cognizant of foreign law. With just the occasional regrettable aberration judges while largely ignoring provincial judicial notice statutes are prepared to go along with any agreement of counsel.[4]

[4] The Canadian statutes and cases are collected in an exhaustive article by J.-G. Castel, Proof of Foreign Law (1972), 22 U. of T.L.J. 33.

With perhaps temerity generated by ignorance, they are prepared to find foreign law without the aid of experts. Nothing in the rather anti-American parochialism of legal education and judicial attitude in the still recent past would seem to justify such self-reliance. The result of such efforts by counsel and judge in *Patton* v. *Reed* seem to justify the hesitation of most English judges to adopt this procedure. The Idaho cases referred to in the British Columbia court's discussion of fraud are concerned with the recognition of sister-state judgments in Idaho and are no authority for the proposition for which they are cited and moreover are completely unrelated to the question of fraud.

Aside from this misuse of Idaho authority the court seems to have hopelessly confused the question of finality with that of fraud. Whether the Idaho judgment should be refused recognition because of fraud does not turn on whether it is a "final" judgment under Idaho law. It is doubtful whether even the question of whether an Idaho court would set the judgment aside because of fraud is relevant—A quite distinct question which was never asked—although many lawyers steeped in the notions of politeness and mutual forbearance associated with the doctrine of comity might object to giving a foreigner judgment greater conclusive effect than it has where it was "created".[5]

If the judge wanted to use the traditional tools suggested by counsel he should have inquired whether the facts which the defendant alleged amounted to fraud were available to him at the time of the first trial. If so, he has had his opportunity for a day in court and must abide the result. Thus have the countervailing considerations in favour of ending litigation and denying a litigant advantage from fraud been normally reconciled in both domestic and conflicts cases.[6]

Finality

Logically whether an Idaho judgment has sufficient finality to be recognized in British Columbia, is not a question that can be answered by Idaho law. All that can be discovered is how Idaho treats similar judgments obtained in sister-states or abroad. Similarly you might discover how this Idaho judgment would be treated in other American states. But the question would never arise in Idaho of whether Idaho support judgments are "final" for the purpose of recognition in Idaho. So while Mr. Justice Wilson purports to find an answer to such an impossible question, a close examination of the American cases cited discloses that they are

[5] The vested rights theory would also suggest that such recognition would be illogical.

[6] See J.-G. Castel, Conflict of Laws (2nd ed., 1968), p. 1053.

concerned with Idaho's recognition of sister-state judgments. Since British Columbia is not a sister-state such information cannot be put to any relevant use even assuming recognition by the British Columbia court was based on reciprocity.

Unfortunately no evidence was given whatever to show whether the Idaho judgment could be varied by any Idaho court. This would seem to be the pertinent question under Canadian authority.[7]

Public policy

The failure of other traditional conflicts' concepts to avoid what the trial judge obviously felt was an unjust result, led him to look to public policy as a means of escaping his self-imposed dilemma. Unfortunately as so often happens when courts examine this concept, equine imagery replaced thoughtful analysis. One can sympathize with the invocation of Mr. Justice Burrough's well used simile[8] to cover confusion, since while it is easy to explain why such a concept as public policy is felt to be necessary, it is impossible to define or apply it.

The Anglo-Canadian courts have usually approached conflicts problems in an unusual fashion, atypical of the common law. Perhaps because of the mystique which surrounds the subject, they have tended to treat general propositions of commentators as if they were statutory. Rather than qualifying, limiting, and distinguishing previous authority as the subject developed and new situations arose, the courts have tended to view themselves as bound by a pre-existing exhaustive but limited number of broadly drawn rules. In order to overcome these too broadly drawn rules, courts have felt the need for some rather imprecise exception.

At the same time the pretence of insulation in our conflicts theory quite naturally leads to the qualification that there must be some foreign laws which are just too offensive for even the most tolerant, internationally spirited court to apply. In the nineteenth century world of rather pronounced political, moral and social divergence, examples probably readily come to mind. The difficulty with this explanation is that there is probably no way it can be tested against court practice. While on the surface the most offensive foreign laws have escaped approbation while seemingly harmless rules have not, changing domestic attitudes make it impossible to fully appreciate the relevant standards at the time of trial. As difficult as it seems now to understand, perhaps at one

[7] See *Maguire* v. *Maguire* (1921), 64 D.L.R. 180, 20 O.W.N. 36 (C.A.) and Castel, *op. cit., ibid.*, p. 1043.

[8] *Richardson* v. *Mellish* (1824), 2 Bing 229, at p. 252, 130 E.R. 294, at p. 303, in referring to public policy Burrough J. said: ". . . it is a very unruly horse, and when once you get astride it you never know where it will carry you."

time a foreign order of support for a bastard was considered more offensive than a foreign status of slavery.[9]

Finally, the concept of public policy in conflicts is usually considered a negative rather than positive one. That is, it is not based on the mandatory nature of certain domestic laws. It is not used, for example, to distinguish provincial consumer protection statutes from the older optional-type provisions of provincial sale of goods statutes. Rather it is invoked because of the nature of the foreign law. An otherwise applicable foreign law or judgment is refused recognition because it offends public policy.

Turning to the judgment of Chief Justice Wilson, the reader will note that the learned judge, contrary to the suggestion above, is more concerned with the domestic rule against hoarding than the opposite or lack of such rule (if that is the case) in Idaho. He discovered that the British Columbia rule was based on public policy. Whether the judge meant to say more than the obvious fact that the rule is based on both fiat and reason is unclear. All too frequently the rather useful positivists' distinction between the law and any subjective evaluation of it has been misused to label anything other than fiat as extra legal, as "public policy" or just "policy". From this point of view the purpose, rational or reasoning process of the law is not law, but some less binding and less persuasive "ought", of less concern to the judiciary and which can only be brought to the court's attention by a certain subterfuge by counsel. If Chief Justice Wilson is of this frame of mind perhaps the fact that the rule against hoarding is based on some reason besides the fact that the previous judges have said so, may seem extraordinary.

However, something other than the fact that there is an explanation for the rule against hoarding is necessary to bring it within the ambit of "public policy". Just how affronted the court has to be is not clear, but something more than a different rule abroad is necessary. As we shall see below, although the rule against hoarding has been explained in various ways by different courts, there is universal agreement that it is a discretionary rule. Rather than a rule whose application is fundamental and necessary to implement strong local policy, just the reverse is true.

After giving every indication that the recognition of the Idaho judgment would be contrary to public policy, the learned trial judge in the end felt bound to enforce it on the technical distinction that he was not asked to enforce the payment of arrears under the original support award but rather a judgment in which all arrears are consolidated. Such a distinction is completely without

[9] Compare *Re Macartney*, [1921] 1 Ch. 522 with *Santos* v. *Illidge* (1860), 8 C.B.N.S. 861.

merit unless Idaho, like British Columbia, had a rule against hoarding which had been considered but not applied at the time of the 1969 Idaho hearing. Although in that event the distinction should not be needed since there would be no conflict between Idaho and British Columbia law.[10] Surprisingly enough there was no evidence as to the Idaho law on this point, and contrary to the normal presumption or rule of law, the court assumed it was different from British Columbia's, that is, that there was no rule against hoarding in Idaho.

Interestingly enough it would be impossible to by-pass the rule against hoarding in a domestic case in this way, because of the ancient rule that support judgments are not "debts" and cannot be the subject of an action at common law.[11]

"Construction analysis"

The purpose of this comment however, is not just to draw attention to Mr. Justice Wilson's somewhat less than felicitous treatment of traditional recognition concepts. In fact, finality, fraud and public policy are strikingly inept tools to dispose of what the judge assumes is a conflict between the British Columbia and Idaho laws concerning hoarding. They do not allow the judge to examine the issue which obviously—and rightly—troubles him.

If then our traditional view of the issues is bankrupt, what can be put in its place?

The alternative which has been put in various ways in relation to choice of law is to "determine the scope of the divergent domestic rules involved by considering their purpose and effect".[12] If we accept the basic axioms that all laws are designed to influence human behaviour and that law makers should and do draft laws with the intention of influencing the conduct of local people, many conflicts become easier to solve. Although frequently commentators forget Hohfeld's analysis of all law as a right-duty relationship between *two* people, they tend to construe laws as either benefitting or obligating particular individuals. If there is no local individual to benefit or obligate as the case may be, they conclude that the law has no application.

However, even if these basic axioms are rejected and the prob-

[10] Although some courts might be trapped into recognizing the Idaho judgment as "final" as the court did here, and have no other tool except public policy to invoke to do what they would do with a British Columbia judgment and an Idaho court would do with an Idaho judgment.

[11] The prime stumbling block in the case of *Bailey* v. *Bailey* (1884), 13 Q.B.D. 855, much relied on by the Ontario court in *Maguire* v. *Maguire* (1923), 64 D.L.R. 180 (C.A.).

[12] M. Hancock, Canadian American Torts in the Conflict of Laws: The Revival of Policy-Determined Construction Analysis (1968), 46 Can. Bar Rev. 190.

lems recognized as being more difficult than a facile exposition of policies would indicate, there is still merit in this basic approach to fashioning new rules. As several authors have pointed out however, the process is no more difficult and in fact is identical to the construction of laws in domestic situations.[13] The reports are replete with decisions where courts have had to choose between or reconcile seemingly conflicting domestic rules. Of course they often have difficulty doing this because the purpose of some rules is obscure, some rules have many overlapping and conflicting purposes and some even have no discernable purpose at all. These difficulties exist to the same degree in both domestic and conflict cases. For example, if you cannot discover the purpose of the hoarding rule to see whether it makes sense to apply it to an Idaho wife who is subject to no such rule in Idaho, you will not be able to see whether it should be applied to a British Columbia wife who has lived off welfare or private charity.

Given that there is nothing unique in construing a domestic rule to see if it should be applied to a conflicts situation, the process is still not easy. Nor in the end does it suggest, without more, how to choose between two laws both of which ends would be served by their application. Here we are driven to arbitrary devices such as ignoring the purpose of the foreign law,[14] applying forum law[15] or devising some principles of preference supplementary to the purposes of the domestic laws.[16]

If the court had attempted to apply any of the suggested construction techniques to the British Columbia rule against hoarding, they would have faced the problem that the rule has been explained in slightly different ways by different courts. Most of the explanations have been rather facile, and if accepted create some anomalies. For instance the recent English authorities[17] referred to by Chief Justice Wilson, do not explain the rule in quite the same way as he does. Their explanations seem based on the notion that you cannot get blood from a stone. The English courts note that if an award against him is too high, a husband would rather go to jail than pay. If this argument were to be taken seriously, perhaps the British Columbia courts should always apply their rule against hoarding to a British Columbia defendant. After all they are the ones who will be forced to jail the husband if he fails to pay. They should not perform what they consider to be a pointless act even if the Idaho courts would. And it flows from the

[13] See Cavers, *op. cit.*, footnote 2.
[14] Ehrenzweig, Conflict of Laws (1962).
[15] Currie, Selected Essavs on the Conflict of Laws (1963).
[16] Cavers, *op. cit.*, footnote 2.
[17] *Pilcher* v. *Pilcher*, [1956] 1 All E.R. 463; *Huscombe* v. *Huscombe*, [1962] 1 All E.R. 668; *Freeman-Thomas* v. *Freeman-Thomas*, [1963] 1 All E.R. 17, [1973] P. 157.

reasoning of the domestic rule that the British Columbia courts are only running a small risk of creating an undeserved refuge in British Columbia since the ordering of support and jailing by either state would not produce the desired result.

Other courts[18] have explained the rule against hoarding the way the British Columbia court does—that is, the order is for support and if that purpose has already been met by other means, the court should not place a crippling burden on the defendant. No clear explanation is ever given why the defendant should be considered a source of last resort. Although perhaps if the plaintiff had borrowed from other sources obligating herself to repay, this would be sufficient to prevent the application of the hoarding rule. Nor is it clear why the defendant should benefit if the plaintiff had reduced her standard of living in order to survive. Obviously the courts do not like to give something in the nature of a capital sum, but they would certainly not take away the savings of a wife who had tightened her belt in order to put part of her support payments aside for a rainy day.

The explanation does not sit very well with the known practical difficulties and expenses of initiating law suits which would seem to encourage a plaintiff to rely on other sources to survive while allowing the obligation of the defendant to accumulate to a sum to make it worthwhile to sue. Nor does it sit very well with the obvious need to hoard some support money for children to provide for the rather expensive educational and other costs as they approach their majority.

This explanation of the hoarding rule seems primarily, although not exclusively, concerned with the position of the wife. Perhaps it is based on some lack of faith in the courts' ability to get at the plaintiff's real needs, perhaps on some judgment on an appropriate priority between the defendant and the collateral sources which have helped the plaintiff to survive. In any event, the emphasis has shifted away from the husband, perhaps justifying the application of the Idaho law—at least, if, as it appears, Idaho was the matrimonial home and the wife has remained there since the marriage. The courts and laws of the state would seem to be in a better position to judge her real needs. Nor is the husband in the same position as other British Columbia residents. He is not being subjected to an unexpected law. He is simply being denied any advantage by way of refuge from his move to British Columbia.

There is one further explanation which can be gleaned from the cases. This involves some notion of sincerity, lapse or delay. That is, if the plaintiff requires the assistance of the courts she

[18] *E.g. Wilson* v. *Wilson* (1830), 3 Hag. Ecc. 329n., 162 E.R. 1175 n.; *Head-Patrick* v. *Head-Patrick*, [1922] 1 W.W.R. 825, 63 D.L.R. 158 (Sask. C.A.).

should not sit on her rights, but should act expeditiously. Otherwise the court might doubt her sincerity assuming she is acting for some collateral motive. Or the court might assume prejudice to the defendant caused by the delay (such as his own changed position through reliance or the non-availability of evidence after a long delay). If the emphasis is on the wife's sincerity, perhaps the application of Idaho law is called for. On the other hand, if the emphasis is on the difficulty of proof after long delay, perhaps British Columbia law should be applied.

The above suggestions of applicable laws are only tentative. There just are not enough facts given in the reasons for judgment to arrive at firm conclusions. For example, it is necessary to know the basis of the Idaho courts' jurisdiction, the location of the matrimonial home, and the present domicile or residence of the wife to know whether any regard at all should be paid to Idaho law (assuming it is in fact different from British Columbia law).

If the Idaho judgment is based on the wife's separate domicile acquired after the end of her marriage and subsequently abandoned there would seem to be little need to consider Idaho law. On the other hand, the case for the application of Idaho law seems very compelling if Idaho was the matrimonial home and the wife was abandoned there by the husband.

The suggestions are also tentative because they are based solely on an examination of the British Columbia rule. No attempt has been made to construe the opposite Idaho rule. Such construction is necessary to understand the true nature of the choice to be made. Finally, the suggestions are tentative because they have been based on isolated explanations of the rule. In fact the rule is based on a rather ill thought-out and expressed amalgam of these various explanations.

The tentative nature of the above construction analysis is not meant to suggest however, that we should abandon the attempt and return to some arbitrary but simple recognition rule. In the end some arbitrary choices may have to be made since even the above cursory analysis shows conflicting purposes and policies. However having looked at the relevant authority explaining the rule whose application is being questioned, the court should be in a better position to decide. The particular instance can at least be examined against a general background which either sees merit in the hoarding rule and its expansion in marginal cases or which doubts its usefulness especially when placed against countervailing considerations such as meeting a wife's legitimate expectations and providing uniform treatment of her claim to past support. The above tentative treatment only suggests that there are various solutions which can result from an examination of relevant issues and

authority. What the approach offers is not easy pat answers, but an opportunity to get the real issues out on the table.

The second issue which troubled the judge does not appear to be a conflicts problem. That is, the award of a sum to cover insurance payments which were not in fact made should be treated under the appropriate British Columbia rules concerning fraud or the setting aside of default judgments. There is no good reason why British Columbia judicial enforcement machinery should give greater conclusive effect to an Idaho default judgment than it would to a British Columbia judgment. In any event, there is no indication in this respect that Idaho courts would act differently. By ignoring the usual treatment of British Columbia judgments and applying recognition principles mechanically, a conflict in treatment is likely to be created which would not otherwise exist.

MARVIN G. BAER*

* * *

STARE DECISIS—BINDING EFFECT OF DECISIONS OF HOUSE OF LORDS ON LOWER COURTS.—

> Some will say it is our duty to follow the House of Lords and not to question their decision. We are not to reason why. Ours is but to do and die.[1]

With this fanfare, Lord Denning renewed his campaign to revolutionize the English constitutional custom that lower courts are inflexibly bound by prior decisions of the House of Lords.[2] Salmon L.J. and Phillimore L.J. joined him in the effort.[3]

The response of the House of Lords was blunt and uncompromising. The Lord Chancellor, speaking with "a studied moderation"[4], declared:

> The fact is, and I hope it will never be necessary to say so again, that in the hierarchical system of courts which exists in this country, it is

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[1] *Broome* v. *Cassell & Co. Ltd. and Another*, [1971] 2 W.L.R. 853, at p. 871 (C.A.), aff'd in part, *Cassell & Co.* v. *Broome and Another*, [1972] A.C. 1027 (H.L.).

[2] In his dissenting opinion in *Conway* v. *Rimmer*, [1967] 2 All E.R. 1260, Lord Denning M.R. would have refused to follow *Duncan* v. *Cammell Laird & Co., Ltd.*, [1942] 1 All E.R. 507 (H.L.), on the basis of the criticism the case had suffered at the hands of the judiciary of the Commonwealth. "When we find that the Supreme Courts of those countries, after careful deliberation, decline to follow the House of Lords—because they are satisfied that it was wrong—that is excellent reason for the House to think again. It is not beneath its dignity, nor is it beyond its power, to confess itself to have been in error." at p. 1263.

[3] *Supra*, footnote 1, at pp. 873-875 and 884-885.

[4] *Ibid.*, at p. 1053.

necessary for each lower tier, including the Court of Appeal, to accept loyally the decision of the higher tiers.[5]

Lord Reid referred to the conduct of the Court of Appeal as an "aberration".[6] Lord Diplock declared that the Court of Appeal had no "right to disregard a decision of a higher appellate court".[7] The only decision which reflects the least sympathy for the position taken by the Court of Appeal is that of Viscount Dilhorne.[8]

The question which continues to beg an answer is, *why* must the Court of Appeal follow the most recent decision of the House of Lords on any given subject.

The case followed upon the publication by Cassell & Co. of a book authored by David Irving, entitled *The Destruction of PQ17*. The book purported to be a true account of one of the greatest naval disasters suffered during the Second World War. The book placed the blame for the disaster on a Captain Broome and made allegations that his conduct had been improper and cowardly. At trial, Captain Broome adduced evidence which vindicated him and which suggested that both the author and the publishers knew that their charges against him were false. The author and the publisher presented no evidence.

The trial judge directed the jury that they could award punitive damages because the defendants had persisted in their wrongful acts believing the prospects of a best-seller outweighed the possibility of material loss as a result of libeling Captain Broome.

The Court of Appeal held that according to the formulation of the law by the House of Lords, in *Rookes* v. *Barnard*,[9] punitive damages were available in this case, and that the damage award of £40,000 was not excessive. This was sufficient to dispose of the appeal. The Court of Appeal went on to say that *Rookes* v. *Barnard* had been decided *per incuriam* by the House of Lords[10] and that judges should no longer follow it in instructing juries on punitive damages.[11] But it is not the purpose of this comment to assess the merits of the Court of Appeal's comments on the circumstances in which juries should be permitted to assess punitive damages in civil cases.[12] Here attention will be focused on the constitutional implications of the case.

The doctrine of *stare decisis* is normally seen as having two branches. The first is that the highest court is bound by its previous

[5] *Ibid.*, at p. 1054.
[6] *Ibid.*, at p. 1084.
[7] *Ibid.*, at p. 1131.
[8] *Ibid.*, at p. 1007.
[9] [1964] A.C. 1129.
[10] *Supra*, footnote 1, at pp. 869-871, 874-875, 878-880, 884-888.
[11] *Ibid.*, at pp. 873, 879 and 887.
[12] On the Liberation of Appellate Judges—How Not to Do It! (1972), 35 Mod. L. Rev. 449, at p. 451.

decisions and the second is that lower courts must follow the decisions of higher courts. Since the Practice Statement of 1966,[13] the House of Lords no longer considers itself bound by its own precedents. Therefore, the logical support for the second branch *stare decisis* has been swept aside. Admittedly, the Practice Statement expressly said that it was "not intended to affect the use of precedent elsewhere than in this House".[14] However, according to the terms of the Practice Statement itself, this restriction is not binding on the House of Lords. To hold the restriction binding on the Court of Appeal would require a virtuoso exercise in picking yourself up by the bootstraps.[15]

If the argument in Glanville Williams' edition of *Salmond on Jurisprudence*[16] is correct that the Practice Statement could only be valid if *stare decisis* is merely a "practice", then it may be that lower courts are only bound by higher courts' decisions as long as they accept to be bound. And regardless of whether the pronouncements of the House in this context are rules of "practice" or rules of "law",[17] the decisive question in positive terms is how will the Court of Appeal respond to the admonition given to it by the House of Lords. If the Court of Appeal is prepared to say that the rule respecting punitive damages in *Rookes* v. *Barnard* was given *per incuriam*, will it balk at saying that the rule respecting *stare decisis* in *Cassell* v. *Broome* was decided *per incuriam*?

No solution to this "unedifying"[18] divergence of opinion will be reached unless the argument is extracted from the emotional context in which it is presently lodged.

Lord Diplock argued that "the judicial system only works if someone is allowed to have the last word, and if that last word, once spoken, is loyally accepted".[19] But, with all due respect, this is far too sweeping a generalization. There are many judicial systems which apparently function to the general satisfaction of those subject to them without *stare decisis*.

Stare decisis is not an element of the civil law.

> . . . [O]ne of the chief rules of our judiciary requires that a court shall never be bound by the decisions it has previously handed down; it may always change its mind. All the more is it not bound by the decisions of other courts, even of higher courts. . . .[20]

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[13] [1966] 1 W.L.R. 1234.
[14] *Ibid.*
[15] Roy Stone, The Precedence of Precedents, [1968] C.L.J. 35, at p. 37.
[16] (11th ed., 1957), pp. 187-188.
[17] For a discussion of whether *stare decisis* is a rule of substantive law or a rule of practice, and the implications of this issue, see Julius Stone, Chains of Precedent (1969), 69 Col. L. Rev. 1162, at p. 1165.
[18] *Supra*, footnote 1, at p. 1154. [19] *Ibid.*, at p. 1131.
[20] Planiol and Ripert, A General Survey of Events, Sources, Persons and Movements in Continental Legal History (1912), Vol. I, Ch. III, p. 299.

Indeed, in France, a lower court is not bound by the directives of the *Cour de cassation* which quashed its decision, except if the *Cour de cassation* quashes its decision a second time for the same reasons.[21]

The situation in Quebec is complicated by the interplay of the common law with the civil law, but the principle that a Quebec court does not feel itself bound by a single decision of a higher court on Quebec law seems secure. Bissonette J., of the Quebec Court of Queens Bench, Appeal Side, has summarized the situation in Quebec:

> . . . quand un point déjà jugé se présente de nouveau, la Cour d'appel peut donc considérer les décisions antérieures et en tenir compte, mais moins pour tabler sur le fait même de ces précédents que pour en découvrir les motifs, les apprécier au regard de la loi, des principes et de la logique.[22]

Nor is *stare decisis* the rule in international law.[23] Nor is it the rule before administrative tribunals even in common law jurisdictions.[24]

Admittedly, there are special considerations contributing to the exclusion of *stare decisis* in all of these legal systems.[25] Nevertheless, it is also true that the last rigidity of *stare decisis* which the House of Lords was seeking to salvage in *Cassell* v. *Broome* is a comparatively recent addition to the common law. In the days of Coke, interpretations of the law were not perpetuated if they led to inconvenient and unjust results.[26] Blackstone said that the laws and customs of the land should be enforced unless "the former determination is most evidently contrary to reason; much more if it be clearly contrary to the divine law"[27]. Lord Mansfield's view was that:[28]

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[21] John P. Dawson, The Oracles of the Law (1968), pp. 378-379.

[22] Bissonette J., in *Bellefleur* v. *Lavallée*, [1957] R.L. 193, at p. 205. But see also Anglin C.J., in *Daoust, Lalonde and Cie. Ltée.* v. *Ferland*, [1932] S.C.R. 342, at p. 345, and *contra* Anglin, Stare Decisis, quoted by Bissonette J., *ibid.*, at p. 205. Also, P. B. Mignault, The Authority of Decided Cases (1925), 3 Can. Bar Rev. 1; W. Friedmann, Stare Decisis at Common Law and under the Civil Code of Québec (1953), 31 Can. Bar Rev. 723; Mark R. MacGuigan, Precedent and Policy in the Supreme Court (1967), 45 Can. Bar Rev. 627; Jean-Gabriel Castel, The Civil Law System of the Province of Quebec (1962), Ch. 4.

[23] Decisions of the International Court of Justice have "no binding force except between the parties and in respect of that particular case." Article 59 of the Statute of the Court of International Justice.

[24] "A tribunal which has to exercise discretion must therefore be careful not to treat iself as bound by its own previous decisions." H. W. R. Wade, Administrative Law (3rd ed., 1971), p. 66.

[25] For instance, in the civil law systems, the rules of law are found in the Civil Code, not the cases. Hence, it is the Code that is decisive not the interpretations given to it by courts, see authorities, *supra*, footnote 22.

[26] W. L. Holdsworth (1934), 50 L.Q. Rev. 180, at p. 185.

[27] Commentaries I, p. 70.

[28] *Jones* v. *Randall* (1774), Lofft. 384.

> The law would be a strange science if it rested solely upon cases . . . . Precedent indeed may serve to fix principles, which for certainty's sake are not suffered to be shaken, whatever might be the weight of the principle, independent of precedent. But precedence, though it be evidence of law, is not law in itself; much less the whole of the law.

But the system of private property demanded more stability.[29] Until the birth of the rationalized system of private property, judges theorized that their function was to declare what the law was, and if a prior case had inaccurately declared the law, then this inaccuracy was open to correction in subsequent cases. In response to Bentham's utilitarian attacks on the courts for "making" laws,[30] judges backed themselves into the position of declaring what the law was, once and for all.[31] Since by now the matter of whether courts make law is no longer debated but rather assumed,[32] the doctrinal foundation of *stare decisis* has been exploded.

But a custom, such as *stare decisis*, may have value in contemporary society even if the reasons for its adoption in the first place have long since disappeared.[33] The value of *stare decisis* in today's society must be assessed in functional terms.

> The significance of adherence to precedent may more profitably be stated in terms of the prominence which consistent selection affords one of several otherwise undifferentiated solutions to a problem of coordination.[34]

In other words,

> . . . precedent is merely the source of one important kind of salience: conspicuous uniqueness of an equilibrium because we reached it last time.[35]

Jerome Frank has argued that the attachment of salience to things

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[29] "I think authorities established are so many laws; and receding from them unsettles property; and uncertainty is the unavoidable consequence", per Lord Hardwicke, *Ellis* v. *Smith* (1754), 1 Ves. Jur. 9, at p. 17.

[30] "It is the judges . . . that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it and then beat him. This is the way you make laws for your dog, and this is the way the judges make laws for you and me." Works, Vol. 5, p. 235.

[31] See for a discussion of this point, D. N. MacCormick, Can Stare Decisis be Abolished, [1966] Jurid. Rev. 197.

[32] Stone, *op. cit.*, footnote 12, at p. 477.

[33] "For though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose that they acted wholly without consideration." Blackstone, *op. cit.*, footnote 27. Contrast: "It is revolting to have no better reason for a rule of law than that it was so laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was so laid down have long since vanished, and the rule simply persists from blind imitation of the past." O. W. Holmes, Collected Legal Papers (1920), p. 187.

[34] Robert L. Birmingham, The Neutrality of Adherence to Precedent, [1971] Duke L.J. 541, at p. 552.

[35] D. Lewis, Convention: A Philosophical Study (1969), p. 36, cited in Birmingham, *op. cit.*, *ibid.*, at p. 552.

passed is primal and characteristic of the child's stage of psychological evolution.[36] Others have noted that adherence to precedence safeguards vested social interest from re-adjustment in favour of disadvantaged classes.[37]

Nevertheless, the utility of precedent as a guide to decision-making in the judicial context has been universally recognized. Lobingier has observed a reliance on precedent, to some degree at least, in the societies of China, Babylon, Assyria, Arabia, Rome and Greece.[38] Adherence to precedent and custom is also observable in African societies.[39] And while, as noted above, civil law systems do not feel bound by prior decisions, respect and influence are accorded to well recognized trends, to the "jurisprudence".[40]

The ideal role for precedent has perhaps been described by Benjamin Cardozo:

> If we figure stability and progress as opposite poles, then at one pole we have the maxim of stare decisis and the method of decision by deductive logic; at the other we have the method which subordinates origins to ends. . . . Each method has its value, and for each in the changes of litigation there will come the hour for use. A wise eclecticism uses them both.[41]

But the rule that a single decision of any one court or judge can, by virtue of a position in a hierarchy of courts, bind all lower courts in subsequent cases contributes little or nothing to the achievement of either progress or stability. By definition, the rule inhibits the process of change that is a prerequisite of progress. Moreover it yields, at best, a marginal benefit in stability and, more likely, the benefit is illusory. An examination of House of Lords decisions before and after the "historic" Practice Statement of 1966 led Julius Stone to the conclusion that the Statement may well be a false symbol. Without the Practice Statement, the House was able to confine cases to their facts and to their ratios, and so avoid following them. Since the "liberation" of 1966 the House has chosen to emphasize how exceptional is the case in which

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[36] Law and the Modern Mind (1930), pp. 158-159.

[37] *Op. cit.*, footnote 34, at p. 552. The *reductio ad absurdum* of this thought pattern was reached by Lord Ellenborough: "If this rule were to be changed, a lawyer who was well stored with these rules would be not better than any other man without them." Quoted in Jerome Frank, Courts on Trial (1949), p. 271.

[38] Precedent in Past and Present Legal Systems (1946), 44 Mich. L. Rev. 955, at pp. 956-957.

[39] P. P. Howell, A Manual of Nuer Law (1954), p. 22.

[40] Moreover, the importance of precedent in the broadest sense is growing with increased pressure on judges in civil law jurisdictions to elaborate on their reasons for decisions. Dawson, *op. cit.*, footnote 21, p. 430. Friedmann has noted the relationship between the relatively expansive decisions of Quebec judges and the extent of their reliance on precedent, *op. cit.*, footnote 22, at p. 741.

[41] The Paradoxes of Legal Science (1928), p. 8.

their power to overrule their prior decisions will be invoked.[42]

The simple fact is that the assumption that a court will follow a particular previous decision of whatever level in the hierarchy does not increase the predictability of a decision in a different case. Not only is this true of predicting appeal court decisions which are, or at least should be, the "difficult", "arguable" cases. But, to the extent that one accepts Jerome Frank's theories that the actual reasons for judicial theories are often concealed, then "reliance on precedents is illusory because judges can seldom tell precisely what has been theretofore decided".[43]

Recent experience in the common law jurisdictions demonstrates not only how little marginal certainty is provided by rigid *stare decisis*, but also demonstrates how insecure is the rule itself that lower courts are inflexibly bound by the decisions of higher courts.

There was a time when there was apparently no doubt that the supreme courts of the "colonies" were bound on matters of "English" law by decisions of the House of Lords. The Privy Council,[44] the Supreme Court of Canada[45] and the High Court of Australia[46] all expressed this view. These eminently authoritative statements have nevertheless not stopped the High Court of Australia from refusing to follow the decision of the House of Lords in *Rookes* v. *Barnard*,[47] which refusal was approved by the Privy Council.[48] This case was of course relied upon by the Court of Appeal in launching its assault on the binding effect of House of Lords decisions.[49]

There is also agitation among higher courts in the United States. The State Supreme Court of Arizona recently upheld an Arizona statute despite a United States Supreme Court decision that a comparable Florida statute was violative of due process.[50] The United States Supreme Court had decided the case by a four to three majority and the Arizona court was of the opinion that a full court would have arrived at a different result. The Arizona court has been severely criticized on the basis that the authorities do not support their approach.[51]

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[42] *Op. cit.*, footnote 16, p. 1201.
[43] *Op. cit.*, footnote 36, p. 152.
[44] *Robins* v. *National Trust Co., Limited et al.*, [1927] 1 W.W.R. 881.
[45] *Bright and Co.* v. *Kerr*, [1939] S.C.R. 63.
[46] *Piro* v. *Foster and Co. Ltd.* (1943), 68 C.L.R. 313.
[47] *Australian Consolidated Press Ltd.* v. *Uren* (1966), 40 A.L.J.R. 142. See also the comments of Dixon C.J. in *Parker* v. *The Queen* (1962-63), 111 C.L.R. 610, at p. 632.
[48] (1967), 41 A.L.J.R. 66.
[49] *Supra*, footnote 1, at pp. 869-871, 874-875, 878-880, 884-888.
[50] *Roofing Wholesale Co.* v. *Palmer* (1972), 502 P.2d. 1327, at p. 1328, refusing to follow *Fuentes* v. *Shevin* (1972), 407 U.S. 67.
[51] (1973), 86 Harv. L. Rev. 1307.

Regardless of the merits of that criticism, the fact remains, as Cardozo has said, that, where courts are less than full:[52]

> It happens again and again, where a question is a close one, that a case which one week is decided one way might be decided another way the next if it were then heard for the first time.

While Cardozo's solution to the problem was to "stand by the errors of our brethren of the week before",[53] one is left wondering whether it would not better serve the interests of justice to hold no single decision binding and await the formulation of a practice by a consensus of judicial opinion.

There are those who will react negatively to such a proposal because it might accelerate the process of change in law and in society.[54] But as Mr. Justice Douglas has observed:[55]

> This search for a static security—in the law or elsewhere—is misguided. The fact is that security can only be achieved through constant change, through the wise discarding of old ideas that have outlived their usefulness, and through the adapting of others to current facts.

The controversy continues to rage in the English courts whether courts should be responsive to social change. In *Cassell* v. *Broome*, Viscount Dilhorne observed that:[56]

> As I understand the judicial functions of this House, although they involve applying well established principles to new situations, they do not involve adjusting the common law to what are thought to be the social norms of the time. They do not include bowing to the wind of change. We have to declare what the law is, not what it should be.

On the other hand, as Lord Diplock has commented to his colleagues in *Cassell* v. *Broome*:[57]

> If the common law stood still while mankind moved on, your Lordships might still be awarding bot and wer to litigants whose kinsmen thought the feud to be outmoded.

But the true object of liberating courts from the rigid rules of *stare decisis* is not to promote social change and law reform as such. It is clear that relaxation of *stare decisis* is a double-edged sword that can be wielded as effectively in the direction of restoration as it can be in the direction of innovation. It was, after all, Robespierre who cursed the freedom of judges to make political decisions with no accountability to the people's revolutionary assemblies.[58]

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[52] The Nature of the Judicial Process (1921), pp. 149-150.

[53] *Ibid.*

[54] "All drastic breaks with law that has long been considered established must be regarded by many of the legal professional with misgivings." D. M. Gordon, Hedley Byrne v. Heller in the House of Lords (1964-66), 2 U.B.C.L. Rev. 112.

[55] (1949), 49 Col. L. Rev. 735.

[56] *Supra*, footnote 1, at p. 1107.

[57] *Ibid.*, at p. 1127.

[58] Mélanges Maury, II, pp. 349, 352-353, cited by Dawson, *op. cit.*, footnote 21, pp. 425-426.

It has been said that the issue of relaxation of the rigid enforcement of *stare decisis* on lower courts only arises in minds harboring a "complex of unreal assumptions concerning the day-to-day appellate judicial process".[59] It is undoubtedly the case that judges of lower courts can avoid the effect of decisions of higher authorities through the manipulation of the rules of *stare decisis*.[60]

> The point of all such proposals is that they tacitly concede the impossibility of obtaining legal conformity, but seek to cover up the more obvious manifestations of this lack. The healthier method would be not only to recognize the gross evidences of uncertainty but to make evident the actual but now concealed circumstances which make certainty an impossibility, to the end that by describing accurately the real nature of the judicial process we may learn to better it.[61]

Justice is the ideal which promises society's members a procedurally fair, substantively rational and reasonably understandable account of why society regulates their behavior in particular ways. This ideal presupposes that decisions affecting behavior are made openly and honestly. To encourage courts to obscure their actual reasons in the interest of preserving the shibboleth of *stare decisis* advances neither progress nor certainty nor justice.

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AUDIO-SURVEILLANCE—DROITS DE L'EXÉCUTIF—ACTIVITÉS SUBVERSIVES—PORTE OUVERTE À L'ARBITRAIRE.—Un des thèmes de l'évolution de la démocratie repose sur la lutte des citoyens pour protéger leur intimité contre les tendances inquisitoriales des autorités religieuses, politiques et économiques. Un désir de protection des libertés de parole, d'association, de conscience émerge de l'histoire de l'hémisphère occidental vers une plus parfaite démocratie, de la Grèce antique au Protestantisme, de la création de la *common law* à la constitution américaine, de l'émancipation des serfs au libéralisme économique.[1]

Ce désir s'explique: l'originalité, la diversité et le non-conformisme sont des éléments essentiels à la démocratie; or, une

[59] Julius Stone, *op. cit.*, footnote 12, p. 468.

[60] In contrast to the Arizona Supreme Court's treatment of *Fuentes*, the United States Court of Appeals for the Ninth Circuit has avoided the effect of the Supreme Court's rule by concluding that creditors' self-help repossession of secured property under the Uniform Commercial Code is not "state action" as that expression was understood in the *Fuentes* case, *Adams* v. *Southern California First National Bank* summarized in U.S. Law Week, Oct. 30th, 1973.

[61] Frank, *op. cit.*, footnote 36, pp. 156-157.

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[1] Alan F. Westin, Privacy in Western History (1967).

telle indépendance intellectuelle nécessite une maturation dégagée de la crainte du ridicule et de l'opprobe publique. De plus, une période de méditation est essentielle avant l'éclosion des idées nouvelles![2]

> Great originality is often rooted in the maturing and application of talent outside of the spot-light of instant disclosure.[3]

La période de réflexion terminée, le citoyen doit s'exprimer: c'est grâce au choc des idées que la société évolue! Cependant, les idées nouvelles ne naissent pas sans heurts: l'expression de la dissidence amène souvent, au début, l'opprobe de la majorité. S'il n'est pas libre de livrer ses opinions à sa discrétion et au moment choisi, l'homme moyen s'enfermera dans le mutisme. Il acceptera les normes de la majorité plutôt que de risquer des représailles:[4]

> Anxious men are rarely free men. Those tormented by the thought that it may have been an exercise of freedom that cost them their jobs, deferments, civil rights as liberty—but who never know for sure—are not likely to develop the strengths political democracy needs. Surveillance serves to chill thought and discourage the risk of freedom.[5]

Sans intimité, l'obligation de respecter toutes les conventions sociales serait intolérable: dans nos sociétés complexes la schizophrénie deviendrait la règle et toute la structure démocratique croulerait faute de participation.[6]

L'Etat totalitaire, à l'inverse, requerra une surveillance constante: exigeant une allégeance complète au Régime, il attaquera le concept d'intimité comme antisocial. L'exemple historique de Sparte, de l'Empire romain, de l'Eglise moyenâgeuse et des monarchies de droit divin en témoignent.[7] Les Etats fascistes et marxistes du XXe siècles héritèrent de cette philosophie.[8]

[2] Clinton Rossiter, The Pattern of Liberty dans M. R. Konvitz et Clinton Rossiter (ed.), Aspects of Liberty (1958), pp. 15-32; Alan F. Westin, Privacy and Freedom (1967), p. 34 *et seq.*

[3] H. D. Lasswell, The Threat to Privacy dans R. M. MacIver (ed.), Conflict of Loyalties (1952), p. 121, à la p. 134.

[4] Sur les effets politiques et sociologiques de la surveillance: Johada et Cook, Security Measures and Freedom of Thought: An Exploratory Study of the Import of Loyalty and Security Programs (1952), 61 Yale L.J. 295; *N.A.A.C.P.* v. *Alabama ex rel John Patterson* (1958), 357 U.S. 449, 78 S. Ct 1163.

[5] Askin, Surveillance: The Social Science Perspective, [1972] Col. Human Rights L. Rev. 59, à la p. 63.

[6] Robert Merton, Social Theory and Social Structure (1957), p. 375; Edward F. Ryan, Privacy, Orthodoxy and Democracy (1973), 51 Rev. B. Can. 84, à la p. 91.

[7] Westin, *op. cit.*, note 2, p. 57.

[8] Margaret Mead and Elena Calas, Child-Training Ideas in a Past Revolutionary Content: Soviet Russia, dans Margaret Mead et Martha Wolfenstein (ed.), Childhood in Contemporary Cultures (1955), pp. 179, 190-191; J. P. Hollander, Privacy: A Bastion Stormed dans Mores and Morality in Communist China (1963), 12 Problems of Communism, no. 6, aux pp. 1-9; G. Almond, et S. Verba, The Civil Culture: Political Attitudes and Democracy in Five Nations, (1963), p. 481.

La question de l'audio-surveillance se pose de nos jours avec une acuité saisissante: nécessaire à la survie de l'ordre social,[9] elle peut avoir un effet néfaste lorsque non contrôlée.

En effet, pour éviter les désordres sociaux, l'Etat doit compiler une somme extraordinaire de renseignements et, nécessairement, envahir une parcelle de la vie privée de ses citoyens.[10] De l'autre côté, il est dangereux de confier à l'exécutif un pouvoir de surveillance arbitraire: entre le droit des individus à leur intimité et celui de la communauté à une certaine surveillance, un juste milieu doit être trouvé. Cette ligne médiane dépend cependant des conditions existant à une époque et seuls les tribunaux ont compétence pour jauger la situation existentielle d'un cas particulier.

La "Chilling doctrine" aux États-Unis

Ce danger de l'atteinte incontrôlée à la vie privée préoccupe particulièrement les juristes américains depuis la création de la "chilling doctrine".[11]

Se fondant sur le premier amendement à la constitution américaine, plusieurs opinent que la surveillance gouvernementale serait inconstitutionnelle parce que limitant la libre expression et le droit à la dissidence.[12] Le citoyen serait ainsi poussé à adopter la ligne de pensée de la majorité au pouvoir.[13]

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[9] Margaret Mead, Margaret Mead Re-examines our Right to Privacy Redbook, avril 1965, pp. 15-16: "The devices we have rejected because they can be, (and they have been) used to invade individual privacy, can also be used to insure the public safety without which privacy itself becomes a nightmare isolation."

[10] Edward F. Ryan, The Control of Surreptitious State Electronic Device Surveillance and Interception of Communications in Canada, Ontario Law Reform Commission, inédit. Mémoire du service de police de la communauté urbaine de Montréal concernant le projet de loi sur la protection de la vie privée (Bill C-176) au Comité permanent de la justice et des questions juridiques. Montréal 7 juin 1973; Report of the Privy Councillors Appointed to Inquire into the Interception of Communications (London, 1962).

[11] Note, The Chilling Effect in Constitutional Law (1969), 69 Col. L. Rev. 808; Note, H. v. A.C. and the Chilling Effect, The Dombrowski Rationale Applied (1967), 21 Rutgers L. Rev. 679.

[12] *Arlo Tatum* v. *Melvin R. Laird* (1972), 444 F. 2d 947; 92 S. Ct. 2318; *A.C.L.U.* v. *Westmoreland* (1970), 70 Civ. 3191 (N.D. Ill.); *Fifth Avenue Peace Parade Committee* v. *Hoover* (1970), 70 Civ. 2646 (S.D. N.Y.).

[13] Askin, *op. cit.*, note 5, à la p. 66: "There are, in general, two processes which result in chill. In the first, an individual knows about (or perceives that such is the case without direct knowledge) surveillance and the accompanying record-keeping activities which are directed at groups engaged in legitimate political activity. As a result he, along with others, redefines the legitimate political activities as 'illegitimate' and is therefore reluctant to act on his political beliefs. He has been prevented from taking part himself and in turn becomes intolerant of the activity. He is now himself part of the mechanism of this redefinition. In the second process, the

En 1958, le plus haut tribunal américain consacrait cette doctrine dans l'affaire *National Association for the Advancement of Colored People* v. *State of Alabama, ex rel John Patterson*:[14] il s'agissait de savoir si l'Etat d'Alabama pouvait forcer la N.A.A.C.P. à divulger au Solliciteur général le nom de tous ses membres. Par une action collective, l'association précitée réussit à faire reconnaître son droit au secret:

> Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs. . . . Petitioner has made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility. Under these circumstances, we think it apparent that compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.[15]

Subséquemment dans l'affaire *Anderson* v. *Sills*,[16] la Cour supérieure du New Jersey permit à six personnes de poursuivre, au nom de tous les mouvements de défense des droits fondamentaux, pour faire cesser la cueillette d'information par des agents gouvernementaux. La Cour, élargissant la règle du "standing to sue" nota que les normes applicables à l'intérêt juridique devaient être relâchées lorsqu'il s'agit de protéger le droit de parole prévu au premier amendement à la constitution et que le fait d'oeuvrer dans les organisations sujettes à enquête donnait au requérant l'intérêt suffisant pour poursuivre:

> We do not require that injury be experienced as a condition for suit, and there is good reason to permit the strong to speak for the weak or the timid in First Amendment matters. Nevertheless, the prospect of wrongful conduct must be real and not fanciful for the chance of error is substantial if an issue is accepted in a setting that is merely hypothetical.[17]

Pour ce faire, la Cour reconnut que les demandeurs seraient possiblement visés par cette cueillette d'informations et pourraient ainsi être poussés à une non-participation aux organismes de

individual knows about (or perceives) surveillance and record-keeping directed against legitimate political groups. He also knows that records are sometimes misused. As a result he modifies his form of political expression because he is afraid of the consequences of a record of his presence being kept and later misused or misinterpreted.

[14] *Supra*, note 4.
[15] *Ibid.*, à la p. 1172 (J. Harlan).
[16] (1969), 265 A. 2d 678.
[17] *Ibid.*, à la p. 684.

contestation. Cette constatation fut d'ailleurs approuvée par la doctrine.[18]

Enfin, dans la récente affaire *Melvin R. Laird* v. *Arlo Tatum*,[19] toute la question de l'atteinte à la liberté d'expression par la surveillance gouvernementale fut soulevée. Le dénommé Tatum exigeait un jugement déclaratoire condamnant la surveillance d'activités politiques des citoyens par l'armée américaine et une injonction pour faire cesser cette surveillance.

Le requérant ne put malheureusement prouver un intérêt satisfaisant à poursuivre et il fut débouté:

> Allegations of a subjective chill are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.[20]

Cependant, la Cour suprême reconnut que, si le requérant avait prouvé un trouble déterminé et actuel résultant de cette inquisition, elle aurait émis l'injonction.[21]

La situation au Canada

Au Canada, les tribunaux furent appelés à régler ce conflit entre le droit de surveillance et celui des citoyens à la libre expression dans l'affaire récente *Re Copeland and Adamson*.[22]

Un avocat torontois, inquiet de la prolifération des appareils d'écoute clandestine, exigeait un mandamus enjoignant le chef de police du Toronto metropolitain d'ordonner l'arrêt immédiat de tout espionnage électronique et l'arrestation de tout policier ayant déjà écouté et divulgué des conversations téléphoniques.

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[18] Chilling Political Expression by Use of Police Intelligence Files: *Anderson* v. *Sills* (1970), 5 Civ. Rights L. Rev. 71, à la p. 77: "The NAACP in Sills has a close connection with its membership and, as noted, there exists a reasonable possibility of harm to the organization through consequences of the state gathering apparatus. It can claim to be protecting the rights of its members not wanting to sue on their own behalf, but who are probably included on the police lists. Moreover, the individual plaintiffs should be able to assert the rights of others who have engaged in activity no more violent in nature than their own."

[19] *Supra*, note 12.

[20] *Ibid.*, à la p. 2325.

[21] *Ibid.*, à la p. 2324: "In recent years this Court has found in a number of cases that constitutional violations may arise from the deterrent, or 'chilling', effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights. *e.g. Baird* v. *State Bar of Arizona*, 91 S. Ct. 702; *Keyishian* v. *Board of Regents*, 87 S. Ct. 675; *Lamont* v. *Postmaster General*, 381 U.S. 301; 85 S. Ct. 1493; *Baggett* v. *Bullitt 377* U.S. 360; 84 S. Ct. 1316. In none of these cases, however, did the chilling effect arise merely from the individual's knowledge that a governmental agency was engaged in certain activities or from the individual's concomitant fear that, armed with the fruit of those activities, the agency might in the future take some other and additional action detrimental to that individual."

[22] *Re Copeland and Adamson* (1972), 7 C.C.C. (2d) 393.

Il fut malheureusement jugé que la Déclaration canadienne des droits ne s'appliquait pas à ces cas: en effet, le juge reconnaissant que l'économie générale du droit ontarien ne consacrait aucune protection de l'intimité, et appliquant la théorie selon laquelle la Déclaration canadienne ne protégerait que les droits reconnus au moment du procès, conclut que l'article 1-A de la Déclaration n'avait aucune pertinence.

Il est intéressant de mentionner que cette décision aurait pu être toute différente dans des provinces où le droit à l'intimité est reconnu, dont le Québec, la Colombie Britannique, l'Alberta et le Manitoba.

Quant à la nouvelle loi fédérale sur La protection de la vie privée,[23] elle n'est pas sans danger.

Dans un premier projet,[24] on permettait l'interception des communications privées sans autorisation judiciaire à priori lors d'urgence ou de menées conspiratrices.[25]

C'était laisser une extrême latitude aux policiers. Le terme conspiration vise, dans le Code criminel canadien, toute entente entre deux ou plusieurs personnes pour accomplir un acte illicite ou un acte licite par des moyens illicites;[26] cette définition, large à l'extrême, laissait la porte ouverte à l'écoute électronique sans autorisation.

Heureusement, à l'article 178.15 de la loi, on modifia substantiellement le texte pour exiger, lors d'urgence, l'obtention d'un mandat judiciaire dégagé des formalités requises à l'article 178.13. Les efforts conjugués des Ligues des droits de l'homme et de l'opposition officielle portèrent leurs fruits. Une telle autorisation, dégagée des conditions procédurales normales, sera valide pour une durée de trente six heures.

Un danger cependant demeure! Le pouvoir de l'exécutif à l'audio-surveillance sans mandat judiciaire est maintenant consacré

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[23] Bill C-176, 1ère sess., 29ème Légis. ajoutant au Code criminel les articles 178.1 à 178.22.

[24] Bill C-252, 3ème sess., 28ème Légis.

[25] Art. 167 F. (1): «. . . un agent de la paix ou fonctionnaire public est convaincu:

a) que se trament ou se trameront des menées conspiratrices mettant en cause des personnes soupçonnées de participer aux activités d'organisations criminelles

b) que l'interception des communications privées entre des personnes déterminées, en un lieu et d'une manière déterminée, serait susceptible de fournir la preuve d'une infraction liée à ces menées conspiratrices, et

c) qu'il existe des circonstances qui justifieraient l'octroi d'une autorisation d'intercepter les communications privées entre ces personnes, en ce lieu ou de cette manière mais que l'urgence de la situation exige que les interceptions commencent avant qu'une autorisation ne puisse avant toute la diligence raisonnable, être obtenue.»

[26] Lagarde, Droit pénal canadien (1967), art. 586 et R.P. ch. XVI.

à l'article 16, paragraphes 2 et 3 de la Loi sur les secrets officiels:[27]

> (2) Le Solliciteur général du Canada peut décerner un mandat autorisant l'interception ou la saisie de toute communication s'il est convaincu, en se fondant sur une preuve faite sous serment, que cette interception ou saisie est nécessaire pour prévenir ou dépister une activité subversive dirigée contre le Canada ou préjudiciable à la sécurité du Canada, ou est nécessaire pour recueillir des renseignements d'origine étrangère essentiels à la sécurité du Canada.
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> (3) Aux fins du paragraphe (2), "activité subversive" désigne:
>
> a) l'espionnage ou le sabotage
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> b) des activités de renseignement d'origine étrangère visant à réunir des renseignements sur le Canada
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> c) des activités visant à opérer un changement de gouvernement au Canada ou ailleurs par la force, la violence ou tout autre moyen criminel
>
> d) des activités d'une puissance étrangère visant, en fait ou éventuellement, à attaquer le Canada ou à se livrer contre lui à d'autres actes hostiles; ou
>
> e) des activités d'un groupe de terroristes étrangers visant à la perpétration d'actes terroristes au Canada ou contre le Canada.

La seule obligation imposée au Solliciteur général du Canada est de déposer au Parlement un rapport annuel sur ses activités d'espionnage électronique.

Ne serait-ce pas là une porte ouverte à la surveillance d'organisations marginales? Quelle interprétation le Solliciteur général du Canada donnera-t-il aux termes "activités visant à opérer un changement de gouvernement au Canada par la force, la violence ou tout autre moyen criminel"? Ces termes pourront-ils laisser libre cours à une interprétation circonstancielle pouvant être appliquée abusivement à des actes à saveur politique? Cette délégation à l'exécutif semble être un accroc aux principes sous-jacents à cette loi sur la "protection de l'intimité".

L'hésitation des tribunaux à contrôler l'exécutif lors d'activités subversives réelles ou appréhendées[28] jointe aux excès commis lors de la Crise d'Octobre[29] 1970 nous permettent d'envisager avec circonspection cette latitude donnée au Solliciteur général.

L'éditorialiste Jean-Claude Leclerc écrivait dans *Le Devoir* du samedi 3 juillet 1971 de façon très pertinente le commentaire suivant:

> En vertu du projet Turner, la pègre et n'importe quel citoyen auraient droit de poursuivre la Couronne et cas d'écoute illégale. . . .
> Bien moins égaux seraient les citoyens qui auraient eu le malheur d'être

[27] S.R.C., 1970, c. 0-3.

[28] Gerald J. Kenny, The "National Security Wiretap": Presidential Prerogative or Judicial Responsability (1972), 45 Southern Cal. L. Rev. 888; Herbert Marx, The "Apprehended Insurrection" of October 1970 and the Judicial Function (1972), 7 U.B.C.L. Rev. 55.

[29] Ron Haggart et Aubrey E. Golden, Rumours of War (1971).

soupçonnés par le solliciteur général au chapitre de la sécurité d'Etat. Là, pour prévenir l'espionnage, le sabotage, ou "toute autre activité subversive dirigée contre le Canada ou préjudiciable à la sécurité du Canada", un mandat du soliciteur général du Canada suffit pour intercepter les conversations privées, dès lors qu'il le juge nécessaire "dans l'intérêt public". . . . Telle est la porte ouverte par le dernier article du Bill Turner. Cette disposition évoque trop l'autre Bill Turner, celui qui suivit les mesures de guerre, pour que les citoyens ne sachent pas à quoi s'en tenir sur la protection réelle qu'ils auraient dans leur vie privée. Il est piquant de voir, à côté de la guerre "réglementée" contre le crime organisé, cette chasse libre aux éléments "subversifs". Serait-ce que le crime organisé est moins néfaste que la subversion? Ou bien, faudrait-il penser que si l'argent est le nerf de la guerre, la pègre est le muscle de la démocratie libérale?

L'adoption d'une telle disposition porterait une atteinte grave au droit de dissidence politique: d'ailleurs, la Cour suprême des Etats-Unis a déjà, malgré son actuelle tendance à respecter les désirs de l'exécutif,[30] rejeté l'argument selon lequel le Président possèderait, lors de questions concernant la sécurité nationale, le pouvoir d'audio-surveillance sans mandat.

Dans l'affaire *United States* v. *United States District Court for the Eastern District of Michigan*,[31] le tribunal suprême reconnut que, quoique le serment d'allégeance du Président comporte l'obligation de préserver et défendre la constitution et que l'audio-surveillance soit évidemment l'un des moyens efficaces d'arriver à cette fin, il demeure que ce pouvoir pourrait mettre en péril les libertés fondamentales garanties par le "Bill of Rights".

Soupesant le devoir du gouvernement de protéger la sécurité domestique "versus" les droits individuels à l'intimité et à la libre expression, la Cour estima que donner feu vert au gouvernement aurait constitué un danger trop grand.[32] Muni de tels pouvoirs, il lui aurait été loisible d'appliquer de telles techniques d'enquête à tous ceux qui ne partagent pas ses vues. Il aurait pu ainsi interpréter le concept "sécurité domestique" assez largement pour inclure la surveillance d'activités n'ayant aucun rapport avec les intérêts qu'il devait initialement protéger.[33]

Enfin, selon la Cour, la règle énoncée à l'arrêt *Katz*[34] avait étendu la protection du quatrième amendement aux enregistrements de conversations, elles-mêmes protégées par le droit à la libre expression prévu au premier amendement; ainsi, dans le cas présent, les deux amendements convergeaient pour faire échec à la prétention gouvernementale.

[30] Arthur Schwyn Miller, Privacy in the Modern Corporate State: A Speculative Essay (1973), 25 Ad. L. Rev. 231, à la p. 241.
[31] (1972), 407 U.S. 297; 92 S. Ct 2125.
[32] Cowden, Note (1972-73), 77 Dickinson L. Rev. 166, à la p. 171.
[33] Janov, Note, [1972] Geo. Wash. L. Rev. 119, à la p. 126.
[34] *Katz* v. *United States* (1967), 389 U.S. 347; 88 S. Ct 507.

La liberté de parole et de dissidence serait-elle moins importante au Canada? Dans notre pays où une forte minorité nationale demande le droit à l'auto-détermination, ne serait-il pas d'autant plus nécessaire de poser une limite au pouvoir d'enquête du fédéral? D'ailleurs, dans tout pays, la revision judiciaire des actes de l'administration est un pré-requis contre l'arbitraire.

L'intimité: valeur fondamentale en démocratie

Il doit exister une présomption en faveur de l'intimité: celle-ci découle du choix qu'ont fait les démocraties en faveur de l'autonomie et de la liberté de choix.

Il est néanmoins évident que cette présomption est réfutable quand le peuple, par des moyens démocratiques, décide que le droit à la vie privée doit être limité pour éviter des dommages plus importants ou lorsque l'état d'urgence nécessite une réévaluation nécessaire à la survie de l'Etat.[35]

Il demeure qu'une telle décision, quoique prise démocratiquement selon les normes constitutionnelles, n'est pas nécessairement légitime; pour qu'elle soit telle, l'intrusion doit être nécessaire: on devra la justifier par la preuve soit d'une urgence, et alors la loi permissive sera temporaire, soit de la nécessité pour lutter contre un désordre grave, et alors cette loi devra être restreinte aux cas prévus.

Le législateur canadien devrait méditer les résolutions suivantes du Congrès des juristes des pays nordiques sur le droit au respect de la privée:[36]

> a. 7 Il est essentiel que les cas dans lesquels l'immixtion est autorisée soient définis avec précision. Les lois et les règlements doivent être tels, que les pouvoirs susceptibles de provoquer une immixtion dans la vie ne doivent être exercés que par une personne ou un organisme spécialement nommé par mandat d'une autorité publique responsable en dernier ressort devant le pouvoir législatif. Ce mandat doit définir la période et le lieu où ces pouvoirs pourront être exercés.
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> a. 8, para. c.
> . . . les dispositions législatives doivent définir dans le détail les pouvoirs de la police et des autorités chargées de l'instruction criminelle, identifier les infractions au sujet desquelles il peut en être fait usage et fixer des limites précises à leur emploi. Ces limites doivent notamment être telles, que les mesures entraînant une immixtion dans la vie privée soient dans tous les cas raisonnablement nécessaires, compte tenu de la gravité de l'infraction commise, et demeurent proportionnées à l'importance de cette infraction.

Le rejet de ces normes, par l'inclusion de l'article 16 à la

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[35] (1967), 31 Bulletin de la Commission internationale des Juristes, nu-(1952), p. 121.

[36] (1967), 31 Bulletin de la Commission internationale des Juristes, numero de septembre, p. 4.

Loi sur les secrets officiels serait la preuve d'un oubli du respect que la démocratie doit au citoyen.

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