COMMENTS
COMMENTAIRES

JUDICIAL REVIEW OF RULES OF LAW—JUDGE-MADE LAW REFORM—HOUSE OF LORDS—ROLE OF LOWER COURTS—CHANGES IN SOCIAL CONDITIONS—PROSPECTIVE OVERRULING—SELF-RESTRAINT—MAXIM *cessante ratione, cessat ipsa lex.*—In *Broome* v. *Cassell & Co. Ltd*,[1] the House of Lords blocked the Court of Appeal from overriding a House of Lord's position because it was considered by the Court of Appeal to be wrong. And now, in *Miliangos* v. *Geo. Frank (Textiles) Ltd*,[2] where the Court of Appeal has renewed its attack on the authority of a House of Lords position because its underlying social forces had weakened, the House of Lords has again firmly blocked the way. But it is doubtful that the Court of Appeal has been deterred from challenging the House of Lords when it feels the need. Exhortations by the House of Lords, unsupported by any strength of reason, that the Court of Appeal treat its decisions as "absolutely binding"[3] are less than compelling. The history of the issues in *Miliangos* reinforces the claims that judge-made law should be adjusted to new social conditions and that lower courts should be allowed to join in the process.

In *Miliangos*, a Swiss seller and an English buyer had contracted for the sale of goods according to Swiss law with payment in Swiss Francs. Delivery of the goods was completed but the buyer did not pay. Between the time of the breach by the buyer and the issue of an order for judgment in the seller's favour, the value of the Swiss Franc had changed from 9.9 per pound to 6 per pound. So, if the judgment debtor were ordered to deliver

---

[1] [1972] A.C. 1027. The present author had occasion to comment on that case. See Stare Decisis, Binding Effect of Decisions of House of Lords on Lower Courts (1974), 53 Can. Bar Rev. 128.

[2] [1975] 2 W.L.R. 555 (Bristow J., and the C.A.), 3 W.L.R. 758 (H.L.).

[3] Per Lord Simon of Glaisdale, *ibid.*, at p. 775.

Swiss Francs, he would have to pay 166 per cent of the value in Sterling which he had originally agreed to pay. If the judgment debt were paid in Sterling, the allocation between the parties of the exchange risk during the dispute resolution period depends on the date chosen for converting the damages in the contract currency to the judgment debt in the court currency. If judgment is given in the Sterling equivalent as of the date of the default, the Swiss creditor loses forty per cent of his expected Swiss Franc payment. But, the House of Lords decided the parties' intention that their business be transacted in Swiss Francs should prevail over the procedural convenience of giving judgment in Sterling. In doing so their Lordships not only reversed a particular rule of law that had endured for over three centuries but also reversed the House of Lords' traditional emphasis on formal, even at the expense of substantial, justice.

The Exchange Risk Allocation Rule: A Study in Judicial Legislation

Predictably the courts long ago formulated a policy to allocate the risk of exchange loss from delays in compensating wrongs. With the exception of one very early case,[4] the English courts for almost four centuries would give judgment only in English currency. In the words of Lord Justice Lawton:[5]

> This was robust common sense appropriate to trading conditions in which there were no telephones, no radio, no telex and news took seven days to get to London from Paris and a month from Rome.

With the exception of the Master of the Rolls, Sir Nathaniel Lindley,[6] who argued that a Court of Chancery might make an order for specific performance of a contract to pay foreign currency, no one had questioned the wisdom of the policy.[7]

In 1960 the House of Lords in the case of *In re United Railways of Havana and Regla Warehouses Ltd*[8] reviewed the development of the English rule allocating the dispute period exchange risk. They declared the rule to be that judgments must be given in Sterling and that conversion from the damages due in the relevant foreign currency to Sterling was to be effected using the exchange rate on the date of the wrong. The United Railways of Havana

---

[4] *Bagshaw* v. *Playn* (1595), 1 Cro. Eliz. 536.

[5] *Schorsch Meier* v. *Hennin*, [1974] 3 W.L.R. 823, at p. 832.

[6] *Manners* v. *Pearson & Son*, [1898] 1 Ch. 581, at p. 587.

[7] Per Lord Denning, *supra*, footnote 2, at p. 563.

[8] [1961] A.C. 1007.

Company had financed its purchase of rolling stock in the United States under a plan whereby the lenders were given an interest in a trust which rented the equipment to the borrower at a rate guaranteeing the lenders a return on their loan. The dispute arose when the Cuban government purchased control of the railway company and did not make payment on the equipment trust certificates. Under Cuban law, a novation had arguably occurred such as would have released the borrower's successors from the obligation to make payments on the equipment trust certificates. But the English courts found Pennsylvania law applicable and awarded judgment in favour of the lenders. Since Sterling had depreciated relative to the Dollar, the court had to decide whether judgment could be given in Dollars and, if not, at what date the conversion should be made from Dollars to Sterling. Viscount Simonds, whose reasoning was echoed by Lord Radcliffe, argued:[9]

> We are engaged in settling the law upon a question in which any rule is artificial and to some extent arbitrary. In other systems of law different rules have been adopted, and there is no doubt that one system may benefit one creditor and another another. No rule can do perfect justice in every case. In this country the rule is settled so as to bind our courts that where the claim is in damages for breach of contract, or for a tortious act, the date of conversion is the date of that breach or that act. It would, in my opinion, introduce a sort of refinement into the law, against which I have striven and shall ever strive, if a different rule were adopted in the case of a foreign debt.

Lord Reid chose the date of the wrong for making the conversion from foreign to domestic currency by a process of elimination of the alternatives on grounds of procedural impracticality:[10]

> The reason for the existing rule is, I think, primarily procedural. A plaintiff cannot sue in England for payment in Dollars, and he cannot get specific performance of a contract to pay Dollars — it would not be right that he should. So at best he could only have the Dollars converted to Sterling at the date of judgment. Owing to appeals and difficulties of enforcement a long time may elapse between judgment and getting his money, and the rate of exchange may have altered substantially during that time.... Really the only practicable choice would seem to be between converting at the date of breach and converting at the date of raising the action in England.... But the rate at the date of raising the action may be very different from the rate at the date of payment. Indeed the objections to taking it are not very much less than the objections to taking the rate at the date of the breach....

---

[9] Per Viscount Simonds, *ibid.*, at pp. 1048-1049, per Lord Radcliffe, at p. 1060.

[10] *Ibid.*, at pp. 1052-1053.

Lord Denning participated both in the House of Lords decision consolidating the *Havana Railways* position and the Court of Appeal decisions retreating from it. In *Havana Railways*, Lord Denning acknowledged that:[11]

> The origin of the rule . . . lies in the fact that for long years Sterling was regarded as "a stable currency of whose true-fixed and resting quality there is no fellow in the firmament". Sterling is the constant unit of value by which, in the eye of the law, everything else is measured.

But Lord Denning took account of the fact that Sterling had departed from the gold standard and had been devalued:[12]

> The question is whether the rule is to apply when Sterling loses the value which it once had. It may be said that in these conditions the rule is apt to produce an injustice to a creditor in the United States who is owed money in Dollars: because, if he comes to our courts after devaluation, he does not recover sufficient Sterling to compensate him for his loss. But I am afraid that, if he chooses to sue in our courts instead of his own, he must put up with the consequences. Our courts here must still treat Sterling as if it were of the same value as before: for it is the basis on which all our monetary transactions are founded.

In 1969, Lord Denning began the movement away from the *Havana Railways* rule with his dissent in the case of *The Teh Hu*.[13] A Japanese company had contracted under the terms of a Lloyd's Standard Form to salvage a vessel owned by a Panamanian company and registered in Liberia. A dispute arose and, as provided in the Lloyd's form, arbitration was held in London. The value of Sterling had decreased relative to the Japanese salvers' favoured currencies (the Japanese Yen and the United States Dollar) between the time when the salvage expenses were incurred and the time when the arbitration award was issued. Both the original arbitrator and the appeal arbitrator were prepared to increase the Sterling award payable at the time of the award to account for its loss of value. However, when the shipowners appealed, both the judge of first instance and the majority of the Court of Appeal applied the *Havana Railways* rule. Lord Denning dissented commenting that:[14]

> I am afraid that the common law rule on this subject is most unsatisfactory. It was fixed at the time when the Pound Sterling was a stable currency . . . but that enviable state of affairs is gone.

---

[11] *Ibid.*, at p. 1069.

[12] *Ibid.*

[13] [1969] 3 W.L.R. 1135.

[14] *Ibid.*, at pp. 1147-1148.

> Sterling is no longer the most stable currency in the world. It has been devalued more than once. We ought to recognize this. We should modify the common law to meet the new situation....

By 1973, Lord Denning's minority opinion in *The Teh Hu* had become the view of the majority of the Court of Appeal in the case of *Jugoslavenska Oceanska Plovidba* v. *Castle Investments Co.*[15] That case involved a time charter on the standard New York Products Exchange form between Yugoslav shipowners and a company registered in Panama. All payments under the charter were expressed in United States Dollars. A dispute arose over unpaid hire and was referred to two arbitrators in London who, in accordance with the City practice, made an award in favour of the shipowners in United States Dollars. When the charterers did not honour the award, the owners sought leave of the court to enforce the award under the Arbitration Act 1950. The Master refused leave and Kerr J. upheld this decision on the ground that English arbitrators were not entitled to make awards in foreign currencies. The Court of Appeal reversed these rulings declaring that the restriction on the ability of English courts to grant judgments in foreign currencies did not apply to arbitrators. Lord Denning justified this distinction on the grounds that resort to execution is less frequent in arbitrations than court proceedings. Accordingly, the difficulties of effecting execution using a foreign currency of account and payment are supposed to occur less frequently in arbitrations.[16] Even in the case of execution of an arbitration award in foreign currency, conversion to local currency could be made on the day of payment of the debt.

In the absence of empirical evidence, Lord Denning's assertion that creditors in arbitration proceedings have less recourse to execution than judgment creditors is not convincing. Also, the vital question is not whether judgments and awards may be denominated in foreign currencies. The vital question is what date is to be selected for converting the amount due in foreign currency into domestic currency. Lord Denning did not attempt to justify the use of different conversion dates in court proceedings and arbitration proceedings. Lord Denning's true intention was manifestly to avoid the effect of the *Havana Railways* rule. Thus, referring to the *Havana Railways* rule, he argued:[17]

> I venture to suggest that this view of the courts should be open for reconsideration. If the money payable under a contract is payable in a

---

[15] [1973] 3 W.L.R. 847.

[16] *Ibid.*, at p. 852.

[17] *Ibid.*

> foreign currency, it ought to be possible for an English court to order specific performance of it in that foreign currency: and then let the exchange rate be made into Sterling when it comes to be enforced. I know that this is not yet the law.... At any rate there is no reason why the rule about judgments of the court should be extended to awards by arbitrators.

In 1974, the Court of Appeal again slipped past the *Havana Railways* rule. *Schorsch Meier* v. *Hennin* involved a debt for the sale and delivery of goods pursuant to a contract which provided for payment in Deutschemarks. Since the date of breach by the English debtor, the value of Sterling had dropped relative to the value of the Deutschemark. The Court of Appeal gave judgment in Deutschemarks and stipulated that if payment were made in Sterling the conversion from Deutschemarks should be made as of the date of payment. All three members of the Court of Appeal used as one ground for avoiding the *Havana Railways* rule the Treaty of Rome provision by which:[18]

> Each member state undertakes to authorize, in the currency of the member state in which the creditor ... resides, any payments connected with the movement of goods, services or capital, ... to the extent that the movement of goods, services, capital and persons between member states has been liberalised pursuant to this Treaty.

A majority of the court of Appeal ruled, as a ground of equal standing for its decision, that the economic and legal conditions supporting the *Havana Railways* rule no longer existed. Relying on the rule that *cessante ratione, cessat ipsa lex*, Lord Denning argued:[19]

> It is a maxim which can be applied by these courts as well as by the House of Lords or by Parliament. From time to time they have done so. A good instance is the Court of Common Pleas in *Davies* v. *Powell* (1737) Willes 46, 51, where Willes L.C.J. said: "When the nature of things changes, the rules of law must change too." So when the nature of Sterling changes, the rule of law may change too.

In fact, however, Sterling had ceased to be a stable currency even before the *Havana Railways* case. In *Havana Railways*, Lord Denning himself had specifically related the issues of the case to the departure of Sterling from the gold standard and its devaluation. Consequently, the majority's argument in *Schorsch Meier* was founded on a change of circumstances but in reality all that had changed was the court's appreciation of the circumstances. Had not the *per incuriam* route for challenging House of Lords decisions been closed in *Broome* v. *Cassel*, the Court of Appeal

---

[18] *Supra*, footnote 5, at p. 830.

[19] *Ibid.*, at p. 827.

might have been able to state its position more candidly. The *Schorsch Meier* decision was not appealed to the House of Lords. So it was only on the appeal in *Miliangos* that the House of Lords had the opportunity to pass judgment on the Court of Appeal's avoidance of the *Havana Railways* decision on the grounds that shifting social conditions had made that rule obsolete.

Judge-Made Law Reform: A Sociological Approach

The House of Lords in *Miliangos* opted for a basically different strategy than their predecessors in *Havana Railways* in allocating the exchange risk during the dispute period. Lord Wilberforce in *Miliangos* refused to be confined to "straightjacket solutions based on concepts".[20] Lord Wilberforce and Lord Frazer of Tullybelton supported Lord Simon of Glaisdale's otherwise dissenting opinion that the maxim *cessante ratione, cessat ipsa lex* lent no authority to the Court of Appeal's reformist initiatives since the maxim merely "operates to distinguish an instant from a previous legal decision or to justify an exception from a principal legal rule".[21]

Nor did the House of Lords choose to treat the decision in *Havana Railways* as given *per incuriam*. Lord Wilberforce thought it:[22]

> ... inappropriate and unnecessary to say that, in the circumstances of the time and on the arguments and authorities presented, the decision was wrong or is open to distinction or explanation.

Lord Cross of Chelsea, while "bluntly" declaring the *Havana Railways* decision "wrong",[23] nevertheless would not have overturned it on that ground alone. Following Lord Reid's comments in another case, he argued that despite

> ... the fact that we no longer regard previous decisions of this House as absolutely binding it does not mean that whenever we think that a previous decision was wrong we should reverse it. In the general interest of certainty in the law we must be sure that there is some very good reason before we so act.[24]

---

[20] *Supra*, footnote 2, at p. 771.

[21] *Ibid.*, at p. 776; per Lords Wilberforce and Frazer of Tullybelton, *ibid.*, at pp. 769 and 804 respectively.

[22] *Ibid.*, at p. 764.

[23] *Ibid.*, at p. 797.

[24] *Ibid.* Per Lord Reid in *Reg.* v. *Knuller (Publishing, Printing and Promotions) Ltd*, [1973] A.C. 435, at p. 455.

Thus the House of Lords in *Miliangos* relied on neither of the established reasons for departing from its prior position in *Havana Railways*. Instead the majority strongly subscribed to the necessity of changing legal rules to accommodate new social conditions. Lord Wilberforce stated:[25]

> But if I am faced with the alternative of forcing commercial circles to fall in with a legal doctrine which has nothing but precedent to commend it or altering the doctrine so as to conform with what commercial experience has worked out, I know where my choice lies. The law should be responsive as well as, at times, enunciatory, and good doctrine can seldom be divorced from sound practice.

Lord Cross of Chelsea referred to the "change which has come over the 'foreign exchange' situation generally and the position of Sterling in particular in the course of the last 15 years"[26] as justifying the departure from the *Havana Railways* position. Lord Edmund-Davies confessed that he was "glad" that the social circumstances had so greatly changed since *Havana Railways* was decided that the court could "avoid perpetrating the great injustice which would result were the *ratio decidendi* of that case applied to the present claim".[27]

Lord Wilberforce alluded to factors other than changes in social conditions in his evaluation of whether to vary the established judge-made law. His Lordship stressed that the *Havana Railways* rule was judge-made in origin and not a subject of such general political interest as to arouse Parliamentarians.[28] In an enigmatic passage, Lord Wilberforce observed:[29]

> These considerations and the circumstances that I have set forth, when related to the arguments which moved their Lordships in the *Havana Railways* case . . . lead me to the conclusion that, if these circumstances had been shown to exist in 1961, some at least of their Lordships, assuming always that the interests of justice in the particular case required, would have been led, as one of them very notably has been led, to take a different view.

It is tempting to speculate that Lord Wilberforce meant that justice in the individual case would be adequate reason for bending an established rule. Also, Lord Wilberforce's observation perhaps invites judges to enter the minds of judges previously charged with the same issues and to extrapolate and apply a different outcome

---

[25] *Ibid.*, at p. 768.

[26] *Ibid.*, at p. 798.

[27] *Ibid.*, at p. 802.

[28] *Ibid.*, at pp. 772-773.

[29] *Ibid.*, at p. 770.

in the prior case on the basis of the newly acquired information. Rewriting of earlier decisions by extrapolation with new information is only one step from interpolating what would have been the outcome considering the hypothetical decisions of a full bench including the judges who did not hear the prior case. The notion is familiar, though not well regarded, in American jurisprudence.[30]

The House of Lords in *Miliangos* looked to precedents with more interest in the force of their argument than their hierarchical status. Lord Wilberforce referred to the different evolution of the allocation rule by arbitrators as a "very important"[31] development. Lord Wilberforce cited cases from the Commonwealth and even the United States in support of his position and also referred to juridical writings.[32] Lord Simon of Glaisdale acknowledged that he lent "great weight" to the views of one particular judge—Lord Radcliffe—because of "his knowledge, unusual in a judge, of public and commercial finance".[33] Lord Simon also cited the report of an expert legal committee—the Private International Law Committee—to show that commercial circles, at least as of 1962 when the Committee reported, felt no urgency to amend the *Havana Railways* rule.[34]

The House of Lords' decisions in *Miliangos* refer to some of the self-restraints that should be exercised in judicial law reform.

---

[30] See *Roofing Wholesale Co.* v. *Palmer* (1972), 502 P. 2d 1327, at p. 1328 (Sup. Ct Ariz.) refusing to follow *Fuentes* v. *Shevin* (1972), 407 U.S. 67. See also the comment on these cases in (1973), 86 Harv. L. Rev. 1307.

[31] *Supra,* footnote 2, at p. 767.

[32] Lord Wilberforce cites: the decision of Mr. Justice Holmes in *Deutsche Bank Filiale Nurnberg* v. *Humphrey* (1926), 272 U.S. 517; the case of *In re Dawson, dec'd,* [1966] 2 N.S.W.R. 211, and F.A. Mann, The Legal Aspect of Money (3rd ed., 1971); see Lord Wilberforce's decision, *ibid.,* at pp. 769 and 711. In the United States, federal courts continue to follow the *Deutsche Bank* reliance on the date of judgment for conversion of the damages into local currency. While the New York courts have in the past used the date of the wrong for conversion, there has been a tendency toward using the judgment date. The other countries in the Western World either allow judgment in foreign currencies or provide for conversion dates closer to the date of actual judgment than the breach date. See F.A. Mann, *op. cit., ibid.,* at pp. 350-376. The Canadian courts generally follow the breach date conversion rule (*The Custodian* v. *Blucher,* [1927] S.C.R. 420), but see *Quartier* v. *Farah* (1921), 64 D.L.R. 37 which used the date of judgment of first instance for conversion. Also see: J.-G. Castel, Private International Law (1960), pp. 92-93.

[33] *Supra,* footnote 2, at p. 787.

[34] *Ibid.,* at p. 784.

Their Lordships expressed reluctance to become embroiled in shifting positions that are pervasively integrated into the legal system or whose reform would be beyond the limit of judicial competence. Both Lord Wilberforce and Lord Simon of Glaisdale were conscious that the judge-made rule allocating the loss from currency fluctuations during the dispute period involves subjects as remote from judicial competence as international monetary theory and public finance. Largely for this reason, Lord Simon of Glaisdale would have preferred that the rule be left to Parliament to change, perhaps with the guidance of an expert committee. "Law is too serious a matter to be left exclusively to judges".[35] But Lord Wilberforce sounded the majority opinion:[36]

> Indeed, from some experience in the matter, I am led to doubt whether legislative reform, at least a prompt and comprehensive reform, in this field of foreign currency obligation, is practicable. Questions as to the recovery of debts or of damages depend so much upon the individual mixtures of facts and merits as to make them more suitable for progressive solutions in the courts.

Lord Simon of Glaisdale also explained his reluctance to participate in law reform from the bench observing that:[37]

> ...a long established rule of law almost always gathers juridical adhesions, so that its abrogation causes dislocations elsewhere in the legal system. Parliament, on executive or expert advice, can allow for these: the judiciary can rarely do so.

This argument actually only tests the court's ability to live with anomalies. The majority expressly confined their rule to foreign debt claims and refused to extend its application to cases involving damages in torts or contracts other than cases of foreign debts.[38] Indeed, anomalies seem inevitable in all law, not only judge-made law. In allocating the exchange risk during the dispute period, the Carriage of Goods by Air Act of 1961 (based on the Hague Convention of 1956) provides that conversion from the foreign currency amount owing to Sterling should be made as of the date of the award.[39] The Carriage of Goods by Road Act provides for

---

[35] *Ibid.*, at p. 783.

[36] *Ibid.*, at p. 773.

[37] *Ibid.*, at p. 789.

[38] Per Lord Wilberforce, *ibid.*, at pp. 771-772; per Lord Cross of Chelsea, *ibid.*, at p. 799; and per Lord Frazer of Tullybelton, *ibid.*, at p. 803. As noted by their Lordships, cases such as bankruptcies, which involve the distribution from a fund, require special rules. See also F. A. Mann, *op. cit.*, footnote 32, pp. 347-352.

[39] The Warsaw Convention as am. at The Hague, 1955, art. 22(5), adopted by Carriage by Air Act 1961, 9 & 10 Eliz. 2, c. 27, s. 1.

conversion as of the date of payment.[40] The Bills of Exchange Act 1882 provides for conversion as of the date of the wrong.[41]

Another important limitation on the exercise of the power to judicially review established rules of law relates to the significance of the interests implicated by the rule. If the rule is in fact an arbitrary mechanism by which to settle disputes in which the private interests weigh equally and the social interests weigh equally or not at all, then the established rule should be retained for the sake of convenience. As noted above, some members of the *Havana Railways* court felt able to treat the rule allocating the exchange risk during the dispute resolution period as arbitrary since currency fluctuations were rare and consequently there were few interests effected by the rule. Had the rule actually been arbitrary in its application, then there would have been no urgency for change. But when private or public interests are effected by changes in currency values, then the courts have a duty to adopt rules that account for the interests at issue.

Lord Simon of Glaisdale, while shying away from participating in judge-made law reform, nevertheless proposed some measures which might overcome his reluctance to do so in the future. Specifically, His Lordship proposed the use of prospective overruling and the participation as *amicus curiae* of representatives of the executive branch.[42] Certainly the use of prospective overruling is desirable. In fact, the House of Lords has already applied the technique in the Practice Statement of 1966 which announced that the House of Lords would no longer consider itself absolutely bound by its prior decisions.[43] But judge-made law by prospective overruling need not and should not be the only technique available to the courts for reforming outmoded rules of law. What justice after all is there in enforcing one last time a rule now considered so unjust that it will not be enforced in subsequent cases? Surely such a margin of certainty cannot outweigh the merits of doing justice in the case immediately at hand.

The idea of obtaining executive guidance in matters of public policy which fall to judges to decide is appealing, but what specifically is to be the evidentiary value of such executive testimony? If the executive viewpoint is purely or primarily political and this

---

[40] Convention on the Contract for the International Carriage of Goods by Road (1956), art. 27(2), adopted by Carriage of Goods by Road Act 1965, c. 37, s. 1.

[41] 45 & 46 Vict., c. 61, s. 72(4).

[42] *Supra*, footnote 2, at p. 792.

[43] Practice Statement (Judicial Precedent), [1966] 1 W.L.R. 395.

view conflicts with the demands of justice in the case, how are these objectives to be reconciled? Is it to be up to the court to invite the executive to participate or is the executive expected to act on its own initiative? How is silence from the executive quarters then to be treated? These are issues that have been well canvassed in the United States where the executive has played a special role in court actions involving the act of state doctrine. The American struggle for a solution to these questions has been a long and vexing experience.[44]

In short, the most significant contribution of the *Miliangos* case is that the House of Lords has committed itself to judge-made law reform as required by changes in social conditions. Yet in what seems a contradiction of this spirit the House of Lords would exclude the lower courts from the process.

Sociological Reasoning in the Lower Courts

In *Schorsch Meier*, the Court of Appeal buttressed its application of the maxim *cessante ratione, cessat ipsa lex*, by pushing forward where the procedural barriers to the grant of a judgment in foreign currency had been swept aside. Lord Denning argued that since *Beswick* v. *Beswick*[45] English courts could give specific performance of debt agreements.[46] Furthermore the rules of court had been changed to provide a form for the issue of judgments in amounts of foreign currencies.[47]

The House of Lords exploded both these arguments. Lord Wilberforce indicated that the actual significance of the *Beswick* case was that an award for specific performance could be given where damages were an inadequate remedy. But it was the change in the foreign exchange markets which had caused the award of damages to become an inadequate remedy for breaches of international agreements.[48] Also the problem is not with the form of order for judgment but with the difficulty of effecting execution in a currency other than the local currency. But execution need not be levied in foreign currencies provided the amount of the judgment in foreign currency is converted to local currency using the

---

[44] For instance, see A. F. Lowenfeld, Act of State and Department of State: *First National City Bank* v. *Banco Nacional de Cuba* (1972), 66 Am. J. Int. L. 795; also the comment on the case in (1973), 14 Harv. Int. L.J. 131.

[45] [1968] A.C. 58 (H.L.).

[46] *Supra*, footnote 5, at p. 829.

[47] *Ibid.*, at p. 828.

[48] *Supra*, footnote 2, at p. 766.

exchange rate prevailing on the date of payment. Lord Cross of Chelsea (Lord Simon of Glaisdale concurring) succinctly assessed the force of the Court of Appeal's reliance on changes in the form of order for judgment as a basis for challenging the authority of a House of Lords decision:[49]

> The only reason ever given for the rule that judgments for payment of sums of money must be expressed in Sterling is that execution by way of "fieri facias" or "elegit" can not issue automatically on a judgment for a sum of money expressed in a foreign currency — and that reason for what it is worth is as valid today as it ever was. As I have said, I think that it is worth nothing: but that is a different matter.

Lord Simon of Glaisdale, with whose judgment on this topic Lords Wilberforce, Cross of Chelsea and Frazer of Tulleybelton expressly concurred, restricted the use by lower courts of the maxim *cessante ratione, cessat ipsa lex*. The maxim did not authorize lower courts to depart from decisions of higher courts on the basis that the reasons for the decision had changed since,

> ... this would enable any court in the land to disclaim any authority of any higher court on the ground that the reason which had led to such a higher court's formulation of the rule of law was no longer relevant. A rule rooted in the history could be reversed because history is the bunk of the past.[50]

Thus the House of Lords has closed every visible avenue by which the Court of Appeal might depart from prior House of Lords decisions.

Briefly, in the *Schorsch Meier* case the Court of Appeal, in order to accomplish an eminently sensible objective of social policy, had to drum up artificial rationalizations. With a touch of sublime irony, the Court of Appeal in *Miliangos* simply held itself bound by the *Schorsch Meier* decision and barely touched on the substantive issues of the appeal.[51] In *Miliangos*, the House of Lords took up the Court of Appeal's position in *Schorsch Meier* on the substantive issues but rapped the Court of Appeal for their artificial reasoning and breach of precedent. While abandoning its position in *Havana Railways* for the Court of Appeal's position in *Schorsch Meier*, the House of Lords unanimously declared that the only judicial means by which its decisions could be reviewed

---

[49] *Ibid.*, at p. 798; per Lord Simon of Glaisdale, at p. 779.

[50] *Ibid.*, at p. 775; per Lord Wilberforce, *ibid.*, at p. 769; per Lord Cross of Chelsea, *ibid.*, at p. 798; per Lord Frazer of Tulleybelton, *ibid.*, at p. 804.

[51] *Supra*, footnote 2, per Lord Denning, at p. 564; see Lord Stephenson, *ibid.*, at p. 567; per Lord Geoffrey Lane, *ibid.*, at p. 568.

was by the House of Lords itself under the Practice Statement of 1966.

But no matter how categorical the House of Lords pronouncements may be, it would be surprising if they actually dissuaded the Court of Appeal from slipping away from House of Lords rules that are antiquated or clearly wrong for whatever other reason. The House of Lords still has not responded rationally and persuasively to the Court of Appeal's challenge to the binding effect of precedent.

Binding lower courts by upper court decisions does not increase predictability where the court of ultimate appeal can change the rule by which all other courts are bound. Assuming that two parties to a dispute both believe their arguments are sustainable and that each will carry the debate to the next level if it loses until the parties reach the final level of decision-making, then it makes no difference whether the lower courts follow the established rule or set off in a new direction. And it makes no difference in principle whether there are five levels of review (as may occur in arbitrations) or only one (under the "Leap-Frog" procedures).[52] The point is that once the House of Lords can change its rules, then there are no gains in expediency by holding lower courts to the old rule because close cases will probably be appealed anyway.

But while the efficiency gains of binding precedent are few, the potential gains from its abolition are considerable. In *Schorsch Meier*, the Court of Appeal departed from the House of Lords rule and there was no appeal. It is of course difficult to read the intentions of the parties from the case reports but one cannot but suspect that counsel were convinced that the change in the rule accomplished by the Court of Appeal was good law and would have been upheld by the House of Lords.[53] Had the Court of

---

[52] Administration of Justice Act 1969, Part II. Under these provisions, application may be made to a judge of first instance for a certificate allowing an appeal directly to the House of Lords. The applicant must have a "sufficient case" for such an appeal and in exercising his discretion to issue the certificate the judge must be satisfied that the point of law is one of "general public importance" relating either to the construction of a piece of legislation or the application of a previous "fully-considered" decision of the House of Lords or the Court of Appeal.

[53] It might be thought that the defendant in *Miliangos* was dissuaded from appealing more by the force of the Treaty of Rome argument than the argument against *Havana Railways*. The former argument was carried unanimously in the Court of Appeal whereas the latter was carried only by a majority of two to one. In fact, a majority of the House of Lords

Appeal applied the *Havana Railways* rule, either the case would have been appealed involving wasted expense or, if the case had gone no further, both the law and the defeated party would have suffered from the Court of Appeal's inability to break new ground.

If situations recur where the Court of Appeal departs from House of Lords decisions, there arises the problem whether courts subsequently charged with the same issues should direct themselves in accordance with the law as stated by the House of Lords or as stated by the Court of Appeal. As long as this problem is analysed in terms of binding precedent and chains of authority no satisfactory answer will be reached. In *Miliangos*, the House of Lords had to evaluate a Court of Appeal decision whose *ratio decidendi* was that, as between a House of Lords decision and a subsequent decision of the Court of Appeal departing from that of the House of Lords, the Court of Appeal is bound to follow its own decision. In *Young* v. *Bristol Aeroplane*, Lord Greene had detailed the application of the rule of precedent in the Court of Appeal. He indicated that the Court of Appeal:[54]

> . . . is bound to follow previous decisions of its own as well as those of courts of co-ordinate jurisdiction. The only exceptions to this rule (two of them apparent only) are those already mentioned which for convenience we here summarize: (1) The court is entitled and bound to decide which of two conflicting decisions of its own it will follow. (2) The court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords. (3) The court is not bound to follow a decision of its own if it is satisfied that the decision was given *per incuriam*. . . .Where the court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute . . . [i]t cannot, in our opinion, be right to say that in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given *per incuriam*.

Lord Greene's approach was endorsed in *Miliangos* by the House of Lords. Nevertheless, the House of Lords split on whether the Court of Appeal should have followed its own prior decision contrary to the earlier Lords decision or instead should have followed their Lordships' earlier decision. Lord Simon of Glaisdale argued that the Court of Appeal's decision in *Schorsch Meier* was not given *per incuriam* within Lord Greene's definition since the

---

in *Miliangos* doubted the validity of the Treaty of Rome argument, per Lord Wilberforce, *supra*, footnote 2, at p. 768; per Lord Simon of Glaisdale, *ibid.*, at p. 779; per Lord Cross of Chelsea, *ibid.*, at p. 799.

[54] [1944] K.B. 718, at pp. 729-730.

Court of Appeal was not ignorant of the *Havana Railways* decision. Accordingly, the Court of Appeal in *Miliangos* acted correctly in holding itself bound by the *Schorsch Meier* decision.[55] On the other hand, Lord Cross of Chelsea argued:[56]

> It was wrong for the Court of Appeal in this case to follow the *Schorsch Meier* decision. It is no doubt true that the decision was not given "per incuriam" but I do not think Lord Greene when he said in *Young* v. *Bristol Aeroplane Co. Ltd* that the only exception to the rule that the Court of Appeal is bound to follow previous decisions of its own were those which he set out, can fairly be blamed for not foreseeing that one of his successors might deal with a decision of the House of Lords in the way in which Lord Denning dealt with the *Havana Railways* case.

The other Lords chose not to comment on the problem perhaps hoping that such a conflict of views between levels of courts would never again present itself.

What emerges is that, if the court of ultimate appeal can change its earlier rules, little marginal certainty is gained by compelling lower courts to follow the earlier decisions of the highest level. Also, there is little point in restricting the grounds on which lower courts can reconsider the law as previously stated by a higher level in the hierachy. If the House of Lords can now change the law to account for new social conditions, why restrict a lower court in its ability to hear evidence of change in circumstances and to pass judgment on that evidence? What is accomplished by a decision such as Lord Justice Lawton's in *Schorsch Meier* in which the rule established by the higher court is described as "founded on archiac legalistic nonsense" but applied nevertheless because the judge is "timorous" and stands in "awe of the House of Lords"?[57] Such a decision is a clear-cut invitation to appeal and, short of impecuniosity, the defeated party would appeal. If the defeated party cannot afford to appeal, what sort of justice is this? If he does appeal, what was accomplished by the token heeding of the superior court's earlier decision? And if the lower court does vary the higher court's rule, the defeated party can accept that the change in the law is for the better or he can rely on the higher court's decision to found his appeal.

Conclusion

The moment is rapidly approaching when the House of Lords will finally abandon the intellectual confines of analytical juris-

---

[55] *Supra*, footnote 2, at p. 780.

[56] *Ibid.*, at p. 797.

[57] *Supra*, footnote 5, at pp. 833-834.

prudence. In the nineteenth century, the English courts sought refuge from the policy implications of their decisions by applying established concepts to analogous problems. In *Miliangos* the analytical approach virtually disappeared from the rhetoric of the House of Lords. Perhaps the only remaining areas of its influence are in subjects where the rules of law are arbitrary, or so pervasively integrated into the network of legal relations as to require extensive ancillary law reform, or where the implications of a reform in the law are overridingly political in nature.

The use by the House of Lords of sociological reasoning in *Miliangos* contrasts sharply with its iconoclastic view of the role of lower courts in the law reform process. This attitude is probably a lingering vestige of the analytical approach seeking once and for all answers in specific rules of conduct. But the search for certainty in law is futile and often counter-productive. If laws are to be adjusted to changing social conditions, then rules of law can be no more stable than their social environment. To preclude lower courts from participating in updating rules of law, at best, only delays the reform until the case can be brought to the highest court of appeal thus putting the parties to unnecessary expense. But if the case is not appealed it postpones the law reform indefinitely. The balance of real flexibility versus pretended certainty shows the value of allowing all levels of court to assess social change and evaluate whether and how rules of law must be adjusted. The House of Lords will surely be frustrated in its campaign to exclude the lower courts from the law reform process.

DANIEL A. LAPRES*

* * *

JUDICIAL REVIEW IN ONTARIO—RECENT DEVELOPMENTS IN THE REMEDIES—SOME PROBLEMS OF POURING OLD WINE INTO NEW BOTTLES.—The shortcomings of the remedies available at common law for securing the judicial review of administrative action have become wearisomely familiar.[1] Their satisfactory

---

* Daniel A. Lapres, Paris, France.

[1] The position was clearly put by the late Professor S. A. de Smith, when he said: "Until the Legislature intervenes, therefore, we shall continue to have two sets of remedies against the usurpation or abuse of power by administrative tribunals — remedies which overlap but do not coincide, which must be sought in wholly distinct forms of proceedings, which are overlaid with technicalities and fine distinctions, but which would con-

removal has been more troublesome than might have been anticipated. A preliminary choice is available to potential reformers. The prerogative orders can be abolished and replaced by a single statutory remedy of judicial review under which a specified range of relief is available upon grounds set out in the statute.[2] Alternatively, an attempt may be made simply to remove the obscure and unsatisfactory procedural and remedial snares and anomalies from the common law remedies, with or without some tinkering with the grounds of review associated with them, leaving enough of the common law intact so as to enable the development of the law of judicial review within its existing contours. The disadvantage of the first method is that the baby of a largely satisfactory and familiar substantive law of judicial review may be thrown out with the bath water of its disfiguring procedural and remedial technicalities and archaisms. The disadvantage of the second method is that reforming legislation may not succeed in totally eliminating the unfortunate distinctions inherent in the common law remedies and may create areas of uncertainty in the relationship between the new remedy and the old law.[3]

The Canadian attempts at reform to date have so far adopted variants of the less radical approach.[4] The purpose of this com-

---

jointly cover a very substantial area of the existing field of judicial control. This state of affairs bears a striking resemblance to that which obtained when English civil procedure was still bedevilled by the old forms of action." Report of the Committee on Administrative Tribunals and Enquiries (1957), Cmnd. 218, Minutes of Evidence, Appendix I, p. 10.

[2] This approach has been most notably urged by Professor K. C. Davis in the course of a comparison between the United States of America's Administrative Procedure Act and the common law remedies of judicial review; see in particular, Davis, English Administrative Law — An American View, [1962] P.L. 134.

[3] A reform inspired by Davis's approach also has to consider the implications for the unreformed law; thus, if *habeas corpus* were not included in the reform, would *certiorari* in aid survive? For the version of this problem that has arisen under the Federal Court Act, S.C., 1970-71-72, c. 1, see, for example, *Mitchell* v. *The Queen* (1976), 61 D.L.R. (3d) 77 (S.C.C.); *Pereira* v. *Minister of Manpower and Immigration* (1976) Ont. H.C., as yet unreported.

[4] For useful early commentaries on the legislation, see Mullan, The Federal Court Act — a Misguided Attempt at Administrative Law Reform? (1973), 23 U. of T.L.J. 14, and Mullan, Reform of Judicial Review of Administrative Action — The Ontario Way (1974), 12 O.H.L.J. 125. The Report on Remedies in Administrative Law, Cmnd. 6407, published in March 1976 by the English Law Commission (Law Com., No. 73) also attempts only a limited reform; but it is clear that this resulted not from the Commission's choice, but from the limited terms of reference imposed by the Lord Chancellor under the Law Commissions Act 1965, c. 22, s. 3(i)(e). See the Report, pp. 1-5.

ment is to examine some recent decisions that probe aspects of the relationship between the Judicial Review Procedure Act, 1971[5] and other remedies of judicial review of common law and statutory origin.

Despite the historical background of the 1971 legislative package in the *McRuer Report* and the reaction of critics who have argued that undue importance has been given to lawyers and the courts in the business of government,[6] the implication of some recent decisions is that the Judicial Review Procedure Act, 1971 has reduced the availability of judicial review. The intended impact of section 2(1) of the Act upon the former prerogative orders of mandamus, certiorari and prohibition would seem reasonably clear. For it provides in paragraph 1 that on an application by way of an originating notice the court may grant any relief that the applicant would be entitled to in proceedings for an order in the nature of certiorari, prohibition and mandamus. Thus, subject to any other relevant provisions in the Act,[7] the court may grant relief corresponding to that previously available under one of the prerogative orders, but the applicant may only obtain the relief for which he would have qualified under the relevant prerogative order.[8] This effects no significant change in the law. Section 2(1) paragraph 2, however, extends the benefits of summary procedure to the remedies of declaration and injunction, insofar as declar-

---

[5] S.O., 1971, c. 48.

[6] See, for example, Willis, The McRuer Report: Lawyers' Values and Civil Servants' Values (1968), 18 U. of T.L.J. 351.

[7] S. 2(2) has reduced the importance of classifying a function as judicial, for it extends "to any decision made in the exercise of a statutory power of decision", the power of the court to quash for error of law on the face of the record. S. 2(4) is apparently intended to remove some untidiness from the old law by providing that the exercise of a statutory power of decision may be set aside when the applicant is entitled to a declaration. The term, "statutory power of decision", is defined in s. 1(f); the legislative aim here is to substitute a new concept to cover powers with a "judicial" flavour, whilst releasing the courts from the common law quagmire of classification. See, *Re Armstrong Investigators of Canada Ltd and Turner* (1976), 9 O.R. (2d) 284, at p. 288 (Div. Ct).

[8] See, Mullan, (1974), 12 O.H.L.J. 125, at pp. 145-148. This view is supported by Hughes J. in *Re Hershoran and City of Windsor* (1974), 1 O.R. (2d) 291, at p. 312: "Nor does the *Judicial Review Procedure Act, 1971* appear to simplify the problem of classification of the function performed by a tribunal, although it undoubtedly prunes away some of the procedural difficulties which formerly encumbered access to the Court. To paraphrase the well known words of F. W. Maitland, the prerogative writs and orders in lieu thereof we have buried, but they rule us from their graves." Aff'd (1974), 3 O.R. (2d) 423.

atory or injunctive relief is sought in relation to the exercise or failure to exercise a "statutory power".[9] Since the Act concerns remedies in the area of public law it was necessary to impose some such limitation upon remedies that are also widely used in private law, but unnecessary in relation to the prerogative orders which are, of course, only applicable to the discharge of public functions.

Thus, where the relief sought upon an application for judicial review is that the impugned decision be set aside, it should be sufficient for the applicant to show that he would be entitled to an order of certiorari. However, if the applicant cannot establish this, he may, nonetheless, be awarded this relief if he would be entitled a declaration in respect of a decision that was an exercise of a "statutory power of decision".

Judicial Review Procedure Act, 1971 and the Prerogative Orders

The reasoning of some recent decisions of the Ontario courts is inconsistent with this analysis of the Act. In *Re Robertson and Niagara South Board of Education*,[10] an application for judicial review was made to the Divisional Court by parents of children attending a school that the respondents had resolved to close. The applicants sought to have the decision quashed on the ground that they had been denied a fair hearing before the resolution was passed. The application was refused. The majority judgment regarded the case as raising, "the question of whether the Divisional Court under the Judicial Review Procedure Act, 1971 has *jurisdiction* to give the orders asked for".[11] Giving further emphasis to the jurisdictional nature of the issue, Wright J. said:[12]

> Our jurisdiction to deal positively with the issues thus raised depends upon the interpretation of the exercise of a statutory power of decision. ... If the motion to close this school was the exercise of a statutory power of decision under these sections, the Divisional Court has jurisdiction to review the decision judicially.

It is submitted that the language of the Act does not support the conclusion that the Divisional Court may not set aside a

---

[9] This term is defined by s. 1(g). It is now possible to request any combination of the forms of relief contained in s. 2.

[10] (1973), 41 D.L.R. (3d) 57 (Ont. Div. Ct); Mullan, (1974), 22 Chitty's L.J. 297.

[11] *Ibid.*, at p. 58, emphasis added.

[12] *Ibid.*, at p. 59.

decision that would be reviewable by certiorari, but which is not a "statutory power of decision". Since the applicants were attacking the legality of the decision for the failure by the Board to comply with the rules of natural justice, the court may have confused the question of its jurisdiction to entertain an application under the Judicial Review Procedure Act, 1971, for judicial review of the decision on *any* ground, with the separate question of whether the procedural code contained in the Statutory Powers Procedure Act, 1971,[13] was applicable, in this case, to the Board. For the existence of a statutory power of decision is a necessary, though not a sufficient, condition precedent to the applicability of the latter Act.[14] It is ironical that just as the availability of certiorari on any ground became indentified with the applicability of the rules of natural justice, so the Divisional Court appears here to limit its power to set aside a decision of a public authority by reference to a statutory term, the functions of which are to trigger the application of the Statutory Powers Procedure Act, 1971, and to extend the range of decisions that the court may set aside.[15] In his dissenting judgment, Holland J. agreed that the respondents were not exercising a statutory power of decision, but he persuasively reasoned that this neither deprived the Divisional Court of jurisdiction to review, nor exhausted the respondents' duties of procedural fairness.[16]

Unfortunately, *Robertson* does not stand alone. Thompson J. appears to have fallen into the same error in *Re Maurice Rollins Construction Ltd and Township of South Fredericksburgh*.[17] The company made an application for judicial review to have a by-law passed by the respondent set aside on the grounds of bad faith and want of notice. His Lordship stated

---

[13] S.O., 1971, c. 47.

[14] *Ibid.*, s. 3(1). Wright J. refers to the fact that the term, "statutory power of decision", is common to both Acts.

[15] See, Judicial Review Procedure Act, 1971, *supra*, footnote 5, s. 2(2), (4).

[16] *Supra*, footnote 10, at p. 63. Although the court, at p. 58, viewed the applicants' *locus standi* with some scepticism, this does not appear to be the basis upon which the court declined jurisdiction. Nor should the fact that the applicants also sought injunctive relief be of relevance, since the Judicial Review Procedure Act, 1971, s. 2(1) para. 2, limits the power to grant injunctive and declaratory relief by reference to the wider term, "statutory power", as defined by s. 1(g).

[17] (1976), 11 O.R. (2d) 418. Finding the matter to be urgent, Thompson J. exercised his discretion under s. 6(2) not to transfer it to the Divisional Court.

that he could not quash the by-law in these proceedings since it did not constitute the exercise of a statutory power of decision. No reference is made in the judgment to any earlier judicial pronouncement in point. Thompson J. stated, quite correctly, that the Act *extends* the court's power to review, by authorising it to set aside the exercise of a statutory power of decision for error of law on the face of the record. He added:[18]

> If the decision is one made merely in the exercise of a statutory power (as defined), as distinguished from a statutory power of decision (as defined), then judicial review in the nature of *certiorari* is not indicated and the applicant is left to whatever form of relief he may otherwise have.

It is difficult to see the relationship between the former observation and the conclusion that the court may only quash an exercise of a statutory power of decision, especially since the applicant's grounds of attack would normally be regarded as going to the respondent's jurisdiction. Indeed, Thompson J. went on to uphold the applicant's procedural attack and to order that the by-law be declared invalid *and set aside*.[19]

A similarly narrow view of the jurisdiction conferred by the Judicial Review Procedure Act, 1971 is implicit in *Re Florence Nightingale Home and Scarborough Planning Board*,[20] in which the applicants sought, on an application for judicial review, to prohibit the Board from considering proposed amendments to an official plan and zoning by-laws. The applicants alleged that they had been denied an opportunity to be heard at the meeting of the Board at which it was decided that the Board should

---

[18] *Ibid.*, at p. 422. In the next sentence he said that: "One must bear in mind that *certiorari* at common law was an attack upon jurisdiction." This is misleading: *R.* v. *Northumberland Compensation Appeal Tribunal ex parte Shaw*, [1952] 1 Q.B. 338. Indeed, the Judicial Review Procedure Act, 1971, s. 2(2), assumes the existence of this ground of review and extends it to bodies that may not have been characterized at common law as amenable to certiorari because of their non-judicial nature: *Re Becker Milk Co. Ltd and Director of Employment Standards of the Ontario Ministry of Labour* (1974), 1 O.R. (2d) 739 (Div. Ct).

[19] *Ibid.*, at p. 431. Unlike the majority in *Robertson*, Thompson J. imposed upon the municipality a common law duty to give notice to the applicant and an opportunity to be heard prior to the enactment of the by-law, although he doubted whether the by-law was made in the exercise of a statutory power of decision.

[20] [1973] 1 O.R. 615 (Div. Ct). Again, the court is primarily concerned with the existence of a statutory power of decision for the purpose of determining the applicability of the Statutory Powers Procedure Act, *supra*, footnote 13. See in contrast *Chadwill Coal Co. Ltd* v. *Treasurer etc. for Province of Ontario* (1976), 1 M. P. L. R. 25 (Div. Ct).

meet again to recommend a change to the official plan which might, if adopted, further limit the use to which the applicants could put their land. The Divisional Court appears to have considered only whether the Board had thus exercised a statutory power of decision. The court held that it had no power to prohibit the Board from proceeding to the next stage of the decision-making process because nothing had so far been decided which had a sufficient finality upon the rights of the applicants to amount to a "deciding or prescribing" of rights so as to amount to the exercise of a statutory power of decision. The court addressed itself primarily to the applicability of the Statutory Powers Procedure Act, 1971.[21] As in *Robertson*, however, it is implicit in the judgments that, absent a statutory power of decision, the court has no jurisdiction under the Judicial Review Procedure Act, 1971 to grant the relief available in certiorari proceedings and that there is no room for the imposition of procedural duties to be derived from any more pervasive notion of a duty to act fairly.

The jurisdictional issue would not be of such importance if it were clear that statutory powers of decision encompassed all those decisions reviewable by certiorari at common law. Indeed, the definition itself would appear to be framed in such a way as to avoid some of the more notorious limitations upon the scope of certiorari that had developed from the courts' insistence that the decision under attack be required to be made upon a judicial or quasi-judicial basis. The provisions of sub-sections (2), (3), (4) of section 2 only make sense if, in some respects at least, the term, "statutory power of decision", includes situations that were excluded, or probably excluded, from the scope of certiorari.[22] However, the combined effect of recent English cases on the availability of certiorari and some Ontario

---

[21] However, Parker J. stated, at p. 618, that: "I think in this case we are governed by the interpretation section of the Judicial Review Procedure Act, 1971 ... section 1(f)."

[22] For example, the inclusion of decisions in the definitional s. 1(f)(ii), "deciding ... the eligibility of any person or party to receive or to the continuation of, a benefit or licence, whether he is legally entitled thereto or not", would appear to have been designed to avoid the distinction drawn in some licensing decision between "rights" and "privileges"; see, for example, *Nakkuda Ali* v. *Jayaratne*, [1951] A.C. 66, a decision now revived, to an uncertain extent, by the Supreme Court of Canada in *Howarth* v. *National Parole Board* (1974), 50 D.L.R. (3d) 349. Similarly, the reference to decisions "prescribing" legal rights or eligibility for benefits may well refer to decisions that have a *lis inter partes* flavour, but which are contained in legislative form; see, for example, *Wiswell* v. *Metropolitan Corporation of Greater Winnipeg*, [1965] S.C.R. 512.

decisions interpreting the term "statutory power of decision", suggests that if the view of jurisdiction under the Judicial Review Procedure Act, 1971, adopted in *Robertson* and *Maurice Rollins Construction* prevails, then some serious *lacunae* in the legislative scheme will appear.[23]

For example, the English Divisional Court has held decisions, made by a Board established under the prerogative powers of the Crown, reviewable by certiorari.[24] The same view has been taken of disciplinary proceedings of a university incorporated by charter.[25] In *Re Godden*,[26] the Court of Appeal granted an order of prohibition on the ground of bias to prevent the making of a recommendation that would, although not binding, have a powerful impact upon the final decision-maker. In *R.* v. *Liverpool Corporation ex parte Liverpool Taxi Fleet Operators' Association*,[27] the English Court of Appeal issued an order of prohibition to prevent the corporation from implementing a resolution to increase the number of licences that it would grant, without first honouring an undertaking to afford to existing licensees an opportunity to be heard. Lord Denning M.R. thought that the corporation would have been under a duty to hear even

---

[23] The English Law Commission, *op. cit.*, footnote 4, has recommended, at p. 20, that the availability of declarations and injunctions in the public law field should not be limited to the exercise or failure to exercise a statutory power, since "it is clear that judicial review is not limited to statutory powers". Instead, the Commission has proposed, at p. 21, that: "The Court should be directed to have regard to the nature of the matters in respect of which, and the nature of the persons or bodies against whom, relief may be granted by way of the prerogative orders and (in view of the special case of the declaration as to subordinate legislation and the developing scope of the prerogative orders themselves) to the justice and convenience of the case in the light of all its circumstances."

[24] *R.* v. *Criminal Injuries Compensation Board ex parte Lain*, [1967] 2 Q.B. 864.

[25] *R.* v. *Aston University ex parte Roffey*, [1969] 2 Q.B. 538, a decision, however, which must be regarded as seriously weakened by the judgment of the Court of Appeal in *Herring* v. *Templeman*, [1973] 3 All E.R. 569. See also *Re Vanek and Governors of The University of Alberta* (1976), 57 D.L.R. (3d) 595 (Alta S.C. App. Div.). In *Re Thomas and Committee of College Presidents* (1973), 37 D.L.R. (3d) 69 (Ont.), the Divisional Court refused relief in the nature of certiorari, holding that the respondents were too far removed from any grant of power under the University of Guelph Act, S.O., 1964, c. 120 and that letters patent had conferred no adjudicative duty. Contrast, *Re Polten and Governing Council of University of Toronto* (1976), 8 O.R. (2d) 749 (Div. Ct).

[26] [1971] 3 All E.R. 482.

[27] [1972] 2 Q.B. 299. In *Re Multi-Malls Inc. and Minister of Transportation and Communications* (1976), Ont. C.A., as yet unreported, the reasoning in *Liverpool Taxi* was adopted.

if it had not given the assurance.[28] Finally, in *R.* v. *London Borough of Hillingdon ex parte Royco Homes Ltd*,[29] Lord Widgery C.J. appears to have severed any lingering connection between the prerogative order of certiorari and the existence of a duty upon the body whose decision is under attack to act judicially.

If *Robertson* is correct, then it is doubtful whether the Judicial Review Procedure Act, 1971, provides a remedy on the facts of any of these cases.[30] For example, in *Re Raney*[31] the applicants sought to have set aside a recommendation to the Minister by a non-statutory body within the Ministry of Transportation and Communications that the value of the contracts for which the applicants should be in future allowed to tender be reduced. The Ontario Court of Appeal held that since the committee derived no power from statute its recommendations did not constitute the exercise of a statutory power of decision. The court also added, in response to the alternative argument that certiorari lay, that the recommendation of the committee could not be quashed because its function was not judicial. *Florence Nightingale*[32] appears analogous to *Godden*,

---

[28] *Ibid.*, at p. 307.

[29] [1974] 2 All E.R. 643. It should be noted that the basis of the attack in *Royco* was substantive, not procedural, *ultra vires*. It would be premature to conclude from the availability of certiorari to quash that a judicial-type hearing is a condition precedent to a valid decision. The Supreme Court of Canada, on the other hand, appears to have linked inextricably the jurisdiction of the Federal Court of Appeal under the Federal Court Act, *supra*, footnote 3, s. 28, with the availability of certiorari and the rules of natural justice: *Howarth* v. *National Parole Board*, *supra*, footnote 22. See also, *Martineau and Butters* v. *Matsqui Institution*, [1976] 2 F.C. 198 (Fed. Ct App.).

The primary significance of *Royco* in English administrative law is that by allowing a decision to be challenged by means of the motion procedure of certiorari, without requiring that the right of appeal to the Minister first be exhausted, expeditious access to the courts is provided for those dissatisfied with planning decisions. It also opens the possibility of conferring upon neighbours *locus standi* to challenge planning decisions. Standing had previously been denied under both the statutory remedy to quash (*Buxton* v. *Minister of Housing and Local Government*, [1961] 1 Q.B. 278), and an action for a declaration (*Gregory* v. *London Borough of Camden*, [1966] 2 All E.R. 196). Contrast, *Lord Nelson Hotel Ltd* v. *City of Halifax* (1973), 33 D.L.R. (3d) 98 (N.S. Sup. Ct App. Div.).

[30] Legal proceedings would thus have to be brought by way of an action for a declaration or an injunction unless the relief was in respect of the exercise of a "statutory power".

[31] (1975), 4 O.R. (2d) 249 (C.A.).

[32] *Supra*, footnote 20. Compare, *Bell* v. *Ontario Human Rights Commission* (1971), 18 D.L.R. (3d) 1 (S.C.C.); *Saulnier* v. *Québec Police Commission et. al.* (1976), 57 D.L.R. (3d) 545 (S.C.C.).

although in the former case the court resorted to the statutory definition and thus avoided the substantive difficulties of determining the procedure that the court should appropriately impose upon the agency before the final stage of the administrative process. However, it should also be pointed out that in subsequent decisions some non-final decisions have been encompassed within the court's jurisdiction.[33] Lastly, in *Robertson* itself, the Divisional Court unanimously adopted an approach to the definition of "statutory power of decision" that was remarkably similar to the dichotomy made in some cases at common law between judicial and administrative decisions.[34]

No reference was made to *Robertson* or *Florence Nightingale* in *Chadwill Coal Co. Ltd* v. *Treasurer etc. for Province of*

---

[33] See, for example, *Zadrevec* v. *Town of Brampton* (1972), 28 D.L.R. (3d) 641 (Ont. Div. Ct), rev'd on other grounds, [1973] 3 O.R. 498 (C.A.); *Re Hershoran and City of Windsor* (1974), 1 O.R. (2d) 291 (Div. Ct), aff'd. (1974), 45 D.L.R. (3d) 533 (Ont. C.A.); *Re Orangeville Highlands Ltd and A.G. of Ontario* (1975), 8 O.R. (2d) 97 (Div. Ct). In *Re London Gardens Ltd and Township of Westminster* (1976), 9 O.R. (2d) 175, the Divisional Court held that a preliminary ruling by an Assessment Review Court that the taxpayer had the onus of proof, was the exercise of a statutory power of decision, but in its discretion refused relief. Compare the view adopted by the Federal Court of Appeal of its jurisdiction under the Federal Court Act, 1970, *supra*, footnote 3, s. 28 to set aside "a decision or order ... made by or *in the course of proceedings* before a federal board, commission or other tribunal ..." (emphasis added). Thus in *A.G. Can.* v. *Cylien*, [1973] F.C. 1166, Jackett C.J. held that review under s. 28 extended only to the exercise or purported exercise of "the specific jurisdiction or powers conferred by the statute" (at p. 1175), and not to the "myriad of decisions or orders that the tribunal must make in the course of the decision-making process" (at p. 1173).

[34] The court held that the respondents were not "deciding or prescribing the legal rights, privileges ..." of the applicants because, "the right or privilege of the applicants to have their children attend a particular school is not a legal right or privilege and is not subject to judicial review under the Ontario statutes as they stand. The decision to close the school was an administrative decision ..." (at p. 60). The court stated that the adjective "legal" in s. 1(f)(i) qualified all the succeeding nouns, and not simply "rights". Moreover, the applicants' contention that the Board's decision fell under s. 1(f)(ii) on the ground that it decided or prescribed "the eligibility of any person ... to the continuation of a benefit or licence, whether he is legally entitled thereto or not ...", failed, since "the respondent Board were deciding as a matter of policy and prudent administration, whether or not the school ought to be closed to all students, not whether one or a group should be eligible or ineligible to attend it" (at p. 61). In the *Liverpool Taxi* case, *supra*, footnote 27, the corporation's decision to increase the number of licences available was as clearly one of "policy and prudent administration", rather than one of deciding the legal rights or privileges or the eligibility of existing licensees, as was that of the Board in *Robertson*, *supra*, footnote 10.

Ontario[35] when the court was prepared to review a ruling by hearing officers, appointed to inquire and report to the Minister, either as an exercise of a statutory power of decision or as a matter reviewable at common law by prohibition. In *Re Hershoran and City of Windsor*[36] an application was made to the Divisional Court to declare invalid a by-law made by the city and approved by the Minister of Municipal Affairs, expropriating the applicants' land, upon which tax arrears had accrued. The ground of attack was that the applicants had not received adequate notice before the by-law was passed. In holding for the applicants, Hughes J. stated that the provisions of the Judicial Review Procedure Act, 1971, "do not, in my view, deprive this court of any of its inherent powers and in particular of those powers of supervision which it derived from the Court of Queen's Bench".[37]

---

[35] *Supra*, footnote 20. See, also, *Re Thomas and Committee of College Presidents*, *supra*, footnote 25; *Re Raney*, *supra*, footnote 31.

[36] *Supra*, footnote 33.

[37] *Ibid.*, at p. 312. The judgment, in other respects, presents difficulties. For the court appears to hold that the municipality was bound by the Statutory Powers Procedure Act, 1971, *supra*, footnote 13, despite s. 3(2)(h) which excludes from the ambit of the Act, "proceedings of a tribunal empowered to make ... by-laws insofar as its power to make by-laws is concerned". The court treated this as a privative clause which would not protect a municipality which had exceeded its jurisdiction by failing to discharge its quasi-judicial duty to hold a hearing, in accordance with *Wiswell*, *supra*, footnote 23, before a by-law was passed. However, the courts have never adopted the same attitude to partial exclusion clauses as they have to those purporting totally to exclude judicial review: *Smith* v. *East Elloe R.D.C.*, [1956] A.C. 736, *Pringle* v. *Fraser* [1972] S.C.R. 821. Moreover, the Supreme Court of Canada in *Law Society of Upper Canada* v. *French* (1974), 49 D.L.R. (3d) 1, was prepared to find, at p. 15, on less substantial grounds than are to be found in the express words of s. 3(2)(h), that the Law Society Act, R.S.O., 1970, c. 238, had by implication excluded one limb of the rules of natural justice.

The Divisional Court's interpretation deprives s. 3(2)(h) of any legal effect, in that it is, in any event, only capable of applying to those aspects of by-law making that at common law are required to be performed in a quasi-judicial manner. The reasoning was recently adopted in *Atkinson* v. *Municipality of Metro Toronto* (1976), 12 O.R. (2d) 401, at p. 414 (C.A.). The section is now explicable only on the basis of *inclusio ex abundanti cautela*. Of course, the Statutory Powers Procedure Act, 1971, *ibid.*, should not be regarded as an exhaustive code of administrative procedure: see Mullan, Fairness: The New Natural Justice (1975), 25 U.T.L.J. 281. Insofar as the court, at p. 315, appears to require a hearing to be held both by the municipality and by the Minister before he decides whether to approve the by-laws, the reasoning of the Divisional Court is difficult to reconcile with that of the Court of Appeal in *Zadrevec* v. *Town of Brampton*, *supra*, footnote 33.

In addition, in *Re Canada Metal Co. Ltd and MacFarlane*,[38] Keith J. entertained an application for judicial review under the Judicial Review Procedure Act, section 6(2), in which the applicants sought to have set aside a stop order issued under the Environmental Protection Act.[39] The learned judge proceeded on the basis that the availability of the relief sought depended upon whether the decision of the official was reviewable by certiorari. He found that it was, and set the stop order aside on the ground that there was insufficient admissible evidence to satisfy the conditions upon which the power was exercisable.[40] The judgment makes no reference to whether the official was exercising a statutory power of decision. Similarly, in *Re Dabor Motors Ltd and MacCormac*,[41] the Divisional Court dealt with an application to set aside, for lack of an opportunity to be heard, a proposal made by the registrar under the Motor Vehicle Dealers Act[42] to suspend the applicant's registration, by considering whether there was a decision that was reviewable by certiorari. The court held that since the registrar had no power to make a final decision, and a full *de novo* hearing was available before the Commercial Registration Appeal Tribunal, "this application is premature, it being our finding that no decision has yet been made".[43] Whilst in this case the court reached the same result as it would have reached had it considered that its jurisdiction depended upon finding a statutory power of decision exercisable by the registrar, its resort to the more flexible rules of common law facilitated consideration of the statutory scheme as a whole,[44] and the impact upon the individual of the registrar's proposal.

Judicial Review Procedure Act, 1971 and the Common Law Motion to Quash

The converse of the jurisdictional issue raised by *Robertson* is the extent to which the Judicial Review Procedure Act, 1971, displaces or provides alternative remedies of judicial review, other

---

[38] (1974), 41 D.L.R. (3d) 161 (Ont. H.C.).

[39] S.O., 1971, c. 86, s. 75.

[40] Under s. 7, the Director must have "reasonable and probable grounds" to believe that the discharge of the pollutant constitutes "an immediate danger to human life, the health of any person, or to property".

[41] (1975), 5 O.R. (2d) 473.

[42] S.O., 1971, c. 21, ss 6(2), 7.

[43] *Supra*, footnote 41, at p. 477.

[44] Similarly, in *Zadrevec*, *supra*, footnote 33, neither the Divisional Court nor the Court of Appeal rendered decision upon the basis of whether the municipality was exercising a statutory power of decision.

than the prerogative orders contained in section 2(1). The Act does not abolish any of the common law remedies, but provides that proceedings commenced for such a remedy shall be treated as an application for judicial review.[45]

Prior to the enactment of the Judicial Review Procedure Act, 1971, it was settled law in Ontario that the decision of a consensual arbitrator was reviewable upon a summary motion to quash. The remedy was procedurally similar to certiorari in respect of decisions made by statutory bodies, although the proper scope of review has been controversial.[46] In *Port Arthur Shipbuilding Company Ltd* v. *Arthurs*,[47] Judson J., in the course of considering the appellant company's remedy if the arbitrator whose decision was under attack were characterized as non-statutory, stated:[48]

> The notice of motion in these proceedings makes it clear that the relief asked for is an order quashing the award. It does not seem to me to be of any consequence that the motion contains a reference to certiorari. The procedure is the same and in my opinion the notice of motion is sufficient to justify an order quashing the award.

The Judicial Review Procedure Act, 1971, however, does make it important to determine the appropriate remedy. For if the ordinary motion to quash an arbitrator's decision is a proceeding by way of application in the nature of certiorari within section 2(1), review must normally be sought before the Divisional Court; if it is not, then the matter will be heard by a single judge of the High Court. The issue is whether the language of section 2(1) includes remedies analogous to certiorari. A number of reasons may be advanced for adopting a wide construction of the Act. First, the words, "in the nature of", rather than, "in lieu of", evince a legislative intent to include remedies procedurally

---

[45] S. 7. S. 8 confers a discretion upon a judge before whom is brought an action for a declaration or an injunction in relation to the exercise of a statutory power, to treat it as an application for judicial review.

[46] Since *Government of Kelantan* v. *Duff Development Co. Ltd*, [1923] A.C. 395, the Supreme Court has allowed review for error of law on the face of a consensual arbitration award, except in respect of the precise point of law referred by the parties to the arbitrator. The scope of review in this latter situation and the flexibility that courts should adopt in drawing the distinction have been controverted: see, especially, *Bell Canada* v. *Office and Professional Employees Union*, [1974] S.C.R. 335; *Metropolitan Toronto Police Association* v. *Metropolitan Toronto Board of Commissioners of Police*, [1975] 1 S.C.R. 630.

[47] (1968), 70 D.L.R. (2d) 693 (S.C.C.).

[48] *Ibid.*, at p. 702.

and substantively similar to the order that replaced the writ of certiorari.[49] Secondly, since there may be substantial similarity in the issues raised in reviewing arbitrations, the Act should be construed to vest jurisdiction in the Divisional Court, which the 1971 legislation intended to develop an expertise in administrative law, whether, before the Act, review would have been sought through the ordinary motion to quash, certiorari or the Arbitrations Act.[50] Thirdly, it would be inconsistent with an important aim of the 1971 Act, namely, simplification of the procedures and remedies of judicial review, to subject litigants to the hazards of delay and expense involved in selecting the wrong forum or remedy. For example, in *Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association*,[51] Arnup J.A., disagreeing with the court below[52] held that an arbitrator appointed under the terms of a collective agreement, which was not statutorily required to contain an arbitration clause, was consensual under the *Port Arthur* test.[53] Since proceedings in this case were instituted before the Judicial Review Procedure Act, 1971, came into force the court did not have to decide the jurisdictional problem discussed above.

However, in *Re Ontario Provincial Police Association Inc. and the Queen*,[54] the Divisional Court held that it had jurisdiction to review consensual arbitrations. Keith J. rested his judgment upon the legislative choice of the words, "in the nature of", rather than, "in lieu of" the prerogative orders specified in paragraph 1 of section 2(1). If this decision is correct, then the Divisional Court, subject to the exercise of discretion by a single judge of the High Court under section 6(2), has exclusive jurisdiction to review both statutory and consensual arbitrations.

---

[49] Supreme Court of Ontario Rules of Practice, R.R.O., 1970, Reg. 545, rs 629, 630, repealed by O. Reg. 115/72, s. 18.

[50] R.S.O., 1970, c. 25, s. 12.

[51] [1972] 2 O.R. 793, at p. 799.

[52] [1972] 1 O.R. 409. The case was ultimately argued and decided on the basis that the arbitration was consensual: *supra*, footnote 46, at pp. 632, 653.

[53] *Supra*, footnote 51, Arnup J.A., at p. 799, left open the question of whether an arbitrator appointed under the statutory procedure would have been a statutory arbitrator. For the position after the Police Amendment Act, S.O., 1972, c. 103, s. 2, see, *Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association* (1975), 5 O.R. (2d) 285.

[54] (1974), 3 O.R. (2d) 698.

Judicial Review Procedure Act, 1971 and Other Statutory Remedies

What, however, if the applicant seeks a statutory remedy of judicial review, such as, for example is contained in the Arbitrations Act, section 12? The problem was considered in *Re Brown and the Queen*,[55] where it was argued that an application made under the Judicature Act[56] for a motion to quash a conviction must, by virtue of the Judicial Review Procedure Act, 1971, section 7, now be treated as an application for judicial review, and unless the case was urgent must be heard by the Divisional Court. Morden J. stated that the 1971 Act was intended to deal with the difficulties inherent in the dual system of common law remedies; no such problems had existed with statutory motions to quash. He held that the reference in the 1971 Act to an "application for an order *in the nature of* . . . certiorari" should be construed only to take account of the substitution of the writ of certiorari by an application on an originating notice for an order.

It is generally agreed that the procedural reforms contained in the Judicature Act and their analogue in civil procedure — first introduced in Ontario in 1888[57] — did not extend the availability or the scope of the remedy formerly obtained by writ.[58] However, it is submitted that no firm conclusion should be drawn merely from the use of the words, "in the nature of", in the 1971 Act. For whilst it is true that the procedural reforms in Ontario did not generally use this formula and that the orders were commonly referred to as orders "in lieu of certiorari", the words, "in the nature of", have often been employed to denote no more than a procedural reform. For example, the proceeding instituted by notice of motion in cases "that were formerly instituted or taken by a writ of quo war-

---

[55] (1976), 11 O.R. (2d) 7.

[56] R.S.O., 1970, c. 228, s. 69(1).

[57] Rules of Practice of the Supreme Court of Ontario, 1888, r. 1140, which provided that the writ should not issue, but that an order should be substituted *"which shall have the same effect as a writ formerly had"*. Emphasis is added. The rule took its modern form in 1913, when the italicized words were replaced by, "but all necessary provisions shall be made in the judgment or order".

[58] In *R.* v. *Cook* (1909), 10 O.L.R. 415, Anglin J. held that the Judicature Amendment Act, S.O., 1908, c. 34, s. 1 which first provided for proceedings by notice of motion to quash a conviction, "instead of by certiorari", did not effect any substantive change in the law, but merely telescoped the two stages of the writ procedure.

ranto, or by information in the nature of quo warranto",[59] has been described as "in the nature of quo warranto", even though the substance of the remedy is identical with that of the old remedy.[60] Moreover, it has not been suggested in other jurisdictions where the writ procedure has been superseded by a notice of motion for an order *in the nature of* the prerogative orders,[61] that this formula has extended the scope of the remedies.[62]

Having decided that the Judicial Review Procedure Act, 1971 did not confer exclusive jurisdiction upon the Divisional Court, Morden J. in *Brown* left open the question of whether that Act provided an alternative remedy to the statutory motion to quash contained in the Judicature Act, section 69(1). The Divisional Court has held in *Serre* v. *Town of Rayside-Balfour*[63] that an application can be made to it under the Act to declare a by-law invalid. The court reasoned that the statutory motion to quash by-laws provided in the Municipal Act,[64] section 283 is not exhaustive[65] and that the effect of the 1971 Act, section 2(1), paragraph 2, is to enable declaratory relief in respect of the exercise of a statutory power to be sought in a summary procedure for an application for judicial review. The court was not required to decide the issue raised in *Brown*, namely, whether the statutory motion to quash was "in the nature of certiorari", and thereby subsumed under section 7. However, if a litigant were to commence proceedings by way of an action for a declaration that a by-law was invalid, the trial judge would, by virtue of section 8, have a discretion to treat the action as an application for judicial review and to transfer the matter to the Divisional Court.

---

[59] Judicature Act, *supra*, footnote 56, s. 147(1).

[60] See *R. ex rel. Haines* v. *Hanniwell*, [1948] O.R. 46; Holmstead and Gale, Ontario Judicature Act and Rules of Practice, Vol. I (1958), pp. 461-464. Although the Judicial Review Procedure Act, 1971, *supra*, footnote 5, does not encompass quo warranto proceedings, the words, "in the nature of", may have been derived from this source and hence, should be given a narrow construction.

[61] See, for example, the Alberta Rules of Court, Alta Reg. 390/68, rs 826, 830; N.S. Civil Procedure Rules, 1971, r. 56.02; Federal Court Act, *supra*, footnote 3, s. 18(b).

[62] *Re Vanek and Governors of the University of Alberta*, *supra*, footnote 25.

[63] (1976), 11 O.R. (2d) 779 (Div. Ct).

[64] R.S.O., 1970, c. 284.

[65] The court relied upon *Wiswell* v. *Metropolitan Corporation of Greater Winnipeg*, *supra*, footnote 22, where the Supreme Court allowed an action for a declaration to be brought outside the limitation period for the statutory summary remedy.

The task of determining the impact made by the Judicial Review Procedure Act, 1971, upon the statutory remedy is complicated by the twelve months limitation period imposed upon the summary motion to quash by section 286 of the Municipal Act. The problem arose in *Re Dorfman and Town of Fort Erie*.[66] The applicants instituted proceedings under the 1971 Act for declaratory relief and for an order setting aside for invalidity a by-law and resolution[67] passed more than twelve months previously by the respondent. They argued that since they had had no prior opportunity to be heard, the respondent had no legal justification for having demolished their house. Without deciding the merits of the case, the Divisional Court, in its discretion declined to grant declaratory relief, on the ground that an award of damages was the appropriate remedy.[68] The Divisional Court, of course, has no jurisdiction over claims for damages, which must still be pursued by way of action. Houlden J. stated:[69]

> In my opinion, an adequate alternative remedy by way of damages, *in which incidentally the validity of the by-law and resolutions of the respondent municipality can be questioned*, is available to the applicants and, therefore, judicial review should be refused.

The italicised portion of this statement, however, appears to overlook the Municipal Act, section 344, which provides that a claim for damages for anything done under the authority of a by-law or resolution may not be pursued within one month of the quashing or repeal of the by-law or resolution.[70]

Indeed, Houlden J. subsequently acknowledged this point, when rejecting the applicants' argument that the by-law and resolution be set aside.[71] He relied upon *Re Clements and Toronto*[72] for the proposition that after the expiry of the limitation period contained in section 286, by-laws may be attacked only by way of action. It is curious that the court did not also use this argument in respect of the claim for declaratory relief, for if the purpose of section 286 is to protect municipalities from being subjected to

---

[66] (1975), 54 D.L.R. (3d) 186.

[67] The provisions of, *inter alia*, ss 283 and 286, apply, by virtue of s. 282, to by-laws, orders and resolutions.

[68] S. 2(5) preserves the judicial discretion associated with the remedies listed in s. 2(1).

[69] *Supra*, footnote 66, at p. 189 (emphasis added).

[70] In *Gray* v. *City of Oshawa*, [1971] 3 O.R. 112, Houlden J. refused, on this ground, to entertain a claim for damages made in a proceeding by way of an action for a declaration.

[71] *Ibid.*

[72] (1960), 20 D.L.R. (2d) 497, [1960] O.R. 18 (C.A.).

challenge by summary procedure for longer than a year, it is difficult to appreciate why the argument in *Clements* should not be as applicable to any relief that may be sought in a single summary proceeding under the 1971 Act. The problem is caused by a failure to provide in the Act for the effect upon other statutes of extending summary procedure to declarations in respect of the exercise of a statutory power. Although the reasoning in *Serre*[73] may suggest that the effect of section 286 can be avoided by seeking declaratory relief under the Judicial Review Procedure Act, 1971, it is submitted that since the by-law impugned in that case was passed within twelve months of the institution of proceedings, it is, at best, equivocal on the point.

After being sent empty-handed from the Divisional Court, what remedy is available to the hapless applicants in *Dorfman*? Presumably, they must bring an action before a single judge of the High Court for a declaration of invalidity.[74] May they then request the judge to exercise his discretion under the Judicial Review Procedure Act, 1971, section 8, to,

> ... direct that the action be treated and disposed of summarily, insofar as it relates to the exercise ... or purported exercise of [a statutory] power, as if it were an application for judicial review and may order that the hearing on such issue be transferred to the Divisional Court ... ?

The Act does not indicate the factors that judges should take into account in deciding how to exercise their discretion under this section, although the need for further development of the facts,[75] or the simplicity of the questions of law in issue should militate against a transfer to the Divisional Court. The question

---

[73] *Supra,* footnote 63. Neither *Dorfman* nor *Clements* was cited in the short reasons given orally by Galligan J.

[74] In *Re Clements and Toronto, supra,* footnote 72, at p. 504, the Court of Appeal also stated that the clear intent of s. 286 prevailed over r. 611, under which an application may be made by originating notice for a declaratory judgment: "When the right of a person depends upon the construction of a deed, will or other instrument." See, also, *Sun Oil Co.* v. *City of Hamilton,* [1961] O.R. 209 (C.A.).

The circumstances in which the validity of a by-law can be raised collaterally in proceedings instituted summarily are unclear: see, for example, *Re Sekretov and City of Toronto,* [1973] 2 O.R. 161 (C.A.) (the court took jurisdiction on an originating notice under r. 610); *Re Sibley and Township of Fenelon* (1972), 26 D.L.R. (3d) 541 (Ont. H.C.), (Keith J. denied jurisdiction in mandamus proceedings brought to require the issue of a building permit that had been withheld under the impugned by-law). Compare, *Children's Aid Society of Metropolitan Toronto* v. *Lyttle,* [1973] S.C.R. 568.

[75] See, *Campbell Soup Co. Ltd* v. *Farm Products Marketing Board* (1976), 10 O.R. (2d) 405, at p. 441 (H.C.).

here, however, is whether the lapse of the limitation period imposed upon the summary statutory remedy under the Municipal Act should conclusively weigh against the positive exercise of discretion under section 8. The argument for holding a transfer inappropriate here is that the summary remedy, of general application, created by the 1971 Act should not be regarded as having, by a side wind, been intended to defeat the clear and specific legislative intent embodied in section 286 of the Municipal Act, to which the courts have consistently given effect.

If this argument does not prevail, and the judge finds no other reason for refusing to transfer the matter, what should be the applicants' position before the Divisional Court? The court might, of course, return the matter to the trial judge on the ground that he exercised his discretion on a wrong legal principle. Alternatively, it might hold that its earlier decision made the matter *res judicata*, even though the reasoning upon which, in its discretion, it had refused to grant declaratory relief contained a significant error and the applicants were now before the court after having instituted proceedings by way of an action.

If, however, the court does not dismiss the application on either of these grounds, it will then be necessary to decide whether effect should be given to the time limitation of section 286. First, it may be argued that section 12(1) of the Judicial Review Procedure Act, 1971 applies the Municipal Act limitation period to an application for judicial review, irrespective of the relief sought. For this argument to succeed, however, the statutory motion to quash would have to be held to be a proceeding in the nature of certiorari. Secondly, even if, in the face of the reasoning in *Brown*, the court accepted this argument, the applicants could rely upon section 5, which authorizes the court to grant an extension of time,

> [n]otwithstanding any limitation of time for the bringing of an application for judicial review fixed by or under any Act, ... where it is satisfied that there are *prima facie* grounds for relief and that no substantial prejudice or hardship will result to any person affected by reason of the delay.[76]

Again, it is open to argument as to whether section 286 imposes a time limitation upon "an application for judicial review". Secondly, if section 12, as modified by section 5, is not applicable,

---

[76] The proposals of the Report of the English Law Commission, *op. cit.*, footnote 4, on time limitations are to be found at pp. 22-23. Although public inconvenience may be a reason for refusing relief under s. 2(5), it is unfortunate that s. 5 makes no reference to it.

then it remains open for the court, under section 2(5), to take account of any undue delay in the application for relief.

One final barrier stands in the way of the applicants' recovery of damages, even if they succeed in obtaining a declaration that the by-law and resolution are invalid. For the Municipal Act, section 344 provides that the by-law upon which the municipality relied must have been *quashed* or repealed. It is not clear whether a declaration of invalidity suffices for this purpose. In *Welbridge Holdings Ltd* v. *Metropolitan Corporation of Greater Winnipeg*,[77] Hunt J. held that the equivalent provision in the Manitoba legislation[78] precluded the recovery of damages even after the by-law had been declared invalid by the Supreme Court of Canada.[79] In the Manitoba Court of Appeal, Freedman J.A., in a dissenting opinion, stated that the earlier proceedings:[80]

> ... effectively declared that the by-law was dead, if indeed it was not still-born. To say it had not been quashed or repealed is simply to play with words and to ignore substance and reality.

This question was not reached by the majority of the Court of Appeal nor by the Supreme Court of Canada.[81] The answer must depend upon the purposes intended to be served by section 344. If the legislature intended to allow municipalities an opportunity to make amends and to protect them from financial liability in circumstances when a court in the exercise of discretion would not make an order rendering a by-law invalid,[82] then section 344 should be construed as if quashing included a declaratory judgment. If, on the other hand, the legislature also intended to impose a short time limitation period, by providing that the municipality be given early notice of the possibility of a claim for damages, as a result of the institution of section 283 proceedings within twelve months of the passing of the by-law, then the conclusion of Hunt J. is correct.[83] This would, however, not

---

[77] (1969), 4 D.L.R. (3d) 509, at p. 519 (Man. Q.B.).

[78] Municipal Act, R.S.M., 1954, c. 173, s. 394.

[79] *Wiswell* v. *Metropolitan Corporation of Greater Winnipeg*, [1965] S.C.R. 512.

[80] (1970), 12 D.L.R. (3d) 124, at pp. 137-138 (Man. C.A.).

[81] [1971] S.C.R. 957.

[82] This point is brought out by *Gray* v. *City of Oshawa*, *supra*, footnote 70, rev'd, [1972] 2 O.R. 856 (C.A.).

[83] Since the Public Authorities Protection Act, R.S.O., 1970, c. 374, s. 15 specifically exempts municipalities from the six months limitation period of section 11, and since the Municipal Act, *supra*, footnote 64, contains time limitation provisions in respect of particular wrongs, (see, for example, ss 340, 443(2)), it is submitted that interpretation implicit in the judgment of Hunt J. is questionable.

justify a refusal to award damages where, as in *Serre* v. *Township of Rayside-Balfour*,[84] declaratory summary relief was sought within the twelve months limitation period. These considerations give a, perhaps, unexpected point to the different reasons given by the Divisional Court in *Dorfman* for rejecting the applicants' request for declaratory relief and for setting aside.[85]

Conclusions

(1) Neither the legislative history nor the plain language of the Judicial Review Procedure Act, 1971, supports the proposition that the Divisional Court has jurisdiction to set aside only decisions that are made in the exercise of a statutory power of decision.

(2) There are circumstances in which relief may be sought under the Judicial Review Procedure Act, 1971, as an alternative to a remedy created by some other statute.

(3) The references in the Judicial Review Procedure Act, 1971, to orders in the nature of mandamus, prohibition and certiorari should not be construed to include remedies, whether of common law or statutory origin, other than the orders that were substituted by the Rules of Practice for the prerogative writs; the words "in the nature of" do not compel an interpretation of the Act one way or the other.

There is arguably no inconsistency between *Re Brown* and *Re Ontario Provincial Police Association*, in that the 1971 Act was intended to remove the obscurities and deficiencies of the common law remedies, whereas similar problems did not surround analogous statutory remedies. Thus, to subject the applicant to the hazard of commencing proceedings in the wrong court, the common law motion to quash should be regarded, for the purpose of the Judicial Review Procedure Act, 1971, as being "in the nature of certiorari". However, the 1971 Act was

---

[84] *Supra*, footnote 63.

[85] It should be noted that unless certiorari were available to quash a by-law or unless it was made in the exercise of a "statutory power of decision", the court could not set it aside, — which presumably would be considered a quashing for the purpose of s. 344, — even if the applicant were entitled to declaratory relief: Judicial Review Procedure Act, 1971, *supra*, footnote 5, s. 2(4). This point is obscured by *Re Maurice Rollins Construction Co. Ltd and Township of South Fredericksburgh*, *supra*, footnote 17. In *Re Clements and Toronto*, *supra*, footnote 72, at p. 22 (O.R.), Laidlaw J.A. stated that, "The jurisdiction of the Court to quash a municipal by-law upon application is not inherent, but is expressly conferred by legislation".

intended to simplify the procedure for obtaining judicial review of the exercise of public power; the source of consensual arbitrators' authority is, to a large extent, private in nature. Secondly, the remedial distinctions between the judicial review of statutory and consensual arbitration awards reinforce and reflect substantive differences in the scope of review of the respective remedies. Thirdly, if *Re Brown* is correct, then a distinction will have to be drawn between the statutory motion under the Arbitrations Act and the common law remedy, even though the issues raised might well be identical.

This, of course, brings into question the correctness of *Re Brown*,[86] so that, for example, the Municipal Act remedy of the application to quash a by-law, should be regarded as a proceeding "in the nature of certiorari". It is submitted that this should be rejected. First, the legislative history of the Judicial Review Procedure Act, 1971 clearly indicates that it was directed towards reform of the common law remedies. Secondly, the language of section 2(1), paragraph 1, falls far short of demanding the conclusion that the legislative purpose was any broader. Thirdly, to leave the statutory remedies outside the scheme of the 1971 Act would not create a unique anomaly; for example, questions of judicial review raised collaterally in a claim for damages alone, are not covered by the Act. Fourthly, the implications of construing the Judicial Review Procedure Act, 1971, an Act of general application, as entirely displacing remedies, specifically created by particular statutes, would have to be worked out piecemeal. In the absence of more compelling statutory language, there seems little to be said for adopting a construction of the Act that is likely to create unnecessary confusion where none previously existed.

J. M. EVANS*

* * *

CONTRACTS—DAMAGES FOR MENTAL DISTRESS—INJURY TO FEELINGS.—Damages for breach of contract are traditionally viewed as compensation for the pecuniary loss caused by a

---

[86] Unless *Re Union Felt Products (Ontario) Ltd and The Queen* (1975), 8 O.R. (2d) 438 (H.C.) is wrongly decided, it is difficult to argue that *Re Brown, supra,* footnote 55, is properly confined to the review of criminal proceedings.

* J. M. Evans, of Osgoode Hall Law School, York University, Toronto.

breach.[1] Although a plaintiff might also recover for tangible non-pecuniary loss arising from a breach, for example substantial physical inconvenience[2] or mental breakdown,[3] the courts in England and Canada have tended to view such loss as being generally irrecoverable in contract. It is therefore of interest that in a recent group of cases the English courts have extended recovery of damages for non-pecuniary loss in contract to include in certain situations damages for disappointment, injury to feelings and mental distress short of mental breakdown.

This comment will consider the basis for awarding damages of this nature, and the situations where such damages may be awarded. This will be done in the context of an analysis of two of the most recent cases in this development, *Heywood* v. *Wellers*[4] and *Cox* v. *Philips Industries Ltd.*[5] The former case concerned the negligence of the defendants, a firm of solicitors, in their handling of the plaintiff's case against her ex-boyfriend M, a police officer. The plaintiff had, *inter alia*, asked the defendants to take out an injunction against M to prevent him harassing her. The defendants however failed to properly enforce the injunction. Owing to this failure the plaintiff suffered harassment and threats of physical violence by M on a number occasions. She testified that after he had called on one occasion she had felt like a nervous wreck. When the plaintiff received a demand for a large amount in costs she refused to pay and asked the

---

[1] Reflecting the commercial nature of contract. See McGregor on Damages (13th ed., 1972), p. 61; McCormick, Damages (1935), pp. 592 *et seq*. For an economic analysis of contract damages see R. Posner, Economic Analysis of Law (1972), p. 60 and articles cited therein at p. 64.

[2] *Hobbs* v. *L.S.W. Ry* (1875), L.R. 10 Q.B. 111; *Bailey* v. *Bullock*, [1950] 2 All E.R. 1167 (K.B.D.).

[3] See remarks of Lord Denning M.R. in *Cook* v. *Swinfen*, [1967] 1 W.L.R. 457, at p. 461. Also *Collard* v. *Saunders*, [1971] C.L.Y. 11161. McGregor, *op. cit.*, footnote 1, notes at p. 68 that the courts in England have recently awarded damages to clients of solicitors where the clients have suffered deterioration in their nervous condition because of the solicitor's negligence in bringing the client's action for personal injury. This deterioration in nervous condition is medically recognized as "compensation neurosis". He cites in support of his proposition the cases of *Wales* v. *Wales* (1967), 111 S.J. 946 and *Malyon* v. *Lawrence Messer and Co.* (1968), 112 S.J. 623.

[4] [1976] 1 All E.R. 300.

[5] [1976] 1 W.L.R. 638. The earlier cases in this group are *Jarvis* v. *Swan's Tours*, [1973] 1 All E.R. 71 noted in (1973), 51 Can. Bar Rev. 507, and *Jackson* v. *Horizon Holidays Ltd*, [1975] 3 All E.R. 92. See also in Scotland the case of *Diesen* v. *Samson*, [1971] S.L.T. 49 (Sheriff Ct) noted in (1972), 50 Can. Bar Rev. 305. Also in Australia see *McDonald* v. *Kazis*, [1970] S.A.S.R. 264 noted in (1971-72), 4 Adelaide L. Rev. 466.

defendants to drop the case. In addition, she brought this action for breach of contract against them claiming the amount she had paid on account of costs and £150 in general damages. The county court judge allowed her to recover the amount she had paid on account as damages for the breach allowing the defendants to set off their costs against her damages. He denied her any general damages in addition to the recovery of the amount she had already paid to the defendants. The plaintiff appealed to the Court of Appeal.

The Court of Appeal (Lord Denning M.R., James L.J. and Bridge L.J.) held that the plaintiff was entitled to damages of £125 in addition to recovery of the money paid on account. All three judges agreed that she was entitled to these damages for the mental distress, vexation and anxiety[6] caused by the negligent breach of the solicitors in failing to properly enforce the injunction.

The second case concerned an employer's breach of a contract of employment. C had worked for the defendant's firm for over fifteen years. He was offered a lucrative post with a rival company. In order to retain C's services, the defendant offered him a post with greater responsibility. C accepted this post and occupied it successfully for over a year. He then wrote a letter protesting the meagreness of his rise in salary. This had an unfortunate effect. He was almost immediately demoted to a position where his duties were extremely vague and no one ever told him what he was supposed to do. It was at this point that the plaintiff suffered sickness, depression, and anxiety. The company doctor diagnosed this condition as being causally connected with his relegation in the company. He was subsequently induced to resign from the company. C then brought the present action against the company for breach of contract. Lawson J. held that the demotion without reasonable notice constituted a breach of contract. He further held that this breach exposed C to depression, vexation, frustration and ill health, and that these were foreseeable consequences of the breach. He thus awarded the plaintiff £500 as damages for these injuries.

---

[6] It is unlikely that anything will turn on the differing words used by the judges. However, it may be interesting to note that Lord Denning M.R. uses the terms "disappointment, upset and mental distress", *supra*, footnote 4, at p. 306; James L.J. uses the words "vexation, frustration and distress", *ibid.*, at p. 310, and Bridge L.J. uses the words "vexation, anxiety and distress", *ibid.*, at p. 311. All seem to denote a type of intangible emotional state which falls short of any medically recognized form of mental breakdown.

What is the basis for awarding damages of this nature in these situations? One approach is to view the question of recovery as simply turning on the issue of foreseeability, that is if mental distress or injury to feelings are a foreseeable consequence of the breach then damages may be recovered under this head. This was the approach taken by Lord Denning M.R. in *Heywood* v. *Wellers*[7] and Lawson J. in *Cox* v. *Philips Industries Ltd.*[8] It was also the approach taken in the case of *Kolan* v. *Solicitor*[9] where the court held that a client's breakdown in health was not a foreseeable consequence of the negligence of a solicitor in failing to ascertain whether there was an outstanding demolition order on the house the client was purchasing. This approach contrasts with that taken by earlier authorities on this topic. Earlier decisions categorically denied recovery for injury to feelings and mental distress in breach of contract. This view was based not on foreseeability but a settled policy that damages for this type of injury were inappropriate.[10] Four reasons may

---

[7] *Supra*, footnote 4. This differs from the approach he took in *Jarvis* v. *Swan's Tours, supra*, footnote 5, where he viewed the issue of recovery as a question of policy.

[8] *Supra*, footnote 5.

[9] (1970), 7 D.L.R. (3d) 481 (Ont. H.C.). See also *Keks* v. *Esquire Pleasure Tours Ltd*, [1974] 3 W.W.R. 406 (Man. Cy Ct). This latter decision concerned the situation of the disappointed holidaymaker suing the travel agent for the latter's failure to provide the accommodation promised. The judge noted the recent developments in the law in England and awarded general damages which reflected the difference between the price paid and the value of the holiday in fact furnished, taking into account the inconvenience and frustration suffered by the plaintiff. The judge thus followed the method adopted by Pugh J. in *Feldman* v. *Allways Travel Service*, [1957] C.L.Y. 934. In *Elder et al.* v. *Koppe* (1975), 53 D.L.R. (3d) 705, the defendant in breach of contract failed to deliver a motor home to the plaintiffs who intended to use it for their vacation. The Nova Scotia Supreme Court awarded damages against the defendant for the inconvenience and disappointment caused to the plaintiffs since they were not able to have a proper holiday. The court (Cowan C.J.T.D.) followed *Jarvis* v. *Swan's Tours, supra*, footnote 5.

[10] *Groom* v. *Crocker*, [1939] 1 K.B. 194; *Cook* v. *Swinfen, supra*, footnote 3, Lord Denning M.R., at p. 461; *Hobbs* v. *L.S.W. Rlwy., supra*, footnote 3; *Addis* v. *Gramophone Co. Ltd*, [1909] A.C. 488. In the last mentioned case two of the judges viewed damages for injury to feelings as being exemplary in nature, rather than an indemnity for the plaintiff. It is difficult to reconcile *Cook* v. *Swinfen* with *Heywood* v. *Wellers*, except as reflecting differing policy approaches. The former case was concerned with the negligence of solicitors in handling the plaintiff's divorce claim. The plaintiff had suffered anxiety state and a nervous breakdown (more tangible injury than *Heywood* v. *Wellers*) as a result of the solicitor's negligence. She did not recover damages for this injury because the nervous breakdown was not a foreseeable consequence of the breach. In addition

be suggested for this policy: the intangible nature of such damage; the possibility of numerous feigned claims; the suspicion that such damages were exemplary and therefore inappropriate in contractual situations[11] and the fear that it would be detrimental to the encouragement of commercial activity to extend liability beyond the reasonable business risk involved.[12] The first two reasons suggest difficulties in the evaluation of a claim for mental distress or injury to feelings. Such difficulty is always present and does not present an insurmountable obstacle to the principle that damages of this nature may be appropriate in a particular situation. The third objection begs the question whether exemplary damages are appropriate in contract, and will be briefly discussed below. The fourth reason assumes that contracts are business affairs concerned with commercial interests. It is this reason that is perhaps of greatest interest. In those recent cases[13] where damages for injury to feelings and mental distress have been recovered the contracts were concerned with personal and not commercial interests. This concept of a personal contract as opposed to a commercial contract is not a totally novel concept in English jurisprudence.[14] It is well known in the United States of America and has been applied in situations such as failures by undertakers to properly seal a casket,[15] or failure to provide a wedding dress.[16] It has recently been applied to insurance contracts where insurance companies have erroneously withheld payments from the insureds, who have

---

Lord Denning M.R., at p. 461, noted that although it was foreseeable that the breach on the part of the solicitors would lead to injured feelings, mental distress, and anger and annoyance on the part of the plaintiff, no damages could be recovered for these injuries. Lord Denning M.R. in *Heywood* v. *Wellers*, *supra*, footnote 4, at pp. 306-307 simply suggests that *Cook* v. *Swinfen* is "different from this case" and "may have to be reconsidered".

[11] See *Addis* v. *Gramophone Co. Ltd*, *ibid.*, per Lord Atkinson, at p. 493, and dissenting speech of Lord Collins, at p. 497, which view damages for injury to feelings and mental distress as exemplary. See also *British Guiana Credit Corporation* v. *Da Silva*, [1965] 1 W.L.R. 248, at p. 259 (P.C.).

[12] Farnsworth, Legal Remedies for Breach of Contract (1970), 70 Col. L. Rev. 1144, at pp. 1207-1208. McCormick, *op. cit.*, footnote 1, pp. 592-593.

[13] Cited *supra*, footnote 5.

[14] It is suggested in McGregor on Damages, *op. cit.*, footnote 1, p. 68 and is specifically incorporated in the reasoning in the Scottish case of *Diesen* v. *Samson*, *supra*, footnote 5.

[15] *Chelini* v. *Nieri* (1948), 32 Cal. 2d 480, 196 P. 2d 915.

[16] *Lewis* v. *Holmes* (1903), 109 La. 1030, 34 S. 66.

consequently suffered mental distress.[17] The classification of a contract into personal or commercial may provide a useful test for a court in determining whether damages for disappointment, vexation and mental distress may be recovered. Such a classification formed a basis of the judgment of Lord Denning M.R. in *Jarvis* v. *Swan's Tours Ltd.*[18] However, the courts would still face the initial problem of classifying a particular situation into either category. For example, should a consumer transaction be regarded as a personal or commercial transaction? When a consumer buys an automobile one important reason for buying the car will be the enjoyment which he expects to receive in using it. If the car turns out to be useless, should the consumer be able to recover for the disappointment and mental distress which he may well suffer because of the complete failure of the car to live up to his expectations? The mental distress may be foreseeable in this situation, but ought the consumer to recover damages under this head? I pose this question simply to make the point that though the issue of recovery of damage for mental distress in these two recent cases was couched in terms of foreseeability the issue was really one of policy. Expressing the results of these cases in terms of foreseeability gives continuity to the law while superficially concealing the change in policy. The exact scope of the policy of awarding damages for mental distress or disappointment remains to be elaborated. Its extension to the contract of employment in *Cox* v. *Philips Industries Ltd,*[19] however, deserves comment. It should be noted that this case differs in one important aspect from the earlier cases. In this situation there appeared to be a tangible injury in the form of sickness and depression which was testified to by the company doctor.[20] Lawson J. reasoned, as noted earlier, that it was in the contemplation of the parties that a breach of the contract of this nature would cause vexation, frustration and distress, and that such injury sounded in damages. If this reasoning is accepted then such damages may be recoverable in an action for wrongful dismissal.

---

[17] *McDowell* v. *Union Mutual Life Ins. Co.* (1975), 404 F. Supp. 136, at pp. 140-141. For useful surveys of the cases where damages in contract for mental distress have been recovered in the United State of America see: (1956-57), 32 N.D.L. 482, and (1972-73), 48 N.D.L. 1303, and Williston on Contracts (3rd ed., by Jaeger, 1957), Vol. 11, §1341.

[18] *Supra,* footnote 5, at p. 74.

[19] *Supra,* footnote 5.

[20] I make this point simply because I suspect that a court is more willing to award damages for non-pecuniary loss if there is some tangible injury to the plaintiff.

Such a conclusion seems to conflict directly with the decision in *Addis* v. *The Gramophone Company Ltd.*[21] That case held that no damages for injury to feelings could be granted in a case of wrongful dismissal. The decision in that case appeared to be based not on foreseeability but on the view noted earlier that such damages were exemplary and therefore inappropriate in contractual situations. The decision may be criticized for making that assumption since there is no reason in principle why such damages could not have been regarded as compensatory and hence recoverable. It may also be suggested that the reasoning in *Addis* v. *Gramophone Co. Ltd* reflected an excessively commercial view of contract law. Lawson J. did not squarely face these issues, but instead sidestepped this decision by noting that it was not a cause of wrongful dismissal he was dealing with but a case of breach of contract.[22]

Reflecting on these two most recent decisions, it is unfortunate that both, as already noted, focused the question of recovery on the issue of foreseeability. Lord Denning M.R., after explicitly articulating in *Jarvis* v. *Swan's Tours*[23] that the issue of recovery was one of policy did not develop more fully the factors involved in such a policy in *Heywood* v. *Wellers.*[24] For example, in the consumer situation outlined above the question may be raised whether the individual consumer or retailer or manufacturer should bear the risk of inconvenience or distress and whether the result of holding the manufacturer or retailer responsible might result in higher automobile prices. Moreover, it might also be suggested that manufacturers and retailers would take greater pains in the future if they were held liable for disappointment and mental distress caused to the consumer. These are some of the issues that might be raised in an action for recovery of damages for mental distress and inconvenience in contract, just as similar issues of policy have been raised in the area of recovery for economic loss in tort.[25]

---

[21] *Supra,* footnote 10.

[22] With respect, a wrongful dismissal involves a breach of contract on the part of the employer. If damages for mental distress and frustration are appropriate in a situation of wrongful demotion then *a fortiori* they could be awarded in a case of wrongful dismissal.

[23] *Supra,* footnote 5.

[24] *Supra,* footnote 4.

[25] For example, Lord Denning M.R. suggests certain policy factors in *Spartan Steel* v. *Martin & Co.*, [1973] 1 Q.B. 27, at pp. 37-39 and in *Dutton* v. *Bognor Regis U.D.C.*, [1972] 1 Q.B. 373, makes the following comment, at p. 397: "In previous times, when faced with a new problem,

Two further points may be raised. There are certain remarks by Lord Denning M.R. in both *Jarvis* v. *Swan's Tours*[26] and *Heywood* v. *Wellers*[27] which suggest that damages for disappointment and distress may be awarded in a contract which is not primarily concerned with personal or intangible benefits. For example, the taxi taking you to the station for your day trip to the seaside may break down and you may miss the train and consequently be deprived of the enjoyment of your outing. Lord Denning M.R. suggests that in such a case damages may be awarded for the disappointment and distress caused to you by the breach of the taxi driver's obligation.[28] Lord Denning M.R. must, with respect, be assuming that the taxi driver knows that the plaintiff is going on this day trip otherwise it would be unlikely that such a loss could be said to be in the contemplation of the parties under the second limb of the rule in *Hadley* v. *Baxendale*.[29] Indeed, though the taxi driver may be held liable in this situation owing to his special knowledge, as a matter of policy such a liability may be questioned. The taxi driver may be required to charge you a fixed fee and therefore have no opportunity to alter his fee to take account of his greater responsibility for loss.[30] It is also submitted that as a matter of policy the passenger ought perhaps to be the

---

the judges have not openly asked themselves the question: what is the best policy for the law to adopt? But the question has always been there in the background. It has been concealed behind such questions as: Was the defendant under any duty to the plaintiff? Was the relationship between them sufficiently proximate? ... Nowadays we direct ourselves to considerations of policy."

[26] *Supra*, footnote 5, at p. 74.

[27] *Supra*, footnote 4, at p. 306.

[28] *Ibid.* Courts in the United States of America have awarded damages for disappointment and injury to feelings in similar situations. See McCormick, *op. cit.*, footnote 1, p. 595 and *McConnell* v. *U.S. Express Co.* (1914), 179 Mich. 522, 146 N.W. 428.

[29] (1854), 9 Exch. 341, 156 E.R. 145. The question would also arise as to what type of knowledge on the part of the taxi driver would be required to fix him with liability for this additional loss. The suggestion in *Horne* v. *Midland Rlwy Co.* (1873), L.R. 8 C.P. 134, and *British Columbia Saw-Mill Co. Ltd* v. *Nettleship* (1863), L.R. 3 C.P. 499, that the special circumstances extending the area of foreseeability must have become a term of the contract was rejected by Lord Upjohn in *Czarnikow* v. *Koufos*, [1969] 1 A.C. 350, at pp. 421-422. In Canada see *Munroe Equipment Sales Ltd* v. *Canadian Forest Products Ltd* (1961), 29 D.L.R. (2d) 730 (Man. C.A.), and *Scyrup* v. *Economy Tractor Parts Ltd* (1963), 40 D.L.R. (2d) 1026 (Man. C.A.).

[30] Professor Atiyah makes this point in his Introduction to the Law of Contract (2nd ed., 1971), pp. 272-273.

one who should take precautions against this type of loss, for instance through an insurance policy.

It has been suggested elsewhere that the damages awarded in these recent cases for mental distress are really exemplary because of the amount awarded.[31] One can indeed sympathize with the justice of an award of damages of this type in *Jarvis* v. *Swan's Tours*[32] and the other travel agent situations. Whatever name is put on the damages it is difficult not to agree with Lord Devlin's comment that "when one examines the cases in which large damages have been awarded, it is not at all easy to say whether the idea of compensation or the idea of punishment has prevailed".[33]

In conclusion, these cases demonstrate, firstly, that the rule in *Addis* v. *Gramophone Co.*[34] that damages may not be awarded for injury to feelings in contract is being chipped away, and its sphere of application will have to be reconsidered when the issue comes before the House of Lords.

Secondly, they reflect a development in policy. They demonstrate that the courts are willing to grant damages for mental distress and injury to feelings in a personal contract even where there is no financial loss flowing from such an injury. To the question, where will the line be drawn between personal and commercial contracts?, the most appropriate reply may in the final analysis be that of Lord Denning M.R. in *Cook* v. *Swinfen*,[35] "where in the particular case the good sense of the judge decides".[36]

Thirdly, damages may possibly be awarded in what is primarily a commercial contract if the defendant has special notice of the intangible benefits which depend on the contract. Such a policy should be sensitive to the question of who is the most efficient loss avoider.[37]

I. RAMSAY*

* * *

---

* I. Ramsay, of the Faculty of Law, The University of Western Ontario, London, Ontario.

31 See (1973), 36 Mod. L. Rev. 535, at pp. 539-540.

32 *Supra*, footnote 5.

33 *Rookes* v. *Barnard*, [1964] A.C. 1129, at p. 1221, cited by McGregor on Damages, *op. cit.*, footnote 1, p. 303.

34 *Supra*, footnote 10.

35 *Supra*, footnote 3. 36 *Ibid.*, at p. 462.

37 Thus Posner, *op. cit.*, footnote 1, notes at p. 61 that the principle of *Hadley* v. *Baxendale* is that: "where a risk of loss is known to only one

ADMISSIBILITY—PSYCHIATRIC EVIDENCE—TOWARDS A COHERENT POLICY.—"Psychiatric Expert Testimony", says the iconoclastic psychiatrist Thomas Szasz,[1] "[is] mendacity masquerading as medicine". Although this is a particularly extreme view,[2] even Sheldon Glueck[3] has commented that events in the past have caused the psychiatrist to be regarded as a practioner in, ". . . such supposedly devious acts as hypnotism and 'animal magnetism'; and it is nourished by the indubitable fact that mental medicine still has a long way to go in discovering the causes and cures of many psychic illnesses". There is considerable dispute between commentators as to the function of psychiatric evidence: from, on the one hand, Szasz, and Diamond, who considers[4] that psychiatry has failed the law notably in the crucial areas of diagnosis and treatment, to, on the other, Baroness Wootton[5] who sees the value of psychiatry to the law in human, rather than strictly clinical, terms. In view of this controversy, it is not altogether surprising that no truly acceptable or, in fact, coherent judicial policy has, thus far, been devised.

The recent decision of the Ontario Court of Appeal in *R.* v. *McMillan*[6] has raised the issues involved in an important way; indeed it is not for the first time that a difficult case involving expert psychiatric testimony has come before that court in recent years.[7] In *McMillan*, the accused, an eighteen year old man,

---

party to the contract, the other party is not liable for the loss if it occurs. This principle induces the party with knowledge of the risk either to take any appropriate precautions himself or, if he believes that the other party might be the more efficient loss avoider, to disclose the risk to that party. In this way incentives are generated to deal with the risk in the most efficient fashion." The question may be raised who is the most efficient loss avoider in the above noted taxi driver situation. Perhaps one should phrase the question differently: who ought to bear the risk of the loss?

[1] The Second Sin (1973), p. 40.

[2] Szasz's basic thesis is that most mental illness cannot be correctly described as illness *per se*, but rather as moral or social maladaptation often reflecting deficiencies in moral character or responsibility. See, for example, Law, Liberty and Psychiatry (1963) and Psychiatric Justice (1963). The corollary to this view is that psychiatry is totally irrelevant to questions of law.

[3] Law and Psychiatry (1962), p. 34.

[4] From Durham to Brawner, A Futile Journey, [1973] Wash. U.L.Q. 109.

[5] See Social Science and Social Pathology (1959), p. 206.

[6] (1976), 23 C.C.C. (2d) 160.

[7] See *infra*, text at footnote 44.

had been charged with the murder of his baby daughter. The accused and his wife had taken the child to hospital and gave an account of how her injuries had occurred which the medical staff at the hospital did not consider to be consistent with their nature. Later, however, the accused confessed to police officers that he had struck the child to prevent her from crying. At the subsequent trial, the accused stated that these statements were untrue or exaggerated because he wanted to protect his wife, whom he believed was being pressured by the police, and also that he did not know how the child's injuries were caused. He further stated that he did not believe that his wife had injured the child and the wife gave evidence to the effect that the accused had told her that he had not injured the child, but said that he had admitted doing so to protect her — an admission which was unnecessary as she, also, did not know how the injuries to the child had occurred. At first instance, the judge permitted the defence to call a psychiatrist who gave evidence to the effect that the wife had a psychopathic personality disturbance and that a person suffering from such a disorder would be likely to be a danger to her child on the ground that the evidence supported a defence theory that it was more probable that the wife caused the injuries than the accused. Further evidence was given by relatives and friends that the wife had not wanted the child, did not take good care of her and was capable of hurting her. The trial judge did not permit the Crown to cross-examine the psychiatrist as to the mental state of the accused or to call psychiatric evidence in rebuttal. The accused was acquitted, the Crown appealed and the Ontario Court of Appeal allowed the appeal and ordered a new trial.

It is immediately clear that *R.* v. *McMillan* is an addition to that agglomeration of cases which begins with *R.* v. *Rowton*[8] and, in England, is most recently manifested in *R.* v. *Turner*[9] and, in Canada, includes *R.* v. *Lupien*,[10] *R.* v. *Dietrich*[11] and *R.* v. *Rosik*.[12] Martin J.A., first of all, considered[13] that there was no doubt that evidence tending to show that a third person (in this case, the wife of the accused) actually committed the

---

[8] (1865), 10 Cox C.C. 25.

[9] [1975] 1 All E.R. 70.

[10] (1970), 9 D.L.R. (3d) 1.

[11] (1971), 1 C.C.C. (2d) 49.

[12] (1971), 2 C.C.C. (2d) 351. For a comment see F. J. Silverman, Psychiatric Evidence in Criminal Law (1971-72), 14 Crim. L.Q. 145.

[13] *Supra*, footnote 6, at p. 167.

crime was admissible provided that it fulfills, "... the test of relevancy and must have sufficient probative value to justify its reception. Consequently, the Courts have shown a disinclination to admit such evidence unless the third person is sufficiently connected by other circumstances with the crime charged to give the profered evidence some probative value". On the facts of the case at hand, Martin J.A. considered that evidence of opportunity coupled with the wife's violent disposition did provide such a connection.[14] The judge then turned his attention to the mode of proof to be adopted. It is clear that, despite the comments to the contrary by Lord Goddard in *R.* v. *Butterwasser*,[15] that the statement by Cockburn C.J. in *R.* v. *Rowton*[16] that, "[t]he way, and the only way the law allows of your getting at the disposition and character of [the accused's] mind is by evidence as to general character founded upon the knowledge of those who knew anything about him and of his general conduct", is by no means a complete description of the situation today, particularly in regard to psychiatric evidence. First, in *Toohey* v. *Metropolitan Police Commissioner*,[17] the accused had been charged with assault with intent to rob and a police doctor had examined the prosecutor, a seventeen year old boy, soon after the alleged incident and found him to be in a hysterical condition, although the boy later gave evidence of the assault. The defence sought to obtain evidence from the doctor of his opinion as to whether the boy's hysterical behaviour was due to alcohol and as to the boy's normal behaviour. At first instance, the judge whose decision was upheld by the Court of Appeal, refused to permit the doctor to give evidence of opinion beyond what could have been obtained by looking at the prosecutor. The House of Lords held that the whole of the evidence was admissible. The real question to be determined, said Lord Pearce,[18] "... was whether, as the prosecution alleged, the episode created the hysteria or whether, on the other hand, the hysteria created the episode. To that issue medical evidence as to the hysterical and unstable nature of the

---

[14] *Ibid.*, at pp. 168-169.

[15] [1948] 1 K.B. 4, at p. 7. See also *R.* v. *Gunewardene* (1951), 35 Cr. App. Rep. 80.

[16] *Supra*, footnote 8, at p. 29.

[17] (1965), 49 Cr. App. Rep. 148. See also a note by C.F.H. Tapper (1965), 28 Mod. L. Rev. 359. This case was not referred to by Martin J.A., presumably because it involved the mental state of a witness. It does, however, mark a significant change of judicial approach from that expressed in *Rowton*, *Butterwasser* and *Gunewardene*.

[18] *Ibid.*, at p. 158.

alleged victim was highly relevant". Lord Pearce concluded[19] by saying that: "Medical evidence is admissible to show that a witness suffers from some disease or defect or abnormality of mind that affects the reliability of his evidence. Such evidence is not confined to a general opinion of the unreliability of the witness, but may give all the matters necessary to show not only the foundation of and reasons for the diagnosis but also the extent to which the credibility of the witness is affected." In Canada, in *R.* v. *Lupien*,[20] a case concerning the personality of an accused, Ritchie J. of the Supreme Court was of the opinion that the *Rowton* test was singularly inappropriate because it, ". . . was decided many years before the development of psychiatry as an accepted branch of medecine . . .". Martin J.A. applied Ritchie J.'s dictum and said[21] that there was, ". . . no logical reason why the same reasoning should not apply *a fortiori* to the manner in which the disposition of a third person may be proved when that disposition is relevant to an issue in the case". The judge then went on to comment[22] that the collection of characteristics exhibited by the wife was diagnostic of abnormality and, as such, was capable of being proved by expert psychiatric evidence.

Martin J.A. then turned his attention[23] to the suggestion advanced by counsel for the Crown that it was not open to the respondent to suggest that it was more probable that the wife had inflicted the injuries as, in his evidence, he had not accused her of the acts, but had attempted to exonerate her. In refuting this suggestion, the judge relied on the important decision of the Judicial Committee of the Privy Council in *Lowery* v. *R.*[24] There, the two accused, Lowery and King, had been convicted in Australia of the murder of a fifteen year old girl. Both accused had imputed responsibility to the other and one of the witnesses called by King was a psychologist who had interviewed both the men and had subjected them to various personality tests. He gave evidence to the effect that King was an immature youth who was likely to be led and dominated by more aggressive and dominant men and that he might behave aggressively in response to the demands of such a person. The psychologist also testified that the tests showed that Lowery was strongly aggressive and lacked control over those

---

[19] *Ibid.*, at p. 163.

[20] *Supra*, footnote 10, at p. 10.

[21] *Supra*, footnote 6, at p. 170.

[22] *Ibid.*

[23] *Ibid.*

[24] [1974] A.C. 85.

impulses. Lowery appealed on the grounds that the psychologist's evidence had been wrongly admitted as it tended merely to show disposition. The Judicial Committee rejected the appeal as the evidence in question was of particular relevance to the defences raised by the accused. Martin J.A. adopted certain dicta of Lord Morris in this context notably his comments that,[25] "[i]t would be unjust to prevent either of [the accused] from calling any evidence of probative value which could point to the probability that the perpetrator was the one rather than the other" and,[26] "[n]ot only however was the evidence which King called relevant to this case: its admissibility was placed beyond doubt by the whole substance of Lowery's case". It is suggested that *Lowery* is of very great and general importance because of Lord Morris's recognition of scientific inquiry in the field of the behavioural sciences when he said[27] that the evidence was not, ". . . related to crime or criminal tendencies: it was scientific evidence as to the respective personalities of the two accused as, and to the extent, revealed by certain well known tests". Attempts to restrict the case to its particular facts, as occurred in the subsequent case of *R.* v. *Turner*,[28] are, it is suggested, to ignore recognised and generally accepted scientific developments and are at odds with a forward-looking statement of principle, enunciated as early as 1554 by Saunders J. in the case of *Buckley* v. *Rice-Thomas*.[29] There it was said that: ". . . if matters arise in our laws which concern other sciences and faculties, we commonly call for the aid of that science or faculty which it concerns, which is an honourable and commendable thing. For thereby it appears that we do not despise all other sciences but our own, but we approve of them and encourage them. . . ." Applying *Lowery*, Martin J.A. considered[30] that the respondent's evidence did not preclude his counsel from suggesting that it was more probable that his wife had inflicted the injuries.

It was next suggested by the Crown that the child's injuries were not of such a character that they could only have been inflicted by a person with an abnormal propensity and that, therefore, psychiatric evidence of the wife's mental make-up was inadmissible. In refuting this contention, Martin J.A. stated[31] that:

---

[25] *Ibid.*, at p. 101.

[26] *Ibid.*, at p. 103.

[27] *Ibid.*, at p. 101.

[28] *Supra*, footnote 9. Discussed in detail *infra* text at footnote 44.

[29] (1554), 1 Bl. Com. 118, at p. 124.

[30] *Supra*, footnote 6, at p. 172.

[31] *Ibid.*, at p. 173.

"Psychiatric evidence with respect to the personality traits or disposition of an accused, or another, is admissible provided:

(a) the evidence is relevant to some issue in the case;
(b) the evidence is not excluded by a policy rule;
(c) the evidence falls within the proper sphere of expert evidence.

One of the purposes for which psychiatric evidence may be admitted is to prove identity when that is an issue in the case, since psychical as well as physical characteristics may be relevant to identify the perpetrators of the crime." Unfortunately, perhaps, the judge then went on to remark that where an offence was of such a kind that it could only be committed by members of a particular group, psychiatric evidence was admissible to show whether the accused was, or was not, a member of that group. The unfortunate aspect of this statement is that the group to which Martin J.A. referred was homosexuals. In view of the two decisions of the House of Lords in *D.P.P.* v. *Kilbourne*[32] and *Boardman* v. *D.P.P.*[33] it now seems no longer correct to suggest that offences involving homosexuality fall into a special category[34] and that the contrary views expressed in *R.* v. *Sims*[35] are, in England at least, no longer correct.[36]

Of course, as Martin J.A. pointed out,[37] central to this particular issue, ". . . is the principle that an expert witness is entitled to give opinion evidence in relation to matters upon which ordinary persons without special knowledge of the subject would be unlikely to form a correct judgment". He then referred to the cases of *R.* v. *Chard*[38] and *R.* v. *Turner*.[39] In *Chard*, the accused had been convicted of murder and sentenced to life imprisonment. Counsel for the defence had sought to call a prison doctor who had prepared a medical report on the mental state of the accused where it was said: "What does seem clear to me in the light of this man's personality is that there was no intent or *mens rea* on his part to commit murder at any time that evening."

---

[32] [1973] 1 All E.R. 440.

[33] [1974] 3 All E.R. 887.

[34] *Thomson* v. *The King*, [1918] A.C. 221.

[35] [1946] K.B. 531.

[36] For a consideration of these cases, see Frank Bates, Similar Facts and the Hallmark Doctrine in England and Australia (1975), 38 J. Crim. L. 283.

[37] *Supra*, footnote 6, at p. 174.

[38] (1971), 56 Cr. App. Rep. 268.

[39] *Supra*, footnote 9.

However, the report also included the statement, "Mental illness, substantially diminished responsibility, the M'Naghten Rules, subnormality and psychopathic disorder do not appear to me to be relevant to the issue". The Court of Appeal (Criminal Division) held that the evidence was inadmissible as, in the words of Roskill L.J.,[40] where the jury is dealing with, ". . . someone who by concession was on the medical evidence entirely normal, it seems to this Court abundantly plain, on first principles of the admissibility of expert evidence, that it is not permissible to call a witness, whatever his personal experience, merely to tell the jury how he thinks an accused man's mind—assumedly a normal mind—operated at the time of the alleged crime with reference to the crucial question of what the man's intention was". In addition, Roskill L.J. refuted[41] counsel's suggestion that, if the medical witness's evidence were of no value, it could have been demolished by opposing counsel or by the judge's summing up. Finally, whilst accepting the witness's expertise in matters relating to mental illness, Roskill L.J. commented[42] that, ". . . neither he nor anyone else can claim to be an expert on the question of the intent of the ordinary man". This last is a somewhat remarkable statement: if no one, whatever his expertise, can claim to be an expert on the intent of the ordinary man, does this mean that no one is capable, whatever his position, of making a judgment of it? In addition the legal concepts of the M'Naghten rules and diminished responsibility have by no means escaped criticism.[43] The other case of *Turner* represents, in my view, a very disappointing turn of events, particularly after *Lowery*. In *Turner*, the accused had been convicted of murder and had pleaded provocation as a defence. He sought to call a psychiatrist to help the jury accept the accused's account of what had happened as credible and to indicate why he was likely to be provoked. The trial judge refused to admit the evidence on the ground that the psychiatrist's report contained hearsay evidence and was irrelevant and, thus, inadmissible.[44] The Court of Appeal (Criminal Division) upheld the trial judge even though it did not regard the psychiatrist's evidence as irrelevant, but refused to admit the evidence because, in the circumstances of the case, the jury was able to form their own conclusions. "If",

---

[40] *Supra*, footnote 38, at p. 270.

[41] *Ibid.*

[42] *Ibid.*, at p. 271.

[43] In regard to the M'Naghten rules, see Royal Commission on Capital Punishment 1949-1953, paras 289-333. On diminished responsibility, Baroness Wootton, Crime and the Criminal Law (1963), p. 74.

[44] See the remarks of Lawton L.J., *supra*, footnote 9, at p. 74.

said Lawton L.J.,[45] "on the proven facts a judge or jury can form their own conclusions without help then the opinion of an expert is unnecessary. In such a case if it is dressed up in scientific jargon it may make judgment more difficult. The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves; but there is a danger that they may think it does". Lawton L.J. concluded his judgment[46] by saying he was firmly of the opinion that, ". . . psychiatry has not yet become a satisfactory substitute for the commonsense of juries or magistrates on matters within their experience of life". Appeals to commonsense and experience in matters as important as the criminal trial do not much commend themselves to me: one man's commonsense is another man's idiocy (thus, I would expect that the notion of commonsense held by most readers of this *Review* would differ from that held by, say, Archie Bunker) and the same experiences produce different conclusions and results in different people. Furthermore, inherent in Lawton L.J.'s judgment is the antedeluvian myth that the behavioural sciences are exclusively, or even largely, concerned with abnormal behaviour. In the event, Martin J.A. was of the view[47] that since Mrs. McMillan's, ". . . personality traits were characteristic, indeed diagnostic, of the abnormal personality disturbance from which she suffered, their existence and description fell within the proper sphere of the psychiatrist".

Finally, in the area of the case with which we are concerned, the refusal of the trial judge to permit counsel for the Crown to cross-examine the defence witnesses with respect to the accused's personality or call psychiatric evidence on that issue was scarcely justifiable and it was on this ground that Martin J.A., quite correctly, it is suggested, allowed the Crown's appeal. The entire nature of the accused's defence, said the judge,[48] involved an assertion that he was a person of normal personality. "In those circumstances, Crown counsel", Martin J.A. stated,[49] "was entitled to show that, if he could, that there were two persons present in the house who were psychopaths, not one. Any other conclusion would permit an entirely distorted picture to the

---

[45] *Ibid.*, at p. 75.

[46] *Ibid.*

[47] *Supra*, footnote 6, at p. 175.

[48] *Ibid.*, at p. 177.

[49] *Ibid.*

jury".[50] Further, Martin J.A. was of the opinion[51] that the refusal of the trial judge to allow the Crown to call psychiatric evidence in rebuttal could not be said not to amount to a miscarriage of justice, in the particular sense, even though the evidence which they proposed to call was inconclusive. The reason why it is suggested that Martin J.A. was correct in his view is the very simple one that the more appropriate evidence which the courts have at their disposal, the more likely they are to come to a correct conclusion.

Where, then, are we? *McMillan*, it is submitted, is a clear-sighted and desirable development and one which is necessary after the Ontario Court of Appeal's earlier incursion into this area in *R.* v. *Rosik*;[52] a case notable, if for no other reason, than the three distinct judicial approaches which are therein apparent. It is also suggested that it is possible to pay too much attention to criticisms of the behavioural sciences on the grounds of lack of precision or to judicial preference for the still more amorphous notions of "commonsense" or "experience", particularly as there can be little doubt that the legal process is by no means as precise and disinterested as it was once thought to be. The value of psychiatric evidence to the judicial process lies not in any concept of abstract precision but because, in the words of Diamond and Louisell,[53] it, ". . . offers more information and better comprehension of the human behaviour which the law wishes to understand". The gap between legal and medical ideas of responsibility and volition is slowly narrowing and the decision of the Ontario Court of Appeal in the *McMillan* case is to be welcomed for its contribution to this important cause and is one which deserves to have considerable influence in the future.

FRANK BATES*

* * *

---

[50] Even though, Martin J.A. commented (*ibid.*, at p. 178) that the cross-examination in all the circumstances, would be unlikely to have affected the verdict.

[51] *Ibid.*, at p. 178.

[52] *Supra*, footnote 12.

[53] The Psychiatrist as Expert Witness: Some Ruminations and Speculations (1965), 63 Mich. L. Rev. 1335, at p. 1354.

* Frank Bates, of the Faculty of Law, University of Tasmania, Australia.

FAMILY LAW REFORM—ONTARIO.—This comment discusses the Family Law Reform Bill[1] which was published in November 1976 as an appendix to an Ontario Government booklet entitled *Family Law Reform*. The stated purpose of the Bill is to reform the law respecting property rights and support obligations between married persons and in other family relationships. Part I of the Bill deals with family property.

(a) *Family Assets*

Section 3 defines "family assets" as "property owned by one spouse or both spouses and ordinarily used or enjoyed by both spouses or one or more of their children for shelter or transportation or for household, educational, recreational, social or aesthetic purposes . . .". This definition is defective because it does not state at what date or dates the property must be "owned" or at what date or dates it must be "used" or "enjoyed" in order to qualify as a family asset, or at what dates the assets are to be valued. Is the intention: the date of the divorce or breakdown; the date of the last cohabitation; any date during the marriage; are the dates of ownership and use meant to be the same?

Consider the case of spouses (with no minor children) who are living separate and apart at the inception of the divorce proceedings. If the date of the divorce petition is the correct date for determining which assets come within section 3, these spouses have no "family assets" because there are none being "ordinarily used or enjoyed by both spouses" at the time of the divorce.

If the correct date is earlier than the divorce, for instance the last cohabitation date, the composition of the assets (particularly assets such as bank accounts) may have varied greatly between this date and the date of the divorce, and assets may have been converted (by change of use) from family assets to ordinary assets or vice versa.

Concern has been expressed about the vague functional definition "ordinarily used or enjoyed" for "household, educational, recreational, social or aesthetic purposes". What is this definition really supposed to cover? There will be many cases where assets will be used partly for such purposes and partly for business uses. Also, suppose a husband owns $30,000.00 worth of bonds, and the income is regularly used to provide a

[1] Bill 140. The Bill was not passed in 1976. The manuscript of this comment was submitted to the Canadian Bar Review in mid-January 1977.

summer vacation for the family. Are the bonds family assets? What is a "social" purpose? Is the taking of a life policy over a spouse's life for $100,000.00 a social purpose?

For purposes of argument, let us assume that the typical family assets intended by the Bill are: (a) the equity in a matrimonial home or vacation cottage; (b) the equity in a used car; (c) the value of used household furnishings; (d) bank account credit balances. In considering the practical implications of a division of family assets, the existing state of the title to the matrimonial home and the nature of mortgage obligations are relevant. It is generally supposed that quite a high proportion of matrimonial homes in Ontario are held in joint tenancy.[2] Unfortunately neither the Ontario Government, nor the Ontario Law Reform Commission before them, have published statistics on this point, although both have proposed marital property regimes that are heavily centred on sharing the equity in the matrimonial home. Statistics for Ontario should have been obtained and published. Report Number 52 of the English Law Commission refers to a survey on matrimonial homes there, which indicated that seventy-four per cent of owner-occupied homes acquired in 1970-1971 were taken in joint names. It seems to be quite common in Ontario for a husband with his own business to put the matrimonial home in his wife's name as a protection against financial troubles. There may be more women than men (for instance widows) who own a home when they remarry. It is quite possible that a title in the wife's sole name is more frequent than one in the husband's sole name, and that a division of family assets under the Ontario Bill may, therefore, benefit husbands more than wives.

To see the possible implications of division of family assets, it is useful to work out some hypothetical but typical examples.

(1) A husband and wife own a matrimonial home in joint tenancy and the present equity value is $30,000.00 Other family assets are: used furniture valued at $2,000.00; equity in a used car valued at $2,000.00; husband's bank account $5,000.00; wife's bank account $3,000.00. The husband owns the car and furniture.

Total family assets are $42,000.00 and half is $21,000.00.

The wife's present assets are

$$\$15,000.00 + \$3,000.00 = \$18,000.00.$$

---

[2] See Ontario Law Reform Commission, Report on Family Law, Part 4, Family Property Law (1974), p. 135.

On equal division of family assets, the wife would receive $3,000.00. But it must be kept in mind that division of family assets and the assessment of maintenance under section 11 of the Divorce Act[3] are intended to be carried out by the same judge in the same proceedings. The fact that the wife is receiving $3,000.00 from family assets will be known to the judge assessing maintenance under section 11. So the total financial "package" which the wife is likely to receive on divorce (including family assets legislation) may be about the same as she would receive at the present time under section 11 (without family assets legislation).

So in a case such as this, the introduction of family assets legislation may make little or no change in the present situation.

(2) Let us alter example (1) by providing that the home is in the wife's sole name. In this case, before division of family assets the wife's assets are $33,000.00 and the husband's are $9,000.00.

On an equal division of family assets, the husband gets $12,000.00. Suppose the husband's income is $25,000.00 and the wife has not been working prior to the divorce. There are two minor children living with the wife in the matrimonial home.[4] A maximum maintenance order at the present time under section 11 of the Divorce Act might be half the husband's income or $12,500.00. The husband's award of $12,000.00 of the family assets is locked up in the matrimonial home which is occupied by the wife and children. The wife cannot pay the $12,000.00 without selling the home. The husband cannot be expected to pay more than half his income and also have enough left to live on, and he may even be remarrying and have a second family to support. Also, someone has to pay the mortgage on the home. What is the judge supposed to do about family assets in such a case, which will not be atypical? In this example, it is doubtful if the judge has a discretion under section 4(2) to divide the family assets in other than equal shares.

(3) Let us alter example (1) by providing that the home is in the husband's sole name. Now the husband's assets are $39,000.00 and the wife's are $3,000.00. So the wife gets $18,000.00 on equal division. But again how will this affect

---

[3] R.S.C., 1970, c. D-8.

[4] If there are no minor children and the spouses are living apart at the time of the divorce, then, as already discussed, there could be no family assets, depending on the meaning of s. 3.

the assessment of divorce maintenance in the same proceedings? It would seem inevitable that the wife will receive less maintenance because of the $18,000.00 division, and that the courts will assess divorce maintenance and Ontario family assets together as a packaged financial settlement on divorce.

(4) Let us alter example (1) so that the home is not owned but rented.

The family assets are now $12,000.00 and half is $6,000.00.

On equal division the wife receives $3,000.00 and the final result is the same as in example (1).

It seems that the main result of the proposed family assets legislation would be to provide a starting position for the assessment of divorce maintenance. As far as the parties and their lawyers are concerned, the main function of family assets would be to start the economic bargaining process by placing the parties in initial positions with regard to certain property. If the spouses own their home in joint tenancy or rent an apartment (which includes a great many Ontario couples) the effect of family assets would likely be insignificant. It could be argued that any advantages of the "family assets" proposals in the Bill are mainly psychological and political.

Section 4 of the Bill also has interpretation difficulties. It states that a spouse[5] is entitled to division of family assets on a judgment of divorce or nullity or when "there is no reasonable prospect of the resumption of cohabitation". Does *any* divorce or nullity judgment suffice, for instance a foreign divorce judgment that might not be recognised in Ontario? Does "no reasonable prospect of the resumption of cohabitation" have to be established by the court, or does a provision to that effect under a section 45 marriage contract suffice, or any express or implied agreement between the spouses? A nullity judgment would include one declaring a "marriage" to have been void *ab initio*, so that neither party has been legally the husband or wife of the other. This would imply, for example, that a "marriage" between one man and another man who had undergone a sex-change operation, such as in *Corbett* v. *Corbett*[6] would give rise to a division of "family assets". Is a party to

---

[5] According to s. 1(d) "spouse" means a person who is a husband or wife of another person, including a person in respect of whose marriage a judgment of nullity is subsequently made.

[6] [1970] 2 All E.R. 33, [1971] P. 83. Similar reasoning would apply to support obligations, by a combination of ss 11(c) and 12.

an attempted homosexual marriage, that has been declared a nullity by the court, a "spouse" within section 1(d)?

(b) *A Spouse's Contribution*

Section 7(2) allows the court to award compensation or a property interest "where one spouse has contributed work, money or money's worth in respect of the acquisition, management, maintenance, operation or improvement of property in which the other has an interest...". The language: "management, maintenance, operation" is wide enough to include housework and other domestic work by a wife. Thus, for example, a housewife will be able to claim compensation from her husband for housework and other domestic work.

(c) *Economic Partnership*

Section 4(3) states that "there is mutual contribution by the spouses, whether financial or otherwise, to the family welfare, entitling each spouse to an equal division of the family assets...". Why should "mutual contribution... to the family welfare" entitle to an equal division only of the matrimonial home (if not already in joint tenancy) and half the used car and used furniture in the typical case? Why should the entitlement to equal division only arise on divorce or breakdown? Why not on death? The Government's explanation in the introduction to the Bill[7] that the surviving spouse is adequately cared for by succession is not a proper answer. Intestate succession rights can be defeated by will and dependants' relief is a form of private charity from the estate of the deceased for a dependent left in straitened circumstances. Section 4(3) is an artificial, self-serving proposition attempting to justify the sections on family assets. The introduction to the Bill states[8] that the family assets approach "recognizes marriage as an economic partnership". But examination of the text shows that the Bill does no such thing. Division of family assets seems to be restricted both to what many spouses co-own in any event, and to spouses whose marriages have broken down.

(d) *Support Obligations*

Section 11(c)(ii) provides that "spouse" includes an unmarried couple who "have lived together as husband and wife

---

[7] P. 8.

[8] P. 7.

within the preceding six months and had so lived together" either continuously for a least two years, or in a relationship of some permanence where they have produced a child. So for compliance with section 11(c)(ii) there must have been co-habitation within the previous six months. Unless this condition is fulfilled, the person concerned is not a "spouse" and by section 12 only a "spouse" has an obligation to provide financial support for another "spouse" so that the obligation can only last as long as the person is a "spouse". If the one is suing the other for support, under sections 11 and 12, the cohabitation will have ceased, and so the maximum time during which the one can be liable to support the other is six months. Despite the coverage given to it in the news media, section 11(c)(ii) seems to be of small practical importance.

The conditions in the Bill for financial support are need and capacity to pay in regard to spouses, children, and parents. The removal of the present common law and statutory grounds is a great improvement. The Family Law Study proposed in 1968[9] that need and capacity to pay should be the only grounds for financial support between spouses. Section 15(3) gives a check-list of factors which the court must take into account in assessing support for a dependent.[10] However, what is meant by the "needs" of the dependant is not explained except to say that the court "may have regard to his or her accustomed standard of living". Does this mean that the court is invited to orchestrate its various financial and property discretions to reach into the income and assets of a person liable to support (normally the husband) so as to continue the prior standard of living of the dependent?

Section 14 makes a non-minor child liable to support a parent in accordance with need and capacity. Was there really a public demand for open-ended court discretion to make children liable to support their parents, without limit as to time or amount, and in accordance with the vague term "need"? The present, more limited statute for support of parents by children[11] has fallen into disuse and this kind of obligation should have been allowed to die.

---

[9] Baxter, Family Law Reform in Ontario (1975), 25 U. of T. L.J. 236, at p. 237.

[10] A "dependent" is a person to whom another has an obligation to support under Part 2 of the Bill: s. 11(b). A person can be a "dependant" for six months after a divorce or nullity judgment by ss 11 and 12, but the purpose of this is unclear.

[11] The Parents' Maintenance Act, R.S.O., 1970, c. 336.

One item in the check-list in section 15(3) is "any course of conduct by the applicant tending to repudiate the relationship". It may be arguable, for example, that a husband should not be required to support a wife who is living with another man. But what is meant by "repudiate"? Is it repudiation to petition for divorce, to seek a declaration of nullity, to obtain a religious divorce, to commit adultery, to desert, to tell the other spouse to "go to hell", and so on? What is meant by "relationship" in this context? Does a wife claiming support have to show that she is willing to resume cohabitation, (unless she has a justifiable cause for not doing so, such as cruelty by the husband) or else be held to be repudiating the relationship? For consistency with section 12, which provides that a support obligation must be in accordance with "need" and "capacity" to support financially, any conduct considered by the court under section 15(3) must be connected with the criteria of "need" and "capacity". This places a considerable restriction on the kinds of conduct that may be considered by the court, and makes the subsection unclear as to meaning and policy.

Section 30 gives power to the county or district court or the High Court to make a non-molestation order. This power is most needed, however, in the family court, and so should be given to the Unified Family Court.[12]

(e) *Matrimonial Home*

In Part III of the Bill on the Matrimonial Home, there is a lack of a clear statement of the position and rights of third parties. Section 37 gives each spouse an equal right to possession of the matrimonial home. Is this intended to apply only between the spouses (so that one cannot remove the other) but not to affect, for example, the position of a mortgagee? Against whom is the "right to possession of the matrimonial home" exercisable? A clear statement of the position of those who lend money on the security of matrimonial homes is needed in a Bill of this kind.[13]

Section 40(1)(a) authorises the court to make a possession order for a discretionary period of time, including exclusive

---

[12] As defined in s. 1(b) of the Bill, "court" includes the "Unified Family Court". Ontario Bill 189 (1976) was introduced to establish a Unified Family Court only for the Regional Municipality of Hamilton-Wentworth. The idea of a family court with comprehensive jurisdiction was proposed by the Family Law Study in 1968 and endorsed by the Ontario Law Reform Commission in 1974.

[13] For the more careful and detailed English provisions on the same topic, see Bromley, Family Law (5th ed., 1976), pp. 475-487, and the Matrimonial Homes Act, 1967, c. 75.

possession to one spouse for life, provided that, at the date of the order, "other provision for shelter is not adequate in the circumstances."[14] By section 42 such an order can be registered against the land. The Bill seems to contain no provision authorizing variation of an order once made. Suppose that a wife obtains and registers an order under section 40(1)(a) with respect to a home which is owned by the spouses in joint tenancy, and is subject to a purchase-money mortgage in favour of the vendor. The husband's interest is economically valueless during the currency of the order, unless the wife pays rent in respect of the use of the husband's half share.[15] The mortgagee's security is precarious because of the possible effect of the order on an exercise of the power of sale on default, (a problem which the Bill leaves up in the air). This situation could persist until the death of the wife, which could be many years. In a case where the title is in a spouse's sole name, an order could extend even beyond the death of one spouse (the other surviving), according to the language of section 40(1)(a).

What is the meaning of the phrase "other provision for shelter is not adequate in the circumstances" in section 40(3)? Is the reference to "other provision" by a spouse, a mortgagee, a local authority, the Ontario Government, or anyone in particular? Does the phrase mean that no order can be made under section 40(1)(a) if there is anywhere in Ontario (or in the world) where the spouse could find adequate shelter in the circumstances, or what does it mean? What does "adequate" relate to, and what are the "circumstances" to which the section refers?

Instead of these vague and complex provisions, would it not have been better if the Bill, had simply provided that one spouse should not be able to exclude the other spouse from occupation of the matrimonial without a court order, and that the granting and terms of such an order should be in the discretion of the court?

(f) *Conflict of Laws*

A potentially polygamous union may be converted into a monogamous one by a change of domicile.[16] Where the wife has

---

[14] S. 40(3).

[15] The Bill does not contain a provision that the court order may require payment of an occupation rent. This can be done in England: Bromley, *op. cit.*, footnote 13, p. 478.

[16] *Ali* v. *Ali*, [1966] 1 All E.R. 664, [1968] P. 564; *Re Hassan and Hassan* (1976), 12 O.R. (2d) 432, 69 D.L.R. (3d) 224.

a dependent domicile, a change of the husband's domicile is sufficient and, subject to residence, gives the Ontario courts jurisdiction in divorce uninhibited by the rule in *Hyde* v. *Hyde*.[17] Section 49(3)(c) of the Bill gives the married woman an independent domicile. Suppose that this is enacted. The wife of a potentially polygamous marriage acquires an Ontario domicile of choice, and resides there, but her husband retains his domicile as at the date of the marriage. Does the Ontario court have divorce jurisdiction?

Current marital property conflict of laws applies one choice of law rule to determine the matrimonial regime (the husband's domicile at the date of the marriage is the usual connecting factor), and another choice of law rule to succession questions (the last domicile of the deceased is the usual connecting factor). So the total distribution of property on the death of one spouse (the other surviving) can result in the inconvenient and illogical combination of a marital property law from one state and a succession law from another state. Domestic marital property and succession laws tend to relate to one another from the policy point of view. Consequently, the writer proposed one connecting factor (the last common habitual residence) for both marital property and succession as regard movables.[18] Section 10 of the Bill provides that division of family assets and ownership of movable property is to be governed by the internal law of the last common habitual residence. Immovables are to be governed by the internal law of the situs.

(g) *Conclusion*

One wonders how much impact legislation such as proposed in the Ontario Bill would have on the present legal realities of divorce and marriage breakdown. Section 11 of the Divorce Act gives the judge an open-ended discretion to assess maintenance and award custody. The case-law on matrimonial property has revolved around the uncertainties of looking for implied trusts between spouses. In these circumstances, the prevailing tendency is to solve the economic problems of divorce by horse-trading between the spouses' lawyers to work out an agreement for submission to the court, in order to avoid the expense and trauma of litigation necessary to find out how the judge will exercise discretion and resolve any property uncertainties. The Ontario Bill would change some of the parameters of the bargaining pro-

---

[17] (1866), L.R. 1 P. & D. 130.

[18] Baxter, *op. cit.*, footnote 9, at pp. 271-280.

cess but it is questionable whether it would have a significant effect on the resulting economic solutions between spouses. The Ontario Bill would introduce new discretionary situations and legal uncertainties into the bargaining between the spouses and their lawyers, for example: (i) uncertainty as to which assets are "family assets" and divisible; (ii) uncertainty as to the date of valuation of "family assets"; (iii) discretion in section 4, based on rather general guide-lines, to divide the family assets in other than equal shares; (iv) discretion in section 4(2)(g) to order property other than family assets "to be transferred to or vested in the other spouse, as the court considers appropriate"; (v) a series of discretionary powers under section 5(2) to make orders regarding a spouse's property in connection with a division of family assets; (vi) a loosely-worded power under section 7(2) to award one spouse compensation or an interest in the property of the other spouse "where one spouse has contributed work, money or money's worth in respect of the acquisition, management, maintenance, operation or improvement of property in which the other has an interest..."; (vii) a discretion under section 40(1)(a) to direct "that one spouse be given exclusive possession of the matrimonial home or part thereof for life or such lesser period as the court directs".

There is considerable family law activity in the provinces, and we may end up with a variety of family law systems within Canada, particularly in regard to marital property. This could be unfortunate, since marital property questions are closely related to the maintenance questions which are covered by the federal Divorce Act. Since we have a single divorce statute for Canada, surely it would make sense to have also uniform rules for the determination of marital property issues arising on divorce, so that the "economic package" on divorce (that is financial support and property) would be dealt with by the same set of rules, and not: financial support, by federal rules, and marital property, by whatever provincial rules may be applicable. The writer is not forgetting the constitutional problems, but uniformity of marital property rules in the divorce context is common sense, and both federal and provincial authorities should work together to this end.

IAN F. G. BAXTER*

---

* Ian F. G. Baxter, of the Faculty of Law, University of Toronto, Toronto.