

DROIT CONSTITUTIONNEL - PARTAGE DES COMPÉTENCES - LOI
RÉGLEMENTANT LES PRODUITS DU TABAC, S.C. 1988, c. 20 - LA
THÉORIE DES DIMENSIONS NATIONALES: UNE BOÎTE À
PHANTASMES: *Canada (Procureur Général) c. R.J.R. - MacDonald Inc.*

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On met des étiquettes précises sur des faits confus, et cela fait des tableaux synoptiques.
On met des étiquettes précises sur des sentiments confus, et cela fait des fusillés.¹

Introduction

La récente décision de la Cour d'appel du Québec, *Canada (Procureur général du Canada) c. R.J.R. MacDonald Inc.*,² constitue un exemple clair des résultats inquiétants qu'est susceptible d'entraîner l'application de la "théorie" - une bien noble appellation pour un concept aussi abstrus - des dimensions nationales. La Cour, dans cette affaire, a conclu à l'unanimité³ que le tabagisme était une matière d'intérêt national et que, cela étant, le Parlement central était autorisé à adopter la *Loi réglementant les produits du tabac*.⁴

Le litige, dans *MacDonald*, porte donc sur la validité constitutionnelle d'une loi dont le titre complet est le suivant: *Loi interdisant la publicité en faveur des produits du tabac, réglementant leur étiquetage et prévoyant certaines mesures de contrôle*. L'article 3 de cette loi déclare expressément qu'elle a pour objet "de s'attaquer, sur le plan législatif, à un problème qui, dans le domaine de la santé publique, est grave, urgent, et d'envergure nationale". Les trois alinéas de cette disposition précisent ensuite qu'il est nécessaire de protéger la santé des Canadiens et Canadiennes, et plus particulièrement des jeunes, contre les dangers liés à la consommation du tabac; il faut en outre les sensibiliser aux méfaits du tabac par la diffusion efficace d'information.

Les dispositions importantes de cette courte loi - 19 articles - visent essentiellement à limiter toute forme de promotion, directe ou indirecte, des produits du tabac. L'article 4 interdit de façon générale toute publicité en faveur

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L'auteur tient à exprimer sa gratitude au professeur François Chevrete qui a bien voulu lire et commenter le manuscrit de cet article.

¹ H. de Montherlant, *Tous feux éteints* (1975), p. 41.

² [1993] R.J.Q. 375 (C.A.) (ci-après *MacDonald*); décision qui infirme la décision du juge Chabot de la Cour supérieure: *Imperial Tobacco Ltd. c. Canada (Procureur général)*, [1991] R.J.Q. 2260 (ci-après *Imperial Tobacco*).

³ Les juges LeBel et Brossard ont tous deux rédigé des motifs concordants sur cette question. Le juge Rothman a souscrit aux deux opinions.

⁴ S.C. 1988, c. 20.

de ces produits;⁵ la disposition suivante établit des normes de contrôle relatives à leur exposition à des fins de vente dans les commerces au détail; l'article 6 autorise, dans certaines conditions, l'utilisation du nom intégral d'un fabricant ou d'un importateur de produits du tabac à l'occasion d'un parrainage d'activités sportives ou culturelles; la distribution à titre gratuit de produits du tabac est formellement interdite par l'article 7 et la disposition suivante prohibe l'apposition de marques de commerce identifiées à un produit du tabac sur des articles autres que de tels produits; enfin, l'article 9 oblige les fabricants à apposer sur leurs produits les mises en garde prévues par règlement.

Cette décision de la Cour d'appel du Québec soulève, entre autres difficultés, le problème de la qualification d'une loi dont la validité se fonde sur la compétence résiduaire du Parlement fédéral, et celui de l'application de la théorie des dimensions nationales au problème particulier du tabagisme. Nous examinerons successivement ces deux questions, en exposant d'abord la position des tribunaux de première et de deuxième instance à leur sujet et en en faisant ensuite la critique.⁶

La qualification de la loi

Les intimées, R.J.R. MacDonald Inc. et Imperial Tobacco Ltd., soutiennent que la loi en litige ne peut relever du Parlement central car elle vise essentiellement à réglementer le commerce canadien des produits du tabac, et plus particulièrement tout ce qui se rapporte à leur promotion. Or il est aujourd'hui clairement établi que "ni l'implantation nationale d'un commerce ou d'une entreprise ni même la publicité à l'échelon national de ses produits ne peuvent justifier à elles seules l'imposition d'une réglementation fédérale des échanges

⁵ Cette interdiction ne s'applique pas toutefois à la distribution, en vue de la vente, de publications importées au Canada ou à la retransmission d'émissions de radio ou de télévision de l'étranger: par. 4(3).

⁶ Le Procureur général prétendait aussi que la loi pouvait se fonder sur le paragraphe 91(27) de la *Loi constitutionnelle de 1867*, L.R.C. (1985), App. II, no. 5, au motif qu'elle vise à protéger la santé du public, finalité dont la compétence fédérale relative au droit criminel autorise la poursuite. Cet argument fut rejeté en première et deuxième instance au motif que "les actes dont on veut prohiber la fréquence ne présentent pas les caractéristiques habituelles de l'acte criminel ... [et] que ce n'est pas cette activité [consommation du tabac] que l'on veut prohiber mais uniquement certains aspects de sa promotion": *MacDonald*, *supra*, note 2, à la p. 410. Enfin, les intimées avaient reconnu, d'entrée de jeu, que la loi portait atteinte à la liberté d'expression garantie par l'alinéa 2)b) de la *Charte canadienne des droits et libertés* - Partie I de la *Loi constitutionnelle de 1982* (annexe B de la *Loi de 1982 sur le Canada* (1982), R.-U., c. 11). En Cour supérieure et en Cour d'appel, la seule question était donc de savoir si cette loi constituait une limite raisonnable à cette liberté. Le juge de première instance a répondu négativement à cette question. Une majorité de la Cour d'appel - les juges LeBel et Rothman - a infirmé cette décision; quant au juge Brossard, il était d'avis que les articles 4, 5, 6 et 8 de la loi ne pouvaient satisfaire au test de l'article 1. Nous ne nous intéresserons pas, dans ce bref commentaire, aux problèmes posés par le paragraphe 91(27) et par la Charte; seule nous intéressera l'application par la Cour d'appel de la théorie des dimensions nationales.

et du commerce”⁷ qui se fonderait sur le paragraphe 91(2) de la *Loi constitutionnelle de 1867*. Les intimées auraient cependant reconnu au Parlement fédéral le pouvoir limité de légiférer relativement à la publicité qui emprunte le conduit de la télévision et de la radio, moyens de communication relevant de son autorité exclusive.⁸

Le Procureur général prétend, quant à lui, que la loi a pour caractéristique principale la protection de la santé. Or le secteur de la santé n’a pas fait l’objet d’une attribution spécifique aux articles 91 et 92 de la *Loi constitutionnelle de 1867*. Le Procureur général fait alors référence à l’opinion du juge Estey dans *Schneider c. La Reine*,⁹ pour affirmer que le domaine de la santé “constitue ... un sujet indéterminé que les lois fédérales ou provinciales valides peuvent aborder selon la nature ou la portée du problème de santé en cause dans chaque cas”. Par conséquent, soutient-il, puisque le problème du tabagisme constitue un problème de santé publique d’envergure nationale, le Parlement central est autorisé à intervenir en vertu de son pouvoir en matière de paix, ordre et bon gouvernement.

En Cour supérieure, le juge Chabot s’est déclaré d’avis que la publicité était le “mal (“the evil”) que le Parlement [voulait] interdire”.¹⁰ Le Parlement central cherche, selon lui, à réglementer une des facettes particulières - la publicité - du commerce canadien des produits du tabac, produits dont la fabrication et la vente sont tout à fait légales au Canada.¹¹ L’objectif de protection de la santé ne peut être qu’ “indirect et lointain”,¹² puisque la loi s’adresse au problème de la santé uniquement “par ricochet”,¹³ en effet, elle ne porte ni sur la fabrication, la distribution, la vente, la consommation ou la composition des produits du tabac. En somme, la loi ne comporte aucune mesure concrète pour remédier aux problèmes entraînés par le tabagisme.¹⁴

⁷ *Les Brasseries Labatt du Canada Limitée c. Le procureur général du Canada*, [1980] 1 R.C.S. 914, à la p. 941.

⁸ À propos de la compétence fédérale en matière de publicité, lire *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927, à la p. 957.

⁹ [1982] 2 R.C.S. 112, à la p. 142. L’opinion concordante du juge Estey diffère sur ce point de celle des autres juges. Ce dernier semble d’avis, à la p. 141, que les problèmes locaux en matière de santé relèveraient des provinces alors que les problèmes nationaux seraient du ressort du Parlement central. La majorité, sous la plume du juge Dickson, à la p. 137, affirme que les provinces détiennent plutôt une compétence générale en matière de santé alors que le fédéral possède une compétence limitée, “accessoire aux attributions expresses de compétence de l’art. 91 ou consécutive au pouvoir d’urgence relatif à la paix, à l’ordre et au bon gouvernement”; passage approuvé dans *Bell Canada c. CSST*, [1988] 1 R.C.S. 749, à la p. 761; voir aussi A. Lajoie et P.A. Molinari, *Partage des compétences en matière de santé au Canada* (1978), 56 Rev. du Bar. Can. 579.

¹⁰ *Imperial Tobacco, supra*, note 2, à la p. 2274.

¹¹ *Ibid.*, aux pp. 2275-2276.

¹² *Ibid.*, à la p. 2276.

¹³ *Ibid.*

¹⁴ Dans *Benson and Hedges (Canada) Ltd. c. A.-G. B.C.* (1972), 27 D.L.R. (3d) 257, aux pp. 271-272 (B.C.S.C.), le juge Hickson a adopté le même raisonnement lorsqu’il a ²³

En Cour d'appel, le juge Brossard a d'abord conclu que la preuve présentée au procès établissait un "lien direct"¹⁵ entre l'usage du tabac et certains problèmes de santé et que, d'autre part, il existait un "lien rationnel tout abstrait et théorique soit-il",¹⁶ entre cet usage et la publicité incitative. Il reproche au juge de première instance de n'avoir pas recherché le lien possible entre les différents articles de la loi et le but avoué de cette dernière exprimé en son article 3. Au surplus, il affirme que, lorsqu'on procède à la qualification d'une loi aux fins du partage des compétences "c'est l'intention législative qui compte, dans la mesure où le Parlement a des motifs rationnellement et théoriquement justifiés de croire que les effets obtenus rejoignent le but recherché".¹⁷ Or, selon lui, il existe un "lien logique et rationnel entre les effets immédiats et directs de la loi et les buts visés aux paragraphes b) et c) de l'article 3".¹⁸ La loi en litige a donc pour objet véritable la *protection de la santé publique* contre les effets nocifs du tabagisme, étant donné qu'elle cherche à diminuer la consommation du tabac.¹⁹ Il en arrive à cette conclusion après avoir préalablement admis que les moyens prévus par la loi pour réaliser son objet étaient "essentiellement limités"²⁰ à une réglementation de la promotion des produits du tabac. Il ajoute enfin que "l'efficacité ou inefficacité du remède, caractère extrêmement important dans l'appréciation de sa proportionnalité en regard de la violation d'une liberté reconnue par la charte, ne ... paraît pas un critère à retenir à ce stade-ci du débat".²¹ Le juge LeBel partage l'opinion de son collègue quant à l'identification de l'objet de la loi; il reconnaît lui aussi que pour atteindre cet objectif, la loi vise à contrôler la publicité en matière de tabac. Toutefois, ajoute-t-il, "[l]e choix de ce moyen ne signifie pas pour autant que l'objectif de la législation ne demeure pas la protection de la santé publique".²²

déclaré que la *Tobacco Advertising Restraint Act* de la Colombie-Britannique - loi analogue à la *Loi réglementant les produits du tabac* - n'était pas une loi relative à la santé:

I conclude that the Legislature regards the use of cigarettes as a health problem within the Province. However, the *Tobacco Advertising Restraint Act* is not an attempt by the Legislature to deal with that problem on the basis of what may be regarded as the usual manner of meeting such a problem by prohibiting or restricting the manufacture, distribution, sale or consumption of such products. For this reason I conclude that the Legislature did not intend to enact the *Tobacco Advertising Restraint Act* as legislation in relation to health, and that it therefore cannot be sustained on that ground.

Il a cependant reconnu que la loi n'était pas *ultra vires* des pouvoirs de la province puisqu'elle portait sur la réglementation du commerce local.

¹⁵ *MacDonald, supra*, note 2, à la p. 407.

¹⁶ *Ibid.* (Mots soulignés par le juge).

¹⁷ *Ibid.*, à la p. 408. À la p. 407, il dit que, en matière de partage des compétences, "un lien purement rationnel, même abstrait et théorique, entre les effets et le but [de la loi] devrait suffire, sans qu'il soit nécessaire ... d'établir dans les faits un tel lien".

¹⁸ *Ibid.*, à la p. 407 (Mots soulignés par le juge).

¹⁹ *Ibid.*, à la p. 408.

²⁰ *Ibid.*, à la p. 402.

²¹ *Ibid.*, à la p. 408.

²² *Ibid.*, à la p. 381.

Posons pour le moment - nous y reviendrons un peu plus loin - que le but avoué de la loi soit de compétence fédérale. Doit-on alors conclure de la décision de la Cour d'appel que tous les moyens employés pour atteindre un tel but sont constitutionnels? Est-ce que ce but avoué de la loi doit nécessairement déterminer la qualification de cette dernière? Il est vrai que si le moyen employé dans une loi est *intra vires* des pouvoirs d'un ordre de gouvernement, un tribunal ne sera pas autorisé à en évaluer l'efficacité, l'opportunité, la sagesse ou même à en supputer les chances de succès.²³ Néanmoins, où doit-on tracer la frontière entre l'examen de la constitutionnalité et celui de l'efficacité d'un moyen législatif? Avant d'analyser le problème de la constitutionnalité des moyens dans le contexte d'une compétence non énumérée, comme c'est le cas dans *MacDonald*, examinons brièvement ce qu'il en est en matière de compétences énumérées.

Dans ce contexte, la jurisprudence a clairement affirmé, dans un premier temps, que serait inconstitutionnel tout moyen retenu par une loi qui échapperait aux compétences de l'ordre de gouvernement ayant adopté celle-ci. Dans *Bell Canada c. CSST*,²⁴ le juge Beetz rappelle que "au plan constitutionnel, la finalité d'une loi, en l'occurrence, la santé ... ne suffit pas à justifier les moyens spécifiques employés pour l'atteindre". Il signale que la compétence d'une province en matière de santé ne l'autoriserait pas, par exemple, à frapper d'une taxe d'importation les produits qu'elle estimerait dangereux. En l'occurrence, le juge devait d'ailleurs affirmer qu'une province était incompétente pour protéger la santé des employés d'une entreprise fédérale par le moyen d'une réglementation de leurs relations de travail. Une intervention législative de cette nature n'était pas du ressort des provinces, la gestion d'une telle entreprise, et plus particulièrement les relations de travail de ses employés, étant une matière exclusivement fédérale. On a en outre jugé que le fédéral ne pouvait légiférer en matière d'assurances, même s'il prétextait agir dans le but de protéger la santé du public.²⁵

Dans un deuxième temps, les tribunaux ont déclaré qu'une loi poursuivant une finalité incontestablement valide pouvait, à titre accessoire, recourir à des moyens qui, pris isolément, n'étaient pas du ressort de l'ordre de gouvernement qui avait adopté cette loi. Dans *Schneider c. La Reine*, la Cour suprême a conclu que le *Heroin Treatment Act, 1978* de la Colombie-Britannique avait pour trait dominant le traitement médical des héroïnomanes et, à ce titre, relevait de la compétence générale de la province en matière de santé, compétence fondée sur le paragraphe 92(16). La loi prévoyait pourtant un plan de détention et de traitement obligatoires. Le juge Dickson a cependant affirmé que "[l]es aspects coercitifs de [la loi] sont accessoires à l'efficacité du traitement ... Le législateur

Renvoi relatif à la loi anti-inflation, [1976] 2 R.C.S. 373, aux pp. 424-425; *Benson and Hedges (Canada) Ltd. v. A.-G. B.C.*, *supra*, note 14, à la p. 263: "[Lorsqu'il est établi qu'une province est détentrice d'un pouvoir donné] it then becomes a matter for the Legislature rather than the Courts as to the extent to which that power is exercised".

²⁴ *Supra*, note 9, aux pp. 796-797.

²⁵ Référence re *The Employment and Social Insurance Act*, [1936] R.C.S. 427.

cherche à guérir une maladie et non à réprimer une activité criminelle".²⁶ On notera toutefois que la détention et le traitement coercitifs ne sont pas des questions exclusivement fédérales, d'où le fait qu'il n'y a pas contradiction entre la décision du juge en chef Dickson dans *Schneider c. La Reine* et celle de son collègue Beetz dans *Bell Canada c. CSST*.

Dans les arrêts *Bell Canada c. CSST* et *Schneider c. La Reine*, la constitutionnalité du moyen était mesurée à la lumière d'une compétence énumérée, donc préalablement connue. La distinction entre l'objet véritable de la loi et les moyens employés pour le réaliser s'avérait donc plus facile à établir. Le constituant ayant lui-même identifié la compétence, les tribunaux pouvaient plus aisément mesurer l'étendue des finalités législatives dont elle permettait la poursuite. Or ce sont ces finalités qui permettront de se prononcer sur la constitutionnalité des moyens employés.

Dans *MacDonald*, la qualification de la loi et de ses moyens s'est effectuée dans un contexte où la compétence invoquée n'était pas préalablement identifiée. Au contraire, lorsqu'on fait reposer la validité constitutionnelle d'une loi sur une application de la théorie des dimensions nationales, non seulement la tâche du tribunal consiste-t-elle à qualifier la loi en litige, mais encore à identifier la compétence qui en autorise l'adoption. Le tribunal ignore donc, au départ, les finalités législatives dont la compétence invoquée autorise la poursuite. Cette situation rend très subjective la distinction entre objet et moyens. Dans un tel contexte, la conclusion du tribunal sur la question de la qualification est très largement déterminée ou même dictée par son opinion sur l'existence ou l'inexistence d'une matière d'intérêt national.

Selon nous, il n'en reste pas moins incontestable que tous les moyens législatifs ne sont pas nécessairement constitutionnels, et ce, même dans le contexte d'une loi dont la validité repose sur une compétence non énumérée. Avant d'exposer notre point de vue sur cette question, il faut cependant revenir au problème de la qualification donnée par la Cour d'appel, en l'espèce, à l'objet de la *Loi réglementant les produits du tabac*. La principale difficulté liée à l'approche de la Cour d'appel sur ce point réside dans le fait que l'objet avoué de la loi, tel que défini par la Cour, en l'occurrence, la protection de la santé du public, est une matière dont on ne saurait préciser la nature et les limites. Ce secteur embrasse un domaine si vaste qu'il autorise en réalité le fédéral à utiliser pratiquement n'importe quel moyen pour parvenir à ses fins. Pour reprendre l'expression du juge Beetz dans le *Renvoi relatif à la loi anti-inflation*,²⁷ il s'agit d'un sujet qui "embrasse tout". Or le critère du lien logique et rationnel entre les moyens retenus par une loi et son but avoué laisse une dangereuse latitude au législateur dans le choix des premiers. Au surplus, l'approche du juge Brossard ne consiste-t-elle pas simplement à mesurer la constitutionnalité d'un moyen à l'aune de son efficacité, ce qu'il condamne lui-même?

²⁶ *Schneider c. La Reine*, *supra*, note 9, à la p. 138. Pour un exemple du même type, voir *R. c. Swain*, [1991] 1 R.C.S. 933.

²⁷ *Supra*, note 23, à la p. 452.

L'erreur de la Cour, lorsqu'elle a procédé à la qualification du but de la loi et donc des moyens retenus par celle-ci, consiste, selon nous, à n'avoir pas gardé en mémoire la place occupée par le pouvoir résiduaire fédéral dans l'économie générale des articles 91 et 92 du texte constitutionnel et, par conséquent, à n'avoir pas tenu suffisamment compte de la nature particulière du pouvoir législatif conféré par cette compétence. Car il faut savoir que le paragraphe introductif de l'article 91 attribue un pouvoir qui s'oppose au pouvoir résiduaire reconnu aux provinces en vertu du paragraphe 92(16).²⁸ Cette dernière disposition reconnaît aux provinces le pouvoir de légiférer à l'égard "[de] toutes les matières d'une nature purement locale ou privée dans la province". Le paragraphe introductif de l'article 91 n'attribue au Parlement central aucun pouvoir général en matière de protection de la santé publique; il lui confère plutôt un pouvoir de réglementer toute matière qui atteint une dimension nationale par opposition à locale. Ainsi, c'est uniquement dans la mesure où un problème de santé s'élève à ce statut qu'une intervention fédérale fondée sur le paragraphe introductif de l'article 91 sera justifiée. Il s'ensuit que la nature du moyen employé par le législateur peut nous informer sur le caractère local ou national d'un problème. En effet, dans le contexte d'une loi dont on prétend qu'elle ne s'inscrit dans aucune compétence énumérée et relève donc du pouvoir résiduaire *fédéral ou provincial*, une étude des effets de cette loi sur les compétences énumérées des deux ordres de gouvernement devient pertinente pour déterminer si elle s'adresse à un problème de nature locale ou nationale.²⁹ En l'espèce, la loi fédérale empiète massivement sur les compétences provinciales; les moyens employés laissent à penser, dès lors, que le problème devrait être résolu localement.

Cette prise en compte de la nature "nationale" d'une intervention fédérale fondée sur le paragraphe introductif de l'article 91 comporte aussi l'avantage de permettre aux tribunaux de pouvoir mieux distinguer entre ce que le juge Beetz appelait l'"occasion" et le "sujet de la loi".³⁰ Pour déterminer si une loi s'intéresse à un problème d'intérêt national par opposition à un problème local, "il faut examiner son opération, ses effets et l'étendue de ceux-ci plutôt que son but ultime lorsque ce dernier embrasse tout".³¹ Or, pour le juge Beetz, cette qualification du moyen est d'autant plus essentielle que le Parlement ne peut combattre un problème avec les pouvoirs exclusivement réservés aux provinces.³² En l'espèce, même si le désir apparent du législateur pouvait être de protéger la santé du public, il n'en reste pas moins que, juridiquement, la loi avait pour objet la réglementation de la publicité.

²⁸ A.S. Abel, *The Anti-Inflation Judgment: Right Answer to the Wrong Question?* (1976), 26 U. of T.L.J. 409, aux pp. 424, 427 et 436. Voir aussi *A.G. of Ontario c. A.G. of Canada (Affaires des prohibitions locales)*, [1896] A.C. 348, aux pp. 361-362.

²⁹ Abel, *ibid.*, à la p. 431.

³⁰ *Renvoi relatif à la loi anti-inflation*, *supra*, note 23, à la p. 452.

³¹ *Ibid.*

³² *Ibid.*, à la p. 453.

Bref, un tribunal appelé à qualifier une loi dont on fait reposer la validité sur la théorie des dimensions nationales ne doit jamais perdre de vue la nature particulière du pouvoir conféré par le paragraphe introductif de l'article 91. Et les moyens législatifs employés pour atteindre l'objectif avoué d'une telle loi peuvent constituer un juste "révélateur" du caractère local ou national du problème qu'elle vise. Il ne s'agit plus dès lors de se prononcer sur l'opportunité ou l'efficacité du moyen, mais bien sur sa constitutionnalité. Avec égard, la Cour d'appel s'est contentée ici d'étudier l'efficacité de la loi. Nous verrons maintenant, entre autres choses, que la Cour d'appel n'a tenu strictement aucun compte de sa conclusion relative à la qualification de la loi dans son application de la théorie des dimensions nationales.

L'application de la théorie des dimensions nationales

Le juge de première instance, après avoir reproduit les passages les plus importants de l'arrêt *La Reine c. Crown Zellerbach Canada Ltd.*³³ affirme, dans un premier temps, que la théorie des dimensions nationales autorise uniquement l'adoption de mesures législatives présentant "un certain caractère d'exception".³⁴ Il conclut ensuite que la *Loi réglementant les produits du tabac* se distingue des lois sur la tempérance en litige dans les arrêts *A.G. of Ontario c. A.G. of Canada (Affaires des prohibitions locales)*³⁵ et *A.G. of Ontario c. Canada Temperance Federation*.³⁶ Dans ces affaires, précise-t-il, les lois en litige s'attaquaient véritablement aux sources du problème de l'alcoolisme en réglementant la vente du produit intoxicant et non simplement sa publicité.³⁷ De plus, ayant au préalable déterminé que la loi a pour objet la réglementation de la publicité, le juge conclut que la publicité relative aux produits du tabac n'a pas atteint "ce stade de pestilence[...]"³⁸ susceptible de lui conférer cette unicité permettant de la distinguer des matières d'intérêt local. Enfin, il déclare que même en supposant que la loi ait pour objet la santé publique, cette matière ne satisfait pas au critère d'"incapacité provinciale" énoncé dans *La Reine c. Crown Zellerbach Canada Ltd.*, puisque la preuve atteste abondamment de la volonté et de l'aptitude des provinces et du fédéral de collaborer ensemble pour réglementer la publicité en matière de tabac.³⁹

En Cour d'appel, les motifs du juge Brossard souffrent d'une première déficience: il n'est pas facile d'identifier ce qui, à ses yeux, constitue la matière qu'il considère avoir atteint une dimension nationale. S'agit-il du tabagisme⁴⁰ ou du secteur beaucoup plus vaste de la santé publique?⁴¹ Une lecture attentive

³³ [1988] 1 R.C.S. 401.

³⁴ *Imperial Tobacco, supra*, note 2, à la p. 2280.

³⁵ *Supra*, note 28.

³⁶ [1946] A.C. 193.

³⁷ *Imperial Tobacco, supra*, note 2, aux pp. 2280-2281.

³⁸ *Ibid.*, à la p. 2281.

³⁹ *Ibid.*, à la p. 2283.

⁴⁰ *MacDonald, supra*, note 2, aux pp. 412, 415.

⁴¹ *Ibid.*, aux pp. 410, 413.

permet de constater qu'il s'agit du tabagisme puisque c'est à cette matière qu'il appliquera le critère d'indivisibilité. Toutefois, cette conclusion jure avec celle à laquelle il en était arrivé quant au caractère véritable de la loi. Lorsqu'on sait que la théorie des dimensions nationales a pour conséquence l'attribution au fédéral d'un pouvoir exclusif et permanent ⁴² à l'égard d'une nouvelle matière, on demeure confondu devant l'imprécision du jugement quant à l'identification de celle-ci.

Au dire du juge Brossard, la reconnaissance au Parlement central d'une compétence en matière de tabagisme par le moyen de l'application de la théorie des dimensions nationales laisserait place à "une compétence législative parallèle et non contradictoire, *dans le même domaine* et en tout autre aspect".⁴³ Il est faux, selon nous, de prétendre que les provinces pourraient légiférer relativement à la réglementation du tabagisme puisque cette matière serait dorénavant une chasse-gardée du Parlement fédéral,⁴⁴ même quant à ses aspects intraprovinciaux.⁴⁵ Il pourrait peut-être y avoir double aspect si une loi provinciale analogue à la loi fédérale en litige ici était réputée ne pas porter sur le tabagisme mais bien sur la réglementation d'un aspect particulier d'un commerce local. C'est ainsi que l'on a qualifié la *Tobacco Advertising Restraint Act* de la Colombie-Britannique dans l'affaire *Benson and Hedges (Canada) Ltd. c. A.-G. B.C.*⁴⁶

Enfin, l'application par les juges Brossard et LeBel de la théorie des dimensions nationales au problème particulier du tabagisme est elle aussi éminemment discutable. Nous allons maintenant exposer brièvement le raisonnement de chacun des juges sur cette question pour en faire ensuite la critique.

Le juge Brossard déclare premièrement que le tabagisme est un fléau non seulement national, mais mondial.⁴⁷ Cette affirmation faite, il conclut que les problèmes de santé liés au tabagisme, au même titre que les problèmes provoqués au siècle dernier par l'alcoolisme, comportent une dimension

⁴² *Johannesson c. La municipalité rurale de West Saint-Paul*, [1952] 1 R.C.S. 292, aux pp. 311-312; *Renvoi relatif à la loi anti-inflation*, *supra*, note 23, aux pp. 444, 461.

⁴³ *MacDonald*, *supra*, note 2, à la p. 416; voir aussi les pp. 413, 414-415. (Mots soulignés par l'auteur de l'article).

⁴⁴ *Dans Renvoi relatif à la loi anti-inflation*, *supra*, note 23, à la p. 444, le juge Beetz énonce que si l'inflation était réputée d'intérêt national:

... les provinces pourraient probablement continuer à réglementer les marges bénéficiaires, les prix, les dividendes et la rémunération si le Parlement jugeait bon de leur laisser de la place dans ce champ de compétence; mais elles ne les réglementeraient pas relativement à l'inflation, qui serait devenue un champ de compétence fédérale exclusive.

⁴⁵ Dans *La Reine c. Crown Zellerbach Canada Ltd.*, *supra*, note 33, à la p. 433, le juge Le Dain précise que cette compétence permanente et exclusive s'exerce aussi sur les aspects intraprovinciaux de la nouvelle matière.

⁴⁶ *Supra*, note 14.

⁴⁷ *MacDonald*, *supra*, note 2, à la p. 414.

nationale.⁴⁸ Il fonde cette affirmation sur les arrêts *Russell v. R.*⁴⁹ - de très funeste mémoire - et *A.G. of Ontario c. A.G. of Canada (Affaires des prohibitions locales)*.⁵⁰

Après avoir procédé à cette “Russellection d’entre les morts”, le juge Brossard se demande si “les problèmes de santé reliés au tabagisme” répondent au critère d’indivisibilité énoncé par le juge Le Dain dans *La Reine c. Crown Zellerbach Canada Ltd.* Pour mémoire, dressons un rapide résumé du passage pertinent de cette décision:⁵¹ (1) la théorie des dimensions nationales peut s’appliquer non seulement à une matière nouvelle, mais aussi à une matière qui, d’intérêt provincial qu’elle était, est devenue d’intérêt national; (2) une matière d’intérêt national “doit avoir une unicité, une particularité et une indivisibilité qui la distinguent clairement des matières d’intérêt provincial”; (3) enfin, pour déterminer si une matière atteint ce degré d’unicité, “il est utile d’examiner quel effet aurait sur les intérêts extra-provinciaux l’omission d’une province de s’occuper efficacement du contrôle ou de la réglementation des aspects intraprovinciaux de cette matière”. Ce dernier critère est généralement désigné par l’expression “incapacité provinciale”. Après avoir énoncé ces critères, le juge Brossard conclut que les problèmes de santé reliés au tabagisme sont effectivement d’intérêt national puisque, “quelle que soit la juridiction, le problème est identique et uniforme”.⁵² Signalons tout de suite que cette conclusion est pour le moins surprenante. Si on la tient pour valable, il faudrait en conclure que le prurit ou l’acné pernicieuse sont aussi d’intérêt national. Les symptômes n’en sont-ils pas les mêmes partout? Le juge poursuit en affirmant, à la même page, qu’“il n’existe aucune preuve permettant de croire que les effets de la publicité sur la consommation ... sont susceptibles de varier d’une juridiction à l’autre”. Enfin, il estime qu’il y a incapacité provinciale au motif que les provinces sont incompétentes pour interdire la publicité d’origine extraprovinciale.⁵³

Les motifs du juge LeBel sont quelque peu obscurs. À l’instar de son collègue, il n’identifie pas clairement ce qu’il considère d’intérêt national; force nous est cependant de conclure qu’il s’agit du tabagisme.⁵⁴ D’après lui, l’intervention fédérale serait valide du fait “qu’elle porte sur un aspect certes important mais restreint [,] le commerce du tabac. Cet aspect est bien identifié,

⁴⁸ Le juge LeBel semble lui aussi partager cette opinion, *ibid.*, à la p. 388.

⁴⁹ (1882), 7 App. Cas. 829.

⁵⁰ *Supra*, note 28.

⁵¹ *La Reine c. Crown Zellerbach Canada Ltd.*, *supra*, note 33, à la p. 432.

⁵² *MacDonald*, *supra*, note 2, à la p. 415. À la même page, il ajoute: “Sa dimension, tant dans ses effets que dans son importance, ne varie pas d’une province à l’autre, ni même d’un pays à l’autre.”

⁵³ *Ibid.*, aux pp. 415-416.

⁵⁴ S’il fait généralement référence à la “santé publique” (*ibid.*, aux pp. 381, 388), le juge parle aussi de “publicité relative au tabac” (*ibid.*, à la p. 388).

limité et caractérisé”.⁵⁵ En outre, l’incapacité d’une province de réglementer la publicité d’origine extraprovinciale risquerait, dit-il, “sinon d’empêcher, du moins de gêner gravement la réalisation de l’objectif recherché”,⁵⁶ objectif dont il ne précise d’ailleurs pas la nature.

La décision de la Cour d’appel soulève des problèmes se rapportant à la nature du pouvoir conféré par la théorie des dimensions nationales et à l’application des critères - indivisibilité et incapacité provinciale - permettant d’identifier les matières susceptibles d’atteindre de telles dimensions. Plus particulièrement, la Cour ne prend pas en considération le fait que le pouvoir reconnu par cette théorie est un *pouvoir de réglementer* une matière qui est *manifestement d’intérêt national*. La Cour passe aussi sous silence le fait que l’indivisibilité d’une telle matière doit s’étudier aussi bien sur le plan conceptuel que pratique.⁵⁷ Il y a indivisibilité conceptuelle lorsqu’une matière n’est pas un simple agrégat de questions relevant de compétences énumérées éparses. De plus, si l’omission par une province de contrôler les aspects intraprovinciaux d’une matière met en péril les intérêts d’une autre province, on pourra conclure à l’existence d’une indivisibilité sur le plan pratique. Examinons maintenant plus en détail chacun de ces points.

La théorie des dimensions nationales vise essentiellement à reconnaître un pouvoir de réglementer une matière; elle ne vise pas à l’octroi d’un droit de propriété sur une chose. Or un pouvoir de réglementation autorise plus que l’adoption de simples prohibitions;⁵⁸ il permet de régir les *sources* mêmes d’un problème.⁵⁹ D’où la nécessité d’examiner l’indivisibilité conceptuelle d’une matière. En effet, il faut se demander si une matière est indivisible au point de justifier sa *réglementation intégrale* par le seul Parlement central. Pour ce faire, un examen du type de réglementation nécessaire - et donc des moyens les plus appropriés - pour s’attaquer efficacement aux sources et aux conséquences d’un problème donné doit alors être fait. Cette analyse, qui se situe sur le plan conceptuel, s’ajoute à l’étude de l’indivisibilité, au sens pratique, de la matière.⁶⁰

⁵⁵ *Ibid.*, à la p. 388. À la p. 389, le juge réitère cette idée en affirmant que “[l]e gouvernement fédéral s’est attaqué à un problème bien distinct, celui de la publicité du tabac, rattaché à une question complexe de santé publique”.

⁵⁶ *Ibid.*, aux pp. 388-389.

⁵⁷ *La Reine c. Crown Zellerbach Canada Ltd.*, *supra*, note 33, à la p. 434.

⁵⁸ *Ibid.*, aux pp. 447-448 (le juge La Forest dissident).

⁵⁹ Comme le rappelle le juge dissident La Forest dans *La Reine c. Crown Zellerbach Canada Ltd.*, *ibid.*, à la p. 446, une affaire où l’on a prétendu avec succès que le contrôle de la pollution des eaux salées constituait une matière d’intérêt national, “un contrôle efficace de la pollution exige une réglementation de celle-ci à sa source”.

⁶⁰ La décision majoritaire dans *La Reine c. Crown Zellerbach Canada Ltd.*, *ibid.*, omet de prendre en considération, comme le fait le juge dissident La Forest, cet examen de l’indivisibilité conceptuelle. Le juge Le Dain ne prend pas en considération le fait que la théorie des dimensions nationales vise l’octroi d’un pouvoir de réglementation, plus particulièrement, de réglementation des sources d’un problème. Il se contente de dire, à la p. 436, que les eaux salées sont indivisibles au motif qu’on ne peut “vérifier de visu la limite entre la mer territoriale et les eaux de la mer qui forment les eaux intérieures d’un État” et parce que la pollution des mers “comporte ses propres caractéristiques” (à la p. 437).

En l'occurrence, en supposant que la matière visée soit le domaine de la santé publique, on constate que la réglementation de ce secteur ne connaît pas de limite, car celui-ci englobe tout sur le plan du partage des compétences. Cette réglementation passe par des interventions en matière de droit criminel, de réglementation du commerce local, des conditions de travail, *etc.* Elle implique donc, nous l'avons d'ailleurs constaté précédemment, un envahissement de plusieurs compétences provinciales. Limiter le domaine visé à la réglementation des problèmes liés au tabagisme ne permet pas plus d'avaliser l'intervention fédérale. En effet, cette matière n'est pas indivisible, au sens pratique cette fois de l'expression. Avant d'examiner cette question, il faut voir comment la Cour d'appel a abordé le problème de l'indivisibilité conceptuelle.

Les juges Brossard et LeBel estiment tous deux qu'il y a indivisibilité - que nous qualifions de conceptuelle - au motif que la loi vise uniquement le domaine limité de la publicité en matière de tabac et que les effets de cette publicité sont les mêmes dans toutes les provinces. Cette approche est erronée. Le test de l'indivisibilité doit être appliqué à la *matière* que l'on prétend être de dimension nationale et non aux *moyens* employés pour en assurer la réglementation. Sinon, il suffirait de prétendre qu'un moyen législatif est suffisamment limité pour conclure que l'objet même de la loi est d'intérêt national; dès lors, le fédéral disposerait d'un pouvoir exclusif et permanent à l'égard de la matière visée par la loi et serait en mesure de sélectionner, par la suite, en toute impunité cette fois, n'importe quel autre moyen qu'il jugerait nécessaire ou idoine. En outre, on ne peut qu'être frappé par le manque de cohérence des juges qui, d'une part, affirment que la loi a pour objet le domaine de la santé publique mais qui, d'autre part, appliquent le critère de l'indivisibilité à ce qu'ils prétendent n'être qu'un moyen, en l'occurrence la publicité des produits de tabac. En agissant ainsi, ils démontrent que, dans le contexte de la théorie des dimensions nationales, la qualification préalable de la loi est un exercice apparemment futile.

Non seulement le pouvoir attribué à l'égard de la nouvelle matière doit-il être indivisible sur le plan conceptuel, comme nous venons de le constater; il doit l'être aussi sur le plan pratique. Cela signifie que le problème visé doit porter sur une question qui met véritablement en jeu l'intérêt de la nation et qui ne peut être efficacement jugulé par une action provinciale concertée. Il ne lui suffit pas de revêtir "un grand intérêt pratique pour le Dominion".⁶¹ Le

Comme l'affirme avec justesse le juge dissident La Forest, à la p. 457, "ce sont moins les eaux ... qui nous intéressent que leur pollution". Le juge Le Dain ignore le fait que, sur le plan juridique, la réglementation des sources de la pollution des eaux de mer implique le contrôle de la pollution de l'air, l'imposition de normes d'émission, le contrôle de la production et de la fabrication dans l'industrie manufacturière, *etc.* L'intervention fédérale n'a pas de fin. L'application du raisonnement du juge Le Dain dans l'affaire *MacDonald* entraînerait un résultat bien farfelu. Il ne s'agirait plus de savoir si la réglementation du tabagisme est une matière indivisible, mais bien de savoir si le tabac lui-même est indivisible!

⁶¹ *Re Board of Commerce Act*, [1922] 1 A.C. 191, aux pp. 197-198, 200; voir aussi *Reference as to the Validity of Section 5(a) of the Dairy Industry Act*, [1949] R.C.S. 1, aux pp. 52 (le juge Rand) et 78 (le juge Estey); *A.G. of Ontario c. A.G. of Canada (Affaires des prohibitions locales)*, *supra*, note 28, aux pp. 360-361; *Reference re The Natural Products*

problème doit être exceptionnel. L'omission d'une province de s'occuper efficacement du contrôle ou de la réglementation des aspects intraprovinciaux de la matière visée doit être susceptible d'entraîner des conséquences graves pour les habitants des autres provinces. Le tabagisme est-il un problème de cet ordre? Possède-t-il une telle indivisibilité permettant de le distinguer des matières d'intérêt provincial? Le critère d'incapacité provinciale est un indice de cette indivisibilité qui se manifeste cette fois sur le plan pratique. L'approche adoptée par les juges de la Cour d'appel sur cette question n'est pas elle non plus exempte de tout reproche.

Même en supposant que l'objet de la loi soit le tabagisme, il ne suffit pas d'affirmer, comme le fait le juge Brossard, qu'il s'agit là d'un fléau pour justifier une intervention fédérale. Dire d'un problème qu'il est indivisible parce qu'il se manifeste partout de la même façon ne clôt pas non plus le débat. Prenons, par exemple, le problème de la toxicomanie. Il ne fait aucun doute qu'il s'agit d'un sujet préoccupant; on parle même de fléau.⁶² Toutefois, ce ne sont pas toutes les questions relatives à la consommation de drogues qui peuvent être qualifiées "d'intérêt national". C'est ce qui explique que, si le commerce illégal des stupéfiants est une question d'intérêt national,⁶³ il n'en va pas de même du traitement des toxicomanes.⁶⁴ En effet, "[l']omission d'une province d'établir des services de cures ne met pas en péril les intérêts d'une autre province".⁶⁵ L'indivisibilité sur le plan pratique exige la mise en preuve d'une atteinte réelle aux intérêts des résidents d'une autre province. Dans l'arrêt *Schneider c. La Reine*,⁶⁶ le juge Dickson affirme:

Je ne crois pas que la question des stupéfiants soit si globale et indivisible qu'on ne puisse pas diviser la compétence législative en attribuant au Parlement du Canada la compétence sur le commerce illégal des stupéfiants et aux provinces la compétence sur le traitement ou la cure des toxicomanes.

Il faut donc garder en mémoire, lorsqu'on a recours à la théorie des dimensions nationales, qu'une matière relèvera du fédéral si, et seulement si, *elle dépasse la capacité des provinces de s'en occuper*. Cette approche permet ainsi de limiter le champ d'intervention du fédéral - en le confinant à ce qui est manifestement d'intérêt national - et donc de restreindre l'étendue des moyens dont il peut faire usage. Or si l'héroïnomanie n'est pas une matière dont le contrôle transcende le pouvoir des provinces d'y remédier, comme on l'a décidé dans *Schneider c. La Reine*, comment le tabagisme pourrait-il prétendre au statut de matière d'intérêt national? Y a-t-il véritablement incapacité provinciale en matière de tabagisme?

Marketing Act, 1934, and Its Amending Act, 1935, [1936] R.C.S. 398, à la p. 416; *A.G. of Ontario c. A.G. of Canada (Arrêt des conventions de travail)*, [1937] A.C. 326, à la p. 353.

⁶² *Schneider c. La Reine*, *supra*, note 9, à la p. 137.

⁶³ *R. c. Hauser*, [1979] 1 R.C.S. 984.

⁶⁴ *Schneider c. La Reine*, *supra*, note 9.

⁶⁵ *Ibid.*, à la p. 131.

⁶⁶ *Ibid.*, à la p. 132.

Tous les juges de la Cour d'appel prétendent que le critère d'incapacité provinciale est satisfait au motif que les provinces sont incapables de réglementer la publicité d'origine extraprovinciale. Encore ici, le critère est appliqué au moyen et non à la matière. Ce sont les conséquences entraînées par l'absence de contrôle du tabagisme qui importent et non celles qui découlent de l'absence de contrôle de la publicité en matière de produits du tabac.⁶⁷

L'ambiguïté du critère d'incapacité provinciale énoncé par le juge Le Dain dans *La Reine c. Crown Zellerbach Canada Ltd.*⁶⁸ ne facilite pas la tâche des juges. Rappelons qu'il fait référence à l'"effet [qu']aurait sur les intérêts extra-provinciaux l'omission d'une province de s'occuper efficacement du contrôle ou de la réglementation des aspects intraprovinciaux"⁶⁹ de la manière prétendument d'intérêt national. Qu'est-ce qui caractérise de tels intérêts? À ce critère fort vague d'"atteinte aux intérêts extra-provinciaux", nous préférons celui que proposait P.W. Hogg⁷⁰ et qu'a approuvé le juge Estey dans l'arrêt *Les Brasseries Labatt du Canada Limitée c. Le procureur général du Canada*,⁷¹ car il possède le double avantage d'être beaucoup plus objectif et de mieux convenir au caractère exceptionnel du pouvoir conféré par la théorie des dimensions nationales:

... l'élément le plus important de la dimension nationale ou de l'intérêt national est le besoin d'une loi nationale, but qu'une action concertée des provinces ne peut atteindre de façon réaliste, car le défaut de coopération de l'une d'elles entraînerait des conséquences graves pour les habitants des autres provinces.

Dans cet arrêt, la Cour a d'ailleurs conclu que le brassage et l'étiquetage de la bière n'étaient pas une question d'intérêt national transcendant le pouvoir des autorités locales d'y faire face par voie législative. En l'occurrence, en quoi l'omission de la part d'une province de contrôler le tabagisme sur son territoire

⁶⁷ Est-ce que le simple fait pour les provinces de ne pouvoir légiférer à l'égard de ce secteur d'activité restreint qu'est la publicité d'origine extraprovinciale peut justifier l'attribution au fédéral d'une compétence à l'égard de tout ce qui se rapporte au tabagisme? La logique du fédéralisme canadien s'oppose à une telle conclusion. Dans *Reference re The Natural products Marketing Act, 1934, and Its amending Act, 1935*, *supra*, note 61, à la p. 412 - passage approuvé par le Conseil privé, [1937] A.C. 377, à la p. 389 - le juge en chef Duff, alors qu'il se prononçait sur la portée du paragraphe 91(2), a refusé de reconnaître au fédéral une compétence en matière de commerce local sous prétexte que ce dernier était intimement lié au commerce extraprovincial:

The enactments in question, therefore, in so far as they relate to matters which are in substance local and provincial are beyond the jurisdiction of Parliament. Parliament cannot acquire jurisdiction to deal in the sweeping way in which these enactments operate with such local and provincial matters by legislating at the same time respecting external and interprovincial trade and committing the regulation of external and interprovincial trade and the regulation of trade which is exclusively local and of traders and producers engaged in trade which is exclusively local to the same authority...

⁶⁸ *Supra*, note 33.

⁶⁹ *Ibid.*, à la p. 432.

⁷⁰ P.W. Hogg, *Constitutional Law of Canada* (1977), p. 261.

⁷¹ *Supra*, note 7, à la p. 945. (Mots soulignés par l'auteur de l'article).

serait-elle susceptible d'entraîner des conséquences graves pour les habitants des autres provinces? La situation est difficile à imaginer car la santé de ceux-ci ne sera en aucune façon mise en danger. Au surplus, les conséquences découlant de l'omission de contrôler la publicité en matière de tabac sont encore moins susceptibles de mettre en péril la santé des habitants des autres provinces.

En somme, non seulement la *Loi réglementant les produits du tabac* porte-t-elle sur la réglementation d'un commerce local, domaine de compétence provinciale, mais encore, même en supposant qu'elle porte sur le tabagisme, cette matière ne possède pas le degré d'indivisibilité conceptuelle ou pratique permettant d'en faire une matière d'intérêt national.

Il eût été préférable pour la Cour d'appliquer au tabagisme le raisonnement adopté par le juge La Forest dans *Friends of the Oldman River Society c. Canada (ministre des Transports)*,⁷² en matière de contrôle de l'environnement. Dans cette affaire, après avoir conclu que le contrôle de l'environnement n'était pas une matière d'intérêt national,⁷³ le juge La Forest a affirmé qu'il était préférable d'analyser tous et chacun des pouvoirs énumérés dans la *Loi constitutionnelle de 1867* et de voir "comment ils pouv[ai]ent être utilisés pour répondre aux problèmes environnementaux ou pour les éviter".⁷⁴ Le juge La Forest a donc préféré la coopération fédérale-provinciale à la monopolisation pure et simple par Ottawa d'un secteur donné par le biais de la théorie des dimensions nationales.⁷⁵ Une approche semblable aurait pu et aurait dû être adoptée en matière de réglementation de la promotion des produits du tabac.⁷⁶

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UNJUST ENRICHMENT - SPECIAL RELATIONSHIP - DOMESTIC SERVICES - REMEDIAL CONSTRUCTIVE TRUST: *Peter v. Beblow*.

Keith B. Farquhar*

Introduction

The decision of the Supreme Court of Canada in *Peter v. Beblow*¹ represents further development of many of the issues associated with unjust enrichment and the constructive trust that emerged out of the 1980 decision of

⁷² [1992] 1 R.C.S. 3.

⁷³ *Ibid.*, à la p. 64.

⁷⁴ *Ibid.*, à la p. 65.

⁷⁵ À propos du devoir de coopération qu'impose parfois la nature du partage des compétences au Canada, lire *Attorney-General for British Columbia c. Attorney-General for Canada (Arrêt sur les produits naturels)*, [1937] A.C. 377, à la p. 389.

⁷⁶ Le juge Chabot rapporte même que "[c]ette coopération ... exist[e] depuis nombre d'années et elle est d'une rare harmonie": *Imperial Tobacco, supra*, note 2, à la p. 2283.

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¹ [1993] 1 S.C.R. 980, (1993), 101 D.L.R. (4th) 621, [1993] 3 W.W.R. 337, reversing (1990), 50 B.C.L.R. (2d) 266, [1991] 1 W.W.R. 219 (B.C.C.A.).

the same court in *Pettkus v. Becker*.² In what has become something of a Canadian tradition, the case centred on a relationship tantamount to spousal, the uncompensated provision of domestic services by the female plaintiff to the male defendant and the retention of title to property by him.

In April 1973, the defendant (respondent) asked the plaintiff (appellant) to come and live with him. The plaintiff, together with four children, moved into the defendant's home in Sicamous, British Columbia. At the time, two children of the defendant were also living in the home. For the succeeding twelve years the plaintiff acted as the wife of the defendant (albeit they never married) and as a mother and stepmother to the children. She cooked and cleaned, and undertook a variety of tasks and projects associated with the property itself. She received no payment of any kind from the defendant. She also performed part-time work outside the home, and thus was able to contribute to the purchase of groceries and household supplies. Throughout the relationship the defendant worked steadily as a grader operator and generated a preponderance of the family income.

Because of the alcoholism of, and abuse by, the defendant, the plaintiff terminated the relationship in 1985. At the time of trial, some few years later, the plaintiff was impoverished, but the defendant (now retired) owned a houseboat (on which he lived) and a van, as well as the vacant house and property.

The plaintiff brought an action claiming that the respondent had been unjustly enriched as a result of her unpaid efforts. She sought, *inter alia*, to have a constructive trust in her favour imposed on the Sicamous property. She succeeded at trial, lost in the British Columbia Court of Appeal³ and successfully appealed to the Supreme Court of Canada. There, two judgments were delivered. McLachlin J. spoke for La Forest, Sopinka and Iacobucci JJ., while Cory J. spoke for L'Heureux-Dubé and Gonthier JJ. The judgments were largely concurrent but the differences, comparatively slight though they were, are of significance. Many issues were canvassed. There was an examination of the importance of domestic services when it comes to enrichment, deprivation and an absence of juristic reason. There was a discussion of how to quantify the extent of compensation for the successful plaintiff, and of the related issue of balancing benefits received by her. Beyond that the court ventured into another and very important analysis of when it is appropriate to impose a constructive trust following unjust enrichment, and of its truly remedial nature when it is imposed.

Unjust Enrichment and Domestic Services

The starting point of the analysis in both judgments was, predictably, *Pettkus v. Becker*,⁴ in which it was held definitively that the action for unjust enrichment exists in Canada and that three conditions must be fulfilled for its

² [1980] 2 S.C.R. 834, (1980), 117 D.L.R. (3d) 254.

³ *Supra*, footnote 1.

⁴ *Supra*, footnote 2.

success. First, there must have been an enrichment of the defendant. Secondly, a corresponding deprivation must have been suffered by the plaintiff. Thirdly, there must be an absence of any juristic reason for the enrichment itself. *Pettkus v. Becker* was a case involving a successful claim by an unmarried woman against her male partner for compensation for the services performed by her during their lengthy relationship. Dickson J., emphasizing the nature of the unjust enrichment claim in this case, stated:⁵

... where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it.

Given the importance of *Pettkus v. Becker* it is not surprising that both McLachlin and Cory JJ. used its framework to solve the issues raised in *Peter v. Beblow*.

(1) *An Enrichment*

In *Sorochan v. Sorochan*⁶ the court had held that the unpaid performance of domestic duties in a relationship unquestionably constituted an enrichment of the partner for whose benefit they were performed. The facts in *Peter v. Beblow* were undisputed, the defendant had not contested the point that he had been enriched by the services of the plaintiff, and both McLachlin and Cory JJ. had no difficulty in finding that enrichment.⁷ For both of them, the fact that the defendant had received the benefit of services for which he had not had to pay made the enrichment self-evident.

(2) *A Deprivation*

In the Court of Appeal it had been held that the plaintiff had not been deprived because the defendant had adequately compensated her by allowing her to live rent-free and by subsidizing, with his income, other aspects of her life. The Supreme Court made short work of this view by relegating such considerations to the question of set-off. McLachlin J. stated quite simply that the provision of services without compensation constituted a deprivation.⁸ Cory J. went even further and expressed the view that it was axiomatic that once enrichment has been found, it would "almost invariably" follow that there is a corresponding deprivation.⁹ This is the orthodox position in the general law of unjust enrichment,¹⁰ but its clear statement in *Peter v. Beblow* will be of

⁵ *Ibid.*, at pp. 849 (S.C.R.), 274 (D.L.R.).

⁶ [1986] 2 S.C.R. 38, (1986), 29 D.L.R. (4th) 1.

⁷ Note, however, that this has not always been as obvious a proposition as it now appears to be. For an account of the "domestic duties" cases leading up to *Sorochan*, see B. Hovius and T.G. Youdan, *The Law of Family Property* (1991), pp. 132 *et seq.*, and K.B. Farquhar, *Causal Connection in Constructive Trust* (1986), 8 Est. and Tr. Q. 161.

⁸ *Supra*, footnote 1, at pp. 989 (S.C.R.), 644 (D.L.R.), 343 (W.W.R.).

⁹ *Ibid.*, at pp. 1012 (S.C.R.), 631 (D.L.R.), 359 (W.W.R.).

¹⁰ See P. Birks, *An Introduction to the Law of Restitution* (1985), pp. 132-134; Lord

assistance to future plaintiffs in similar cases. Such an individual will normally be able to show (1) the provision of services and (2) the absence of conventional (or any) compensation for those services. Having done so, she or he will have gone a considerable distance in making out the cause of action, and the question of what other benefits (if any) the plaintiff may have received from the defendant will be a matter for set-off or counterclaim. This is entirely in keeping with the court's concern, to be discussed next, with righting the balance between plaintiffs and defendants in these situations.

(3) *Absence of Juristic Reason*

McLachlin J. identified one of the main issues in the case to be whether the performance of domestic duties, albeit enriching and depriving, could give rise to a remedy based on unjust enrichment when the appellant had voluntarily assumed the role of wife and stepmother. Allied with this point was whether such services arise from non-compensable natural love and affection. She characterized these matters as "moral and policy questions ... [requiring] the Court to make value judgments" and concluded that they could best be analyzed under the heading of absence of juristic reason.¹¹ Cory J. was willing to, and did, take up the issue both here and under the heading of deprivation, but in both judgments similar conclusions are reached.¹²

The passage from the judgment of Dickson J. in *Pettkus v. Becker* explaining the concept of the absence of juristic reason in domestic cases has been set out earlier.¹³ The passage refers to a number of significant concepts - the relationship tantamount to spousal, prejudice, reasonable expectation, free acceptance and knowledge of the reasonable expectation. In orthodox terms in the law of restitution the concept of prejudice falls to be examined under the heading of deprivation, while the concept of free acceptance is a component of the enrichment.¹⁴ The recipient of the benefit had an opportunity to reject the benefit but did not do so, and is thus, on his or her own terms, enriched.¹⁵ This leaves for examination, in the context of *Peter v. Beblow*, what the court had to say about the concept of reasonable expectation and the relationship tantamount to spousal.

McLachlin J. held¹⁶ that in every case the fundamental concern is the legitimate expectation of the parties. Cory J. took the same position.¹⁷ On the other hand, having referred to reasonable expectation by the plaintiff, and

Goff of Chievely and G. Jones, *The Law of Restitution* (3rd ed., 1986), p. 23; P.D. Maddaugh and J.D. McCamus, *The Law of Restitution* (1990), p. 44.

¹¹ *Supra*, footnote 1, at pp. 989-990 (S.C.R.), 645 (D.L.R.), 343 (W.W.R.).

¹² *Ibid.*, at pp. 1014-1015, 1017 (S.C.R.), 633, 635 (D.L.R.). 361-362, 364-365 (W.W.R.).

¹³ *Supra*, at p. 540.

¹⁴ Goff and Jones, *op. cit.*, footnote 10, pp. 18-18; Birks, *op. cit.*, footnote 10, p. 266.

¹⁵ This is something of an oversimplification, as an examination of the above authorities will reveal. See also G. Mead, *Free Acceptance: Some Further Considerations* (1989), 105 Law Q. Rev. 460.

¹⁶ *Supra*, footnote 1, at pp. 990 (S.C.R.), 645 (D.L.R.), 344 (W.W.R.).

¹⁷ *Ibid.*, at pp. 1017 (S.C.R.), 635 (D.L.R.), 363 (W.W.R.).

knowledge of it by the defendant, McLachlin and Cory JJ., in their respective judgments, immediately went on to consider other, albeit related, concepts. McLachlin J. posed two important questions.¹⁸ Did the plaintiff confer the benefit as a valid gift or in pursuance of a valid common law, equitable or statutory obligation which she owed to the defendant? Does public policy support the enrichment? Cory J. seemed content to conclude the matter by examining the first of the questions asked by McLachlin J. It is highly significant that Goff and Jones¹⁹ catalogue a number of matters that would, if present, justify an enrichment. These have, on the face of it, little to do with reasonable expectation on either side. For present purposes it is important to identify only two of the matters they mentioned.²⁰ An enrichment is not unjust if it was a valid gift or in pursuance of an obligation owed to the defendant under common law, statute or equity. Neither is it unjust if public policy precludes restitution.

The change in focus by the court from the subjective issue of reasonable expectation, to the more objective questions of gift, obligation or public policy, represents one of the important advances made in *Peter v. Beblow*. It is inextricably woven with the court's view about where the burden of proof now lies. A variety of commentators, with varying degrees of force, have recently noted the difficulty faced by a plaintiff, particularly in a domestic case, of having to prove her or his reasonable expectation and the knowledge of it by the defendant.²¹ Each has argued for either the elimination or substantive discounting of the concept of reasonable expectation, to be replaced by inferences that the plaintiff did not confer the benefit as a gift, and that the defendant must be taken to have been aware of it. These inferences may be rebutted, but the burden of rebuttal should fall on the defendant. Professor Scane, in particular, points out the similarity of this reasoning to that underlying the presumption of resulting trust. The commentators have been vindicated in *Peter v. Beblow*. McLachlin J. held that one unmarried partner generally owes no duty at common law, in equity or by statute to perform work or services for the other. Neither should it be presumed that such work or services, if rendered, are a gift. Addressing the question of public policy McLachlin J. forthrightly stated:²²

¹⁸ *Ibid.*, at pp. 990-991 (S.C.R.), 645-646 (D.L.R.), 344 (W.W.R.). She also asked, thirdly, whether the plaintiff had submitted to, or compromised, the defendant's honest claim. This is a traditional defence to an action for restitution, but it was not argued here and McLachlin J. did not pursue the issue.

¹⁹ *Op. cit.*, footnote 10, p. 30.

²⁰ Goff and Jones would also remove from unjust enrichments those benefits conferred while the plaintiff was acting voluntarily in her own self-interest. It is noteworthy, but scarcely surprising, that this issue did not appear to be advanced in argument. In view of the court's opinion on the importance of rewarding unpaid domestic labour it is plain that no such argument would have succeeded.

²¹ See, in particular, R.E. Scane, "Relationships Tantamount to Spousal", Unjust Enrichment, and Constructive Trusts (1991), 70 Can. Bar Rev. 260; M.M. Litman, The Emergence of Unjust Enrichment as a Cause of Action and the Remedy of Constructive Trust (1988), 26 Alta. L. Rev. 407; M.A. Neave, Three Approaches to Family Property Disputes, in T.G. Youdan (ed.), *Equity, Fiduciaries and Trusts* (1989), p. 247; Hovius and Youdan, *op. cit.*, footnote 7, pp. 124 *et seq.*

²² *Supra*, footnote 1, at pp. 993 (S.C.R.), 647 (D.L.R.), 346 (W.W.R.).

The notion that household and child care services are not worthy of recognition by the court fails to recognize the fact that these services are of great value, not only to the family, but to the other spouse.

Public policy, far from justifying the enrichment, requires that it be regarded as unjust. Cory J., equally directly, held:²³

It is just and reasonable that the situation be viewed objectively and that an inference be made that, in the absence of evidence establishing a contrary intention, the parties expected to share in the assets created in a matrimonial or quasi-matrimonial relationship...

It now seems incontrovertible, therefore, that where one partner can demonstrate that work or services of a domestic nature have been performed in a relationship, the inferences of enrichment, deprivation and absence of juristic reason are all on the side of the plaintiff. The burden of rebutting those inferences will, at every step, fall upon the defendant.

The new position is sufficiently different from that applicable in the general law of restitution²⁴ to make it a point of significance whether the plaintiff and defendant can in any given case be said to have been in a "relationship tantamount to spousal". This is not an issue that has received much attention in the cases, and *Peter v. Beblow* is therefore not unusual in making little of it. It is worth noting that in the Supreme Court of Canada the cases have displayed a remarkable consistency in their facts and have not required a careful examination of the definitional limits of a relationship tantamount to spousal. In *Pettkus v. Becker*,²⁵ *Sorochan v. Sorochan*,²⁶ and *Peter v. Beblow* we find the following factors in common. The relationships were heterosexual. The parties cohabited. The relationships were, at the outset, designed to be of an indefinite duration and, in fact, lasted in each case, for lengthy periods. Each relationship existed in a rural or semi-rural setting, so that the services in question were more extensive and arduous than those apt to be required in a purely urban context. There was a sharing of the enjoyment of assets and income and a sharing of lives. The female partner in each case sacrificed, to a greater or lesser extent, her outside earning capacity during the course of the relationship. The female partner in each case found herself in substantial need upon the termination of the relationship.²⁷ In *Peter v. Beblow* McLachlin J. simply assumed (rightly, it is submitted) that the relationship was tantamount to spousal by anybody's definition. Cory J. was more specific, although he cannot be taken as having attempted an exhaustive definition. First, he noted, "the couple lived and worked together in the most intimate of relationships"; secondly, "[t]hey shared

²³ *Ibid.*, at pp. 1017 (S.C.R.), 635 (D.L.R.), 363 (W.W.R.).

²⁴ See, for example, Goff and Jones, *op. cit.*, footnote 10; Birks, *op. cit.*, *ibid.*; Maddaugh and McCamus, *op. cit.*, *ibid.*

²⁵ *Supra*, footnote 2.

²⁶ *Supra*, footnote 6.

²⁷ Cases in the lower courts in which the plaintiff has succeeded have manifested a number of variations on these facts (see the cases cited in Hovius and Youdan, *op. cit.*, footnote 7, pp. 132 *et seq.*), but our concern here is what the pattern in the Supreme Court of Canada portends, particularly after *Peter v. Beblow*.

work and the monies which they earned"; and thirdly, it could not "be said that the relationship was so short-lived that it should not give rise to mutual rights and obligations".²⁸

The question for the future is how many, or how few, of the above factors need be present in order to qualify a relationship as "tantamount to spousal". Are some factors entitled to greater weight than others and, if so, which factors and how much weight? Would a same sex relationship ever qualify?²⁹ If so, would it matter which gender was in question?³⁰ How would the court treat the not uncommon case of the elderly female housekeeper who performs domestic services for an elderly widower for little or no compensation hoping for some testamentary benefit? The commentators have paid no detailed attention to the issue, but Professors Hovius and Youdan would look for "relationships in which there is similar [to spousal] integration of the parties' lives and economic well-being".³¹ Professor Scane would look for those relationships "characterized by a high degree of vulnerability of each party to lack of decency of behaviour by the other"³² or "adjudged to have reached a degree of commitment between the parties which makes the plaintiff highly vulnerable to economic and emotional damage on termination of the relationship".³³ It may be in the end that this quality of domestic vulnerability, for all of its generality and imprecision, is all that the courts are, and should be, looking for in order to apply the new restitutionary dispensations made available in *Peter v. Beblow*.

Quantification

If the court concludes that there has been an enrichment, a deprivation and an absence of juristic reason, the next question that will inevitably arise is the standard by which to measure the level of compensation to be awarded the plaintiff.

As McLachlin J. herself pointed out,³⁴ "the debate centres on whether it is sufficient to look at the value of the services which the claimant has rendered (the 'value received' approach), or whether regard should be had to the amount by which the defendant's property has been improved (the 'value survived' approach)".³⁵ The view of the majority was that before this question may be answered, a court must make up its mind whether to grant a monetary remedy

²⁸ *Supra*, footnote 1, at pp. 1014 (S.C.R.), 633 (D.L.R.), 361 (W.W.R.).

²⁹ *Cf. Anderson v. Luoma* (1986), 50 R.F.L. (2d) 127 (B.C.S.C.). See also, *Forrest v. Price*, unreported, B.C. S.C., Vancouver Registry, No. C913542, Nov.3, 1992.

³⁰ This is not necessarily an unimportant consideration. In *Peter v. Beblow* both McLachlin and Cory JJ. were guided in part to their conclusions by the reasoning in *Moge v. Moge*, [1992] 3 S.C.R. 813, (1992), 99 D.L.R. (4th) 456. This decision involved a specific acknowledgement of the feminization of poverty in Canada.

³¹ *Op. cit.*, footnote 7, p. 129.

³² *Loc. cit.*, footnote 21, at p. 286.

³³ *Ibid.*, at p. 296.

³⁴ *Supra*, footnote 1, at pp. 998 (S.C.R.), 651 (D.L.R.), 349 (W.W.R.).

³⁵ This is the terminology used by Birks, *op. cit.*, footnote 10.

or to declare a constructive trust.³⁶ If, upon analysis, the court concludes that a constructive trust is to be declared, it follows from the proprietary nature of the remedy that the court will calculate, by reference to the extent of the plaintiff's contributions, the proportionate amount by which the defendant's property has been enhanced in value over the course of the relationship. If, by contrast, the court has concluded that a monetary award is adequate to compensate the plaintiff, it is appropriate, the majority holds, to use the value received approach. What is not canvassed here is what might be described as the middle ground. It is plausible to envisage a situation where a constructive trust is not declared, but where a court might nonetheless wish to calculate the monetary award by reference to the "value survived" approach. Some of the commentators, in particular Professor Scane,³⁷ have argued convincingly that in "tantamount to spousal" cases it will rarely be appropriate, and sometimes impossible, to take a fee-for-service approach to the value of contributions made by a plaintiff. Such an accounting would often not be realistic, given the complex economic interplay which characterizes such cases. Yet no supporter of this position takes the view that a constructive trust, for this reason, must always follow.³⁸

Cory J. for the minority took a different view from any of those canvassed so far. In company with McLachlin J. he would first determine whether a monetary award should be made, or a constructive trust declared. He was, however, so convinced in this case that a constructive trust should be declared³⁹ that he did not advert to how a court might go about quantifying a monetary award. Having decided on constructive trust Cory J. was prepared to countenance a process of which McLachlin J. specifically disapproved, namely, to quantify the extent of the trust by reference to value received. He stressed the need for flexibility, principally because the cost of retaining expert evidence as to the value of property might be beyond the reach of the parties and, at times, impractical. But overall he was in favour of the value survived approach because of the nature of the relationship in question.

Ironically, in restoring the award of the trial judge, the court upheld a process based on a calculation of value received in conjunction with set-off. But in both judgments it is made plain that the extent of the trust so declared was approved because it coincided with the court's view of what the plaintiff's contributions were to the surviving value of the defendant's assets taken as a whole.

³⁶ The court's view of this will be discussed *infra*.

³⁷ *Loc. cit.*, footnote 21, at pp. 279-287. See also I. Narev, *Unjust Enrichment and De Facto Relationships* (1991), 6 *Auckland U. Law Rev.* 504, at pp. 528-529. *Cf.* J.G. McLeod, *Case Comment: Peter v. Beblow* (1993), 44 *R.F.L.* (3d) 396, at p. 403. Hovius and Youdan, *op. cit.*, footnote 7, pp. 138-139, see a place for the value received approach, but would take into account in its calculation the opportunity cost to the plaintiff in making her or his contributions.

³⁸ See *Everson v. Rich* (1988), 53 *D.L.R.* (4th) 470, 71 *Sask. R.* 133 (*Sask. C.A.*).

³⁹ For reasons discussed *infra*.

Set-Off

The question of quantification of the defendant's enrichment will, in a typical case, also involve an analysis of whether, and if so to what extent, the plaintiff has received benefits from the defendant. Indeed, it is possible that each party may have so enriched the other that neither, in the event of a claim and counterclaim, would receive an award. In the Court of Appeal, in *Peter v. Beblow*,⁴⁰ this concept may have led the panel to the conclusion, held to be erroneous both in law and on the facts, that the plaintiff had not been deprived, even though the defendant had been enriched. In the Supreme Court of Canada, as has already been noted, the trial judge's decision was upheld. Part of that decision consisted of taking into account the benefits the plaintiff had received from the defendant. These appear to have been, principally, living rent-free in the defendant's house and the enjoyment of other household subsidies emerging out of the defendant's income. The extent of the constructive trust over the defendant's assets was reduced accordingly.

There does not appear to be much, if any, dissent in the cases or in the journals that this process of balancing ought to take place, but what does not seem to be addressed anywhere is the question of whether the benefits received from the defendant are to be quantified by reference to the value received or value surviving approach, or a combination of the two. If, as is usually the case, the plaintiff has little or no property to which the value surviving calculation could be applied, the practical answer is easier, if not necessarily simple. The only thing the court can do is decide, on a value received basis, the amount by which compensation should be reduced. On the other hand it is possible to envisage the following case. A plaintiff, who already owns property, enters a relationship. She undertakes a household role and thus enables the defendant to increase the value of his holdings. The terms of the relationship are that the plaintiff lives rent-free and pays no household expenses. The plaintiff is able to have a job, and by reason of the terms of the relationship is able to devote a substantial portion of her income to improving her investment position. Assuming that the plaintiff is able to make out a case for unjust enrichment against the defendant, the question may then arise as to how to value the benefits received by the plaintiff. Does the court simply quantify the savings made on rent and other expenses, or does the court calculate what proportion of the plaintiff's assets, as they are now worth, are attributable to the contributions made by the defendant? It is worth noting in passing that the issue could have arisen in *Peter v. Beblow*. Upon the termination of the relationship the plaintiff owned land worth \$6,000, having acquired it out of her part-time earnings accumulated during the relationship. Although this was regarded as significant in the Court of Appeal,⁴¹ the trial judge had paid no attention to it and the Supreme court of Canada did not seem to regard it as important.⁴²

⁴⁰ *Supra*, footnote 1.

⁴¹ *Supra*, footnote 1.

⁴² This may have been because there was no evidence or argument that would justify the conclusion that the property emerged out of any benefit conferred by the defendant on the plaintiff.

The Remedy Itself

It has already been noted that, when a case of unjust enrichment has been made out, a court may award either money or the proprietary remedy of constructive trust.⁴³ In *Peter v. Beblow* the issues emerging out of this choice were a major preoccupation. Two distinct questions may be identified. First, is it appropriate to go beyond an award of money and declare a constructive trust? Secondly, what is the nature of the constructive trust as a phenomenon? It is a matter of notoriety that neither of these questions is new for the Supreme Court, and *Peter v. Beblow* can take its place as an important decision in the line of cases that have proclaimed a distinctively Canadian position in this area.

(1) *Money or Constructive Trust*

The question whether following unjust enrichment a constructive trust should be imposed has been considered in a number of Supreme Court of Canada cases. Principal among these are *Sorochan v. Sorochan*,⁴⁴ and *LAC Minerals Ltd. v. International Corona Resources Ltd.*⁴⁵ The issue has caused much debate because of the proprietary nature of the constructive trust, the principal (although not the only) attribute of which is that it gives the plaintiff priority over the general creditors of the defendant, as well as over most third-party transferees. What has made the debate more complicated is that the issue can arise in a purely commercial context or in a domestic case. There has been a tendency for the different realities of these two situations to lead to diverse views about whether the same considerations ought always to govern the decision to impose or withhold a constructive trust.

In *Sorochan v. Sorochan*⁴⁶ Dickson C.J.C. held that "[w]hile it is important that some nexus exist between the claimant's deprivation and the property in question, the link need not always take the form of a contribution to the actual acquisition of the property". A contribution relating to the preservation, maintenance or improvement of property may also suffice. This is a statement of the requirement of "causal connection". At the same time Dickson C.J.C. referred to the plaintiff's "reasonable expectation" - justifying a constructive trust - that she would obtain an interest in the property in question. It had not, up to the point of *Peter v. Beblow*, been made plain by the court whether both causal connection and reasonable expectation are required, or whether one or the other will suffice.⁴⁷

In *LAC Minerals Ltd. v. International Corona Resources Ltd.*,⁴⁸ a commercial case, causal connection was not the issue, as the defendant's breach of

⁴³ The choices are, in reality, more diverse than this statement would tend to suggest. See Hovius and Youdan, *op. cit.*, footnote 7, pp. 141 *et seq.*

⁴⁴ *Supra*, footnote 26.

⁴⁵ [1989] 2 S.C.R. 574, (1989), 61 D.L.R. (4th) 14.

⁴⁶ *Supra*, footnote 6, at pp. 50 (S.C.R.). 10 (D.L.R.).

⁴⁷ See K.B. Farquhar, Causal Connection in Constructive Trust After *Sorochan* (1989), 7 Can. J. of Fam. Law 337. Cf. Scane, *loc. cit.*, footnote 21, at p. 302.

⁴⁸ *Supra*, footnote 45.

confidence was clearly linked to its acquisition of the property in question. The reasonable expectation, if any, of the plaintiff was not referred to. La Forest J., speaking⁴⁹ for the majority on the issue of whether to award a constructive trust, identified the trust as a very special remedy, to be awarded only "if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property". These were identified as (a) priority for the plaintiff in the event of the defendant's bankruptcy, (b) the desirability of changes in the value of the property accruing to the plaintiff, and (c) condemnation of the moral quality of the defendant's activities. These matters were categorized by McLachlin J. in *Peter v. Beblow* as going to the "inadequacy"⁵⁰ or "insufficiency"⁵¹ of monetary compensation.

For the purposes of exposition it is appropriate, in connection with what *Peter v. Beblow* appears to hold on this point, to refer first to the minority judgment of Cory J. For him, the most significant premise was that domestic cases should be treated differently from commercial cases, and that constructive trusts ought to be imposed more readily in the former than in the latter.⁵² He accepted that there must be both causal connection and reasonable expectation for a constructive trust, and also acknowledged the special nature of the remedy. In commercial cases there ought to be a strict insistence on proof of causal connection and a clear demonstration of the inadequacy of a monetary remedy.⁵³ A commercial plaintiff does not necessarily, by the nature of his or her dealings, expect to be awarded an interest in property vested in the defendant given that, in such dealings, there is a heightened awareness of commercial risk. But the situation is very different in domestic cases. Two passages in the judgment of Cory J. are revealing in this regard. First, he states that "in a family relationship the work, services and contributions provided by one of the parties need not be clearly and specifically linked to a specific property".⁵⁴ Secondly, "[t]he remedy provided by the constructive trust seems to best accord with the reasonable expectations of the parties in a marriage or quasi-marital relationship".⁵⁵ For Cory J., in effect, the plaintiff in a domestic case who is able to establish an unjust enrichment is entitled to the benefit of further presumptions or inferences. It will be inferred that the enriching contributions of the plaintiff were causally connected to all assets in the hands of the defendant, without the plaintiff having to prove a connection between particular contributions and particular assets. It will also be inferred that a monetary remedy is inadequate, because the benefits of a constructive trust are what the plaintiff would reasonably expect. At the same time he acknowledges that these inferences

⁴⁹ *Ibid.*, at pp. 678 (S.C.R.), 51 (D.L.R.).

⁵⁰ *Supra*, footnote 1, at pp. 997 (S.C.R.), 650 (D.L.R.), 348 (W.W.R.).

⁵¹ *Ibid.*, at pp. 999 (S.C.R.), 652 (D.L.R.), 350 (W.W.R.).

⁵² He was reiterating here a view he had expressed firmly in the Ontario Court of Appeal in *Murray v. Roty* (1983), 147 D.L.R. (3d) 438, 41 O.R. (2d) 705.

⁵³ In accordance with the prescripts of La Forest J. in *LAC Minerals Ltd. v. International Corona Resources*, *supra*, footnote 45.

⁵⁴ *Supra*, footnote 1, at pp. 1020 (S.C.R.), 638 (D.L.R.), 366 (W.W.R.).

⁵⁵ *Ibid.*, at pp. 1023 (S.C.R.), 639-640 (D.L.R.), 368 (W.W.R.).

would weaken or disappear in the case of a relationship of short duration or where there are no assets surviving the relationship. More to the point, he would take a different, less plaintiff-oriented approach in cases where the rights of *bona fide* third parties would be affected. This is the view of Professors Hovius and Youdan.⁵⁶ They seem prepared to apply rules in domestic cases different from those applicable in commercial cases, except where the rights of third parties are involved. The presence of such parties would, for them, require the court to evaluate the position of the plaintiff from a more commercial perspective. Causal connection to specific property would have to be proved, and the plaintiff would have to demonstrate that he or she did not make the relevant contribution in the role of a creditor.

This brings us to the judgment of McLachlin J. for the majority. Out of a concern to maintain doctrinal integrity - a concern she has emphasized elsewhere⁵⁷ - she proceeded from the premise that unjust enrichment ought not to be divided into commercial and family categories for the purpose of determining whether a constructive trust lies. Yet in the result her analysis does not bring her to a position so different from that of Cory J. It is true that in a family case, as in other cases, she would insist on proof that monetary compensation is inadequate and that there be a link between the plaintiff's contributions and the property in which the trust is claimed. But at the same time she defines monetary insufficiency by reference to causal connection. She states that "[w]here a monetary award is insufficient in a family situation, this is usually related to the fact [that] the claimant's efforts have given her a special link in the property, in which case a constructive trust arises".⁵⁸ She also agrees with Cory J. that "the courts should exercise flexibility and common sense when applying equitable principles to family law issues with due sensitivity to the special circumstances that can arise in such cases".⁵⁹

Bringing her even closer to the view of Cory J. is her only partly stated assumption that the plaintiff by her contributions had established a causal connection to all the assets in the hands of the defendant. These were referred to as family assets, and the plaintiff was awarded a constructive trust over the house and land because their value represented the proportional contribution of the plaintiff to the domestic enterprise. Interestingly, however, McLachlin J. does not refer to the concept of "reasonable expectation" in any part of her analysis on granting a constructive trust. Thus we are left where we were after *Sorochan v. Sorochan*.⁶⁰ In order to obtain a constructive trust - assuming the court is satisfied as to the insufficiency of a monetary remedy - need the plaintiff

⁵⁶ *Op. cit.*, footnote 7, at pp. 145 *et seq.*

⁵⁷ See *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, (1991), 61 B.C.L.R. 1. See also her dissenting opinion in *Rawluk v. Rawluk*, [1990] 1 S.C.R. 70, (1990), 65 D.L.R. (4th) 161.

⁵⁸ *Supra*, footnote 1, at pp. 997 (S.C.R.), 650 (D.L.R.), 348 (W.W.R.). Insufficiency might also be established where there is concern that a monetary award would not be paid.

⁵⁹ *Ibid.*, at pp. 997 (S.C.R.), 650 (D.L.R.), 349 (W.W.R.).

⁶⁰ *Supra*, footnote 6.

prove one or other of causal connection or reasonable expectation, or must both be established? Or is the position now that when monetary insufficiency and causal connection are established, "reasonable expectation" is either assumed or is irrelevant?

The Canadian commentators have on the whole tended to the view that the economic and social reality of a domestic case is different enough from that arising in a commercial setting that indeed there ought to be different rules - or at least different assumptions - about the award of a constructive trust.⁶¹ Professor Scane's analysis⁶² is similar to that adopted by Cory J. It should be rebuttably presumed in a domestic case, after unjust enrichment has been established, that the plaintiff expected to share in all of the assets in the hands of the defendant. At the same time it should also be rebuttably presumed that the plaintiff expected⁶³ a proprietary remedy rather than an award of money. Professor Paciocco has argued⁶⁴ that logic requires that domestic cases be treated differently from commercial cases. The most important aspect of the constructive trust is the priority that it gives to the beneficiary, so the desirability of awarding a constructive trust ought to be analyzed only from that standpoint. In domestic cases the concept of causal connection, generously interpreted, will identify a broad array of property in the hands of the defendant that ought to be protected from general creditors. In commercial cases, by contrast, the plaintiff should be protected only in cases where specific property or its proceeds (ascertained by ordinary tracing rules) may be identified in the hands of the defendant as the product of the unjust enrichment. But the court must go further and evaluate whether the plaintiff accepted the role of general creditor. In domestic cases it should be rebuttably presumed that she or he did not. In commercial settings each case must be examined on its own merits.

(2) *The Constructive Trust as Truly Remedial*

After *Pettkus v. Becker*⁶⁵ the Supreme Court of Canada developed and expanded the principle that the constructive trust, following unjust enrichment,⁶⁶ was a remedy and not a substantive right. The chief implication of this position is that, because it is remedial, it cannot arise until a court has made the

⁶¹ The views of Hovius and Youdan, *op. cit.*, footnote 7, on this point have already been set out; see text following footnote 56, *supra*.

⁶² *Loc. cit.*, footnote 21.

⁶³ Scane, *ibid.*, at p. 302, is of the opinion that the concept of "reasonable expectation" in conjunction with the presumptions, may be more appropriate than causal connection or the insufficiency of the monetary remedy. He does not, however, *ibid.*, at pp. 299-301, take it for granted that plaintiffs should always receive priority over general creditors.

⁶⁴ D.M. Paciocco, *The Remedial Constructive Trust: A Principled Basis for Priorities Over Creditors* (1989), 68 Can. Bar Rev. 315.

⁶⁵ *Supra*, footnote 2.

⁶⁶ The status of the constructive trust in non-restitutionary situations is still uncertain. See Paciocco, *loc. cit.*, footnote 64, at p. 318, and the authorities cited by him. For an account of constructive trust situations seen as non-restitutionary and substantive, see D.J. Hayton, *Constructive Trusts: Is the Remedying of Unjust Enrichment a Satisfactory*

appropriate ruling. Thus, unless the court exercises a discretion to make the order retroactive, third-party dealings with the property in question, prior to the order, may place the plaintiff at risk. If, by contrast, the constructive trust is seen as substantive, it would arise at the moment of the unjust enrichment and the plaintiff would thereafter be protected by its proprietary nature. The truly remedial nature of the constructive trust following unjust enrichment seemed to be cemented by the decision in *LAC Minerals Ltd. v. International Corona Resources Ltd.*,⁶⁷ and as a result the decision in *Rawluk v. Rawluk*⁶⁸ came as a surprise. The latter case has been the subject of extensive analysis elsewhere,⁶⁹ but the point at issue has been encapsulated as follows:⁷⁰

The majority [in *Rawluk*] took the view that, while in common law Canada the constructive trust is undeniably a remedy, the constructive trust rights originate as of the date of the contribution or, as an alternative expression of the same thing, when the unjust enrichment takes place or commences. But how could that be, said the minority, in view of the fact that the court has a complete discretion as to the remedy it thinks appropriate for the purposes of rectifying unjust enrichment, and it is the court alone that will determine whether the appropriate remedy is *in rem* restitution.

It is of considerable importance that Cory J. spoke for the majority in *Rawluk*, while McLachlin spoke for the minority. Thus it is pertinent to inquire whether, in *Peter v. Beblow*, there is any indication that Cory J. may have had a change of view as to the truly remedial nature of the constructive trust that may emerge out of unjust enrichment. It is suggested here that he may well have done so, even though the facts did not involve any prior third-party dealings with the property in question and it was not necessary to address directly the issue of when the trust arose. The significant passage in his judgment states that:⁷¹

The remedy provided by the constructive trust seems to best accord with the reasonable expectations of the parties in a marriage or quasi-marital relationship. Nevertheless, in situations where the rights of *bona fide* third parties would be affected as a result of granting the constructive trust remedy it may well be inappropriate to do so.

He goes on to say that “[i]t follows that in a quasi-marital relationship in those situations where the rights of third parties are not involved, the choice between a monetary award and a constructive trust will be discretionary and should be exercised flexibly”.⁷² While these observations are *obiter*, the fact that Cory J. takes the opportunity to refer to the complicating issue of third parties may bring

Approach, in Youdan, *op. cit.*, footnote 21, p. 205. D.M. Waters, *The Constructive Trust in Evaluation: Substantive and Remedial* (1990), 10 Est. and Tr. J. 334, has long taken the position that the concept of unjust enrichment lies behind all constructive trusts.

⁶⁷ *Supra*, footnote 45.

⁶⁸ *Supra*, footnote 57.

⁶⁹ See, for example, Waters, *loc. cit.*, footnote 66, and J.G. McLeod, Annotation to *Rawluk v. Rawluk* (1990), 23 R.F.L. (3d) 338.

⁷⁰ Waters, *ibid.*, at p. 352.

⁷¹ *Supra*, footnote 1, at pp. 1023 (S.C.R.), 639-640 (D.L.R.), 368 (W.W.R.).

⁷² *Ibid.*

the unjust enrichment constructive trust to truly remedial status. If this is so, the views of McLachlin J. in *Rawluk* will be vindicated.⁷³

Summary

Peter v. Beblow represents a significant advance from positions staked out in *Pettkus v. Becker*,⁷⁴ *Sorochan v. Sorochan*,⁷⁵ *LAC Minerals Ltd. v. International Corona Resources Ltd.*⁷⁶ and *Rawluk v. Rawluk*.⁷⁷ In cases of domestic relationships and unjust enrichment, there are now presumptions in favour of plaintiffs that will make it increasingly difficult for defendants to resist a claim. It will be presumed that a person who performs domestic services enriched the defendant, and was herself or himself deprived in the absence of adequate compensation. More significantly it will be presumed that these services were not rendered as a gift, and it has been made plain that if domestic partners are not married, there is no obligation in law or equity or by statute to provide the services. Thus it will be presumed that there is an absence of juristic reason for the enrichment and deprivation.

The question of quantification of the compensation has been addressed directly, with a heavy vote in favour of the "value surviving" approach when a constructive trust is awarded. It is not quite so clear whether the "value received" approach will be more popular in the case of monetary awards or calculations of set-off, but logic suggests that either of the approaches could and should be available to courts in future.

The court has left open for case-by-case analysis the crucial issue of when domestic services will be seen to be rendered in a relationship tantamount to spousal, but the economic and emotional vulnerability of the plaintiff will surely form part of any future judicial evaluation.

Despite the laudable concern by McLachlin J. that we should not have a fragmented jurisprudence on the award of constructive trust following unjust enrichment, it seems inevitable that domestic cases will continue to be viewed differently from commercial cases. It will simply be easier for a plaintiff in a domestic case to secure a constructive trust over a potentially broad array of property in the defendant's hands. Third parties, however, may or may not be placed at greater risk.

Lastly, *Peter v. Beblow* may very well have ended the debate on whether the constructive trust that follows unjust enrichment is substantive or remedial. The process that began with *Pettkus v. Becker* may have been completed, and a Canadian remedy unique in the Commonwealth, finally fashioned.

⁷³ The question whether *Peter v. Beblow* has any impact on the *Rawluk* ruling that the doctrine of unjust enrichment and constructive trust may co-exist with matrimonial property legislation is discussed by J.G. McLeod, Case Comment (1993), 44 R.F.L. (3d) 396.

⁷⁴ *Supra*, footnote 2.

⁷⁵ *Supra*, footnote 6.

⁷⁶ *Supra*, footnote 45.

⁷⁷ *Supra*, footnote 57.

NEGLIGENCE - DEFENCES - EX-TURPI CAUSA NON ORITUR
 ACTIO - VOLENTI NON FIT INJURIA - THE PURPOSE OF
 NEGLIGENT ACCIDENT LAW: *Hall v. Hebert*

Lewis Klar*

Introduction

Vince Hall, 19, and his friend, Jean Hebert, 20, went to a house party in Gold River, British Columbia, on a Friday evening, in July 1986. Hall walked to the party; Hebert got there in his 1968 souped-up Pontiac Firebird.¹ They both drank beer at the party. The party broke up at about 1:30 or 2:00 on Saturday morning, but neither Hall nor Hebert was in the mood to go home. The young men drove around for a while in Hebert's car, with Hebert doing the driving. They parked at a baseball field, where the young men finished the remainder of their beer. They were, at that point in time, "quite and equally, drunk".² They drove on towards Graveyard Road, a narrow, gravelled road which went uphill a short way until it ended at a graveyard. Part way up the hill itself, the key fell out of the ignition,³ and onto the floor.⁴ Shortly thereafter, the car stalled. The young men, without actually starting the car, were able to turn it around so that it faced downhill. Their plan was to "roll" start the car.⁵ Hall asked Hebert if he could do the driving. Hebert agreed. Hall took the driver's seat, Hebert the passenger's.⁶ The roll start worked; but Hall lost control of the car. It sped

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I would like to thank my colleagues Professors Bruce Ziff and Gerald Robertson for reading over a draft of this comment and for their very useful suggestions.

¹ The car, as described, came equipped with a 350 cubic inch engine, and had been modified so as to increase its power and speed capability.

² As found by the trial judge, and not disputed by the higher courts.

³ Apparently the ignition panel had been modified so that the key could be removed from the ignition without having to turn the engine off.

⁴ Where the key went seems somewhat of a mystery. The trial judge assumed that it fell onto the floor of the car, even though the boys apparently could not find it when they looked for it. In the Court of Appeal judgment, one judge notes that Hebert stated that the key fell onto the road. How this could happen eludes me, unless of course the door of the car was open at the time.

⁵ As explained by the trial judge, a car is roll started by moving it while it is in gear, with the clutch depressed. When the vehicle reaches the desired speed, the driver releases the clutch. This causes the power from the rolling drive wheels to turn the engine over and start the car.

⁶ This was Hebert's version of the events, one which was disputed by Hall. The vital issue as to who was actually driving the car at the time of the accident was much in dispute and was not resolved with much certainty at the trial. Hall's position was that he did not drive and that Hebert did all the driving. Hall remembered nothing about the accident until a few days after it occurred. The trial judge held that since Hebert was the owner of the car and had driven earlier, the "burden of proving" who was driving fell on him, and not, as one might have expected, on Hall, the plaintiff. Hebert, however, was found to have met "the evidentiary inference" raised against him. The trial judge was able to conclude, after examining all the evidence, that Hebert's testimony, as to who was driving, was "probably

downhill, went off the road down a 30 foot vertical drop into a gravel pit. It landed upside down. The two passengers, neither of whom had been wearing seat belts, were able to walk away from the accident. Later it was discovered that Hall had suffered head injuries in the accident, which impaired his powers of recollection.

Hall sued Hebert, alleging that Hebert had been negligent in allowing him to drive Hebert's car.⁷ The trial judge upheld the plaintiff's action, finding that Hebert "had a primary obligation to remain sober enough to preserve his ability to drive or his ability to determine the plaintiff's or any other person's ability and competence to drive before delivering care and control of his car to him".⁸ Stated in this way, Hebert's own intoxication at the time of permitting Hall to drive could not exonerate him from liability.⁹ Turning next to the defence of *ex turpi causa*, the trial judge reasoned that, the parties not being engaged in a joint criminal enterprise at the time of the accident, the defence could not be successfully invoked in this case.¹⁰ The defence of *volenti non fit injuria* was not discussed in the judgment. The court concluded that both parties were at fault, and because the defendant's duty not to become impaired and allow his car to be driven by an incompetent person was seen as an "overriding" one, the liability was apportioned 75% against the defendant, 25% against the plaintiff.

The Court of Appeal, in a unanimous decision, reversed and exonerated the defendant.¹¹ The court rejected the notion that there is "a kind of at large, continuing duty of sobriety upon an owner [of a car] or upon any other person having charge in place of the owner".¹² Gibbs J.A. admitted that there is a duty not to permit another person to operate one's car *when one knows* that the other person is not in a fit condition to do so. However, these were not the facts in this case.

The defence of *ex turpi causa* also would have prevented the plaintiff from succeeding in his action at the Court of Appeal. According to Gibbs J.A., the

truthful", and that Hall drove at the time of the accident. Hall, on the other hand, was less believable, especially since he apparently later offered Hebert \$2000 to say that Hebert was the driver at the time of the accident.

⁷ It is not apparent from the trial judgment how this allegation of negligence came to be. Since Hall had essentially been contending that Hebert was the driver, the allegation that Hebert was negligent in allowing Hall to drive had to have been made either as an alternative ground in the Statement of Claim, or as an amendment to the pleadings.

⁸ See *Hall v. Hebert* (1991), 53 B.C.L.R. (2d) 201, at p. 205, 6 C.C.L.T. (2d) 294, at p. 299 (B.C.C.A.), per Gibbs J.A., citing the trial judgment.

⁹ The trial judge found that the parties were "equally incapable of sober decision when the plaintiff asked and was permitted to drive". Thus, the defendant's negligence had to relate to some earlier breach.

¹⁰ The court took a very narrow view of the defence. According to the reasoning, the illegality of drinking in a public place, or in a car, was over by the time the car was turned over to the plaintiff. Also, the trial judge did not consider a breach of the Liquor Control Act, R.S.B.C. 1979, c. 237, s. 42, to be of such "moral gravity" to allow the defence to succeed.

¹¹ *Supra*, footnote 8.

¹² *Ibid.*, at pp. 205 (B.C.L.R.), 299 (C.C.L.T.).

defence, which, as was noted, has played a decisive role in several recent tort cases involving personal injuries,¹³ preserves the dignity of our legal system by refusing to lend its assistance to a plaintiff whose claim is sufficiently tainted with criminality or culpable immorality. Gibbs J.A.'s statement that "[f]air-minded, right-thinking people would be outraged if the Court lent its assistance to this drunk driver to recover damages from his drunk passenger"¹⁴ encapsulates the Court of Appeal's sentiment.¹⁵

The Supreme Court of Canada reversed the Court of Appeal, and restored the trial judgment.¹⁶ I would like to focus on three topics which flow from the Supreme Court's decision. First, what is the fate of the defence of *ex turpi causa* for Canadian negligence law involving accidents? Second, does the defence of *volenti non fit injuria* any longer have a useful role to play in this area? Third, what is contemporary negligent accident law all about?

The Abolition of the Ex Turpi Defence

As a result of *Hall v. Hebert*, the defence of *ex turpi causa* has been virtually eliminated from tort actions in negligent accident cases in so far as compensation for a wrongdoing plaintiff is concerned.

The majority judgment on this aspect of the case was written by McLachlin J., and concurred in by La Forest, L'Heureux-Dubé and Iacobucci JJ. Although

¹³ Gibbs J.A. mentioned *Mack v. Enns* (1983), 44 B.C.L.R. 145, 25 C.C.L.T. 135 (B.C.C.A.); *Tallow v. Tailfeathers* (1973), 44 D.L.R. (3d) 55, [1973] 6 W.W.R. 732 (Alta. C.A.); and a few other earlier cases. He might also have noted the defence's application in both the trial judgment and Court of Appeal judgment in *Norberg v. Wynrib* (1988), 50 D.L.R. (4th) 167, [1988] 6 W.W.R. 305 (B.C.S.C.), aff'd. (1990), 66 D.L.R. (4th) 553, [1990] 4 W.W.R. 193 (B.C.C.A.), rev'd., [1992] 2 S.C.R. 226, (1992), 92 D.L.R. (4th) 449, [1992] 4 W.W.R. 577; *Mongovius v. Marchand* (1988), 44 C.C.L.T. 18 (B.C.S.C.); *Johnson v. Royal Can. Legion*, [1988] 4 W.W.R. 267, (1988), 26 B.C.L.R. (2d) 124 (B.C.C.A.).

¹⁴ *Supra*, footnote 8, at pp. 211 (B.C.L.R.), 306 (C.C.L.T.).

¹⁵ Southin J.A., in a separate judgment, held that *ex turpi* had no role in tort law. However, she stated, *ibid.*, at pp. 215 (B.C.L.R.), 309-310 (C.C.L.T.):

... as a matter of sound public policy, no person who injures himself by his own criminal act should be able to recover damages from the person who entrusted to him, or sold to him, the instrumentality by which he both committed the crime and injured himself.

She used the analogy of a robber who accidentally shot himself suing the person who gave him a revolver, a drug addict who gets sick from heroine suing his supplier, and a rapist suing his victim if she gave him a sexually transmitted disease. The last example is bizarre and offensive. The implication is that rape victims, like sellers of firearms or drug suppliers, have in some way voluntarily participated in the crime. Moreover, the argument that *ex turpi* has no role in tort, but that "public policy" prevents certain victims from suing, seems inconsistent.

¹⁶ *Hall v. Hebert*, [1993] 2 S.C.R. 159, (1993), 101 D.L.R. (4th) 129, 15 C.C.L.T. (2d) 93. As has been typical with almost all recent Supreme Court of Canada rulings in tort cases, there were several written judgments. This makes the task of summarizing "what the Court said" somewhat perilous. In this case, there were four separate judgments from the seven Justice panel.

the majority did not expressly abolish the defence, and in fact, reaffirmed its role in certain exceptional instances, these exceptions are so trivial that the defence has now become a non-issue in negligent accident cases.

McLachlin J. stated that the defence of *ex turpi* can be applied for only two general reasons. The primary one is to prevent a plaintiff from profiting from his or her illegal or wrongful conduct. Put in a broader context, tort law should not be seen as rectifying or validating conduct which is viewed elsewhere in the law, that is criminal or contract law, as illegal. In this respect, it was McLachlin J.'s view that compensating a victim for personal injuries suffered in an accident as a result of the defendant's negligence cannot be seen as rectifying the plaintiff's own participation in the illegal activity. According to this view, compensating for injuries is not the same thing as allowing a wrongdoer to profit from an illegal transaction, and a tort award for damages does not validate the plaintiff's participation in an activity which may otherwise be punishable by the law.

McLachlin J. would allow for the defence's application in negligent accident cases only in certain extremely limited instances. One example given by McLachlin J. to illustrate a possible application of the defence would be the case of a plaintiff injured in an accident being barred from claiming for his loss of earnings if these earnings would have been gained in an illegal occupation. Thus, for example, a bookie injured in a car accident would not be able to claim as part of his damages earnings lost as a result of being unable to carry on as a bookie. McLachlin J. would not want to assist, even indirectly, the plaintiff from profiting from his illegality.¹⁷ A second example given by McLachlin J. would be the use of *ex turpi* to deprive an injured plaintiff of the non-compensatory aspect of his damage claim; namely, his award of punitive or exemplary damages. Thus, for example, a burglar injured in a burglary attempt by the tortious conduct of the defendant, while being able to receive full compensation damages, might be deprived of any punitive damages because of the principle of *ex turpi*.¹⁸

McLachlin J.'s second reason for applying the defence also accords with her desire for "essential harmony" in the law. Tort law should not be used in order to allow a wrongdoer to evade a sanction imposed upon him by criminal law. Thus, for example, a burglar who is caught due to his partner's negligence, should not be able to sue his co-felon to recoup the costs of his fine. This type of problem has no relevance to a claim for compensation for injuries suffered in an accident.¹⁹

¹⁷ Aside from this type of claim being highly unlikely to arise, it seems to me that it is not about *ex turpi* at all, but about the principles of damage assessment. The wrong in this case, for example being a bookie, did not give rise to a plaintiff's claim for compensation.

¹⁸ In terms of this exception, I would not agree that awarding punitive damages against a defendant is to allow a wrongdoing plaintiff to profit from his wrong. In any event the example is very hypothetical since punitive damages are not likely to be awarded in negligent accident cases.

¹⁹ This type of situation arose, for example, in *677950 Ontario Ltd. v. Artell Developments Ltd.*, [1993] 2 S.C.R. 443, aff'd (1992), 93 D.L.R. (4th) 334 (Ont. C.A.). In

Cory J., in a separate judgment, concurring in the result, considered and rejected three justifications which frequently have been advanced for the application of the *ex turpi* defence in tort actions. He agreed with McLachlin J. that the first one relating to preventing a wrongdoer from profiting from his illegal act is inapplicable to a tort claim for compensation. Cory J. considered the second justification - applying the defence in tort in order to reinforce the criminal law - as being unfair and unreasonable. The third justification relates to the protection of the integrity of the justice system. It has been argued that "the judicial system's scarce resources should not be employed to allow a plaintiff to recover for injuries suffered during the commission of an illegal or immoral act", and that "it would be unseemly for the court to attempt to resolve some of the issues that arise in such a claim".²⁰ In this context, Cory J. referred to *Norberg v. Wynrib*,²¹ where Sopinka J. quoted with approval the following:

The purpose of the rule today must be to defend the integrity of the legal system, and the repute in which the courts ought to be held by law-abiding members of the community. It is properly applied in those circumstances in which it would be manifestly unacceptable to fair-minded, or right-thinking, people that a court should lend its assistance to a plaintiff who has defied the law.

As to this third justification, Cory J. was ambivalent. Seemingly uncomfortable with the general notion that judges should be allowing personal outrage concerning the plaintiff's conduct to determine the right to compensation, he concluded that none of the three justifications merited the continuation of the *ex turpi* defence in accident cases, and therefore that the defence of *ex turpi causa* should be eliminated from application to tort cases. Whatever "policy" considerations might underlay the defence's application could better be dealt with either through the issue of duty or by apportionment. Ultimately Cory J. concluded that there were no public policy concerns present to deny compensation in this case and that to permit the plaintiff to recover "would not offend or shock the conscience of reasonable right thinking members of the community fully apprised of the facts".²² He was, however, unhappy with the

this case the courts refused to allow a civil action for the payment of a mortgage because the terms of the agreement contravened s. 347 of the Criminal Code, R.S.C. 1985, c. C-46, relating to usurious loans.

²⁰ *Supra*, footnote 16, at pp. 214 (S.C.R.), 152 (D.L.R.), 128 (C.C.L.T.).

²¹ *Supra*, footnote 13, at pp. 316 (S.C.R.), 483 (D.L.R.), 639 (W.W.R.), quoting from Taylor J. in *Mack v. Enns* (1981), 30 B.C.L.R., at p. 345, 17 C.C.L.T. 291, at pp. 300-301 (B.C.S.C.).

²² *Supra*, footnote 16, at pp. 224 (S.C.R.), 158 (D.L.R.), 135 (C.C.L.T.). A difficulty with Cory J.'s approach is the manner in which he cast the defendant's duty. He denied that it was an "overriding" duty, but merely a duty on a person who has care and control of a vehicle not to permit another person who he knows is unfit to drive to take over the control of the vehicle. This overlooks the finding that both parties were "quite and equally drunk", and incapable of sober decision. If, on the other hand, the defendant was sober enough to realize that he was handing his car over to an incompetent driver, the plaintiff was arguably sober enough to have voluntarily assumed the risks, both legal and physical, of such an activity. I will revert to this point later.

unequal apportionment of fault between the parties, and held that both parties ought to have been found equally at fault.²³

Only two of the seven judges were in favour of a continued slightly more meaningful role for the defence of *ex turpi* in tort. Gonthier J., in a very short concurring judgment, while agreeing that the defence ought to be restricted and its application more carefully circumscribed in tort cases, refused to "define exhaustively a priori the circumstances or particular grounds for its application".²⁴ Gonthier J. agreed with Sopinka J.'s view that its role is to defend the integrity of the legal system. Otherwise he agreed with its disposition of this case.

Sopinka J. wrote a dissenting judgment. He re-iterated his *Norberg v. Wynrib*²⁵ view that the defence of *ex turpi* should be employed in order to preserve the integrity of the legal system. Without explaining further, however, he agreed that on the facts of this case to lend assistance to the plaintiff would not bring the administration of justice into disrepute. Thus, he would not have dismissed the plaintiff's action in this case based on *ex turpi*. Having said that, however, Sopinka J. resolved the issue in this case by finding that the plaintiff was owed no duty of care by the defendant. Focusing on the law concerning the duty to assist, Sopinka J. found that the defendant's conduct in this case was a mere nonfeasance. The plaintiff and defendant not being in a commercial relationship,²⁶ Sopinka J. held that to impose a duty of care on the defendant on the facts of this case would represent a "quantum leap" in the common law's approach to the duty to assist issue. Looked at from the "policy" perspective, Sopinka J. reasoned that as a matter of judicial policy, a duty of care is not to be imposed on a defendant when the plaintiff has no "reasonable expectation" that such an obligation of care would exist. This is reflected both in the defences of *volenti non fit injuria* and *ex turpi*. But even apart from these defences, there may be cases in which a plaintiff will be denied a duty based on the absence of his reasonable expectation. This was seen by Sopinka J. as one of these cases, and the existence of a duty was accordingly denied.

The long and short of it is that the defence of *ex turpi*, for all practical purposes, has been eliminated from negligent accident law.²⁷

²³ On this matter, McLachlin J. agreed with Cory J.'s views, and thus liability was apportioned equally. Cory J.'s reasoning again raises questions. The statement that the plaintiff was aware of the dangers and risks when he sought permission to drive the car ignores the finding that he was quite drunk at the time. Let us recall that he could not even remember who was driving. As well, Cory J.'s statement that the plaintiff "must accept responsibility for seeking permission to drive the car and for the manner in which he drove it" comes very close to a *volenti* defence.

²⁴ *Supra*, footnote 16, at pp. 195 (S.C.R.), 138 (D.L.R.), 136 (C.C.L.T.).

²⁵ *Supra*, footnote 13.

²⁶ Sopinka J. saw this as the essential rationale of cases like *Jordan House Ltd. v. Menow*, [1974] S.C.R. 239, (1973), 38 D.L.R. 105, and *Crocker v. Sundance Northwest Resorts Ltd.*, [1988] 1 S.C.R. 1186, (1988), 51 D.L.R. (4th) 321. As will be recalled, these cases imposed a duty on commercial operators to ensure that intoxicated patrons did not pose a danger to themselves.

The Defence of Volenti Non Fit Injuria

Although not in issue in *Hall v. Hebert*, one must consider whether the Supreme court's decision augurs very poorly for the continued survival of the defence of *volenti non fit injuria* in negligent accident law.

Canadian tort jurisprudence over the last several decades has indicated a merging of the defences of *volenti* and *ex turpi*. That is, similar principles and reasoning have been used to justify both defences, and accordingly, where one has been successfully invoked the other frequently also was, or at least could have been. This leads me to suspect that, given the opportunity, the Supreme Court of Canada will be inclined to deal the *volenti* defence the same fatal blow which it dealt *ex turpi*.

Although the superficial analysis of *volenti* has been to look for an "implied" agreement on the part of the parties involved in a reckless activity to accept both the physical and "legal" risks of an activity,²⁸ it is apparent that this agreement analysis is fictional. Drunk youths, criminals, and others engaged jointly in reckless and illegal activities do not impose legal agreements on each other in anticipation of potential law suits which might arise from their activities. Although couched in the technical terms of implied agreements, the real purposes of *volenti* defence have been to allow judges to express their own or societal moral outrage over the illegal activities of wrongdoing victims, and to uphold the common law's respect for the notion of "individual responsibility". That being the case, the Supreme Court's rejection of these ideas in *Hall v. Hebert* as valid and convincing reasons to support an *ex turpi* defence applies with equal force to deny support for a continued *volenti* defence.

On the surface, *Hall v. Hebert* appears to be the paradigmatical *volenti* case, if one has regard to those few cases where the defence has been successfully pleaded. In the leading successful *volenti* case, that of *Miller v. Decker*,²⁹ the defence was applied by the Supreme Court of Canada to the plaintiff, an intoxicated passenger, injured in an automobile accident because he had acted together with the intoxicated driver of the car "in a common purpose", where

²⁷ *Ex turpi* can still be seen as a viable principle in other contexts not involving compensation for a wrongdoing plaintiff. For example, in a post-*Hall v. Hebert* case, *Schwarz v. Wallis*, B.C.S.C., May 21, 1993, a defendant who was the registered owner of a motor vehicle, was not permitted to deny his ownership for liability purposes, even though the car actually belonged to someone else. Ownership was in the defendant's name only as a ruse to enable him to obtain insurance coverage. The court, while finding that the defendant was not the true owner and would not therefore have normally been liable for damages as owner, held that the defendant should not be permitted to benefit from this defence. On the principle of *ex turpi*, a wrongdoer was precluded from setting up his fraudulent conduct as a defence.

²⁸ This stems from the Supreme Court's landmark decisions in *Car & General Insurance Corp. v. Seymour & Maloney*, [1956] S.C.R. 322, (1956), 2 D.L.R. (2d) 369; *Miller v. Decker*, [1957] S.C.R. 624, (1957), 9 D.L.R. (2d) 1; *Lehnert v. Stein*, [1963] S.C.R. 38, (1962), 36 D.L.R. (2d) 159. The concept of "legal risk" was adopted by the court from G. Williams, *Joint Torts & Contributory Negligence* (1951).

²⁹ *Ibid.*

"the drinking of each was an encouragement to the same act in the others".³⁰ Rand J. assumed that had the youths put their minds to the matter there would be no doubt that an assumption of the risks which they could foresee and together created would be the terms of the activity. Their intoxication which existed at the time they embarked upon the last leg of their evening's journey immediately prior to the accident did not qualify the assumption of risk which arose at the commencement of the evening. Concurring with the result, Abbott J. adopted the words of Bird J.A. in the Court of Appeal, that it was "inconceivable" that the plaintiff did not both know the danger and freely and voluntarily accepted the risk.

Applying this to *Hall v. Hebert*, all factors point to *volenti*. The youths were involved in a common purpose, were drinking together, and were jointly engaged in the incidents which both led up to and produced the accident. Moreover, if an "implicit" agreement to accept risks is ever to be found, it surely exists when it is the injured plaintiff himself who initiated the occurrence. The argument that *volenti* could not have been successfully pleaded in this case because the plaintiff was too intoxicated to have assumed the risks can be countered in two ways. First, *Miller v. Decker*, which is still the leading authority, makes it clear that intoxication at this point is irrelevant. Second, if the plaintiff's intoxication prevented him from assuming the risks, the defendant's intoxication equally ought to have prevented him from observing a duty to prevent the plaintiff from driving. If the duty arose at an earlier point in the evening, as stated by the trial judge, the acceptance of the risks could have arisen at that point as well, as indeed happened in *Miller v. Decker*. It is clear, moreover, from Cory J.'s interpretation of the facts that the plaintiff's intoxication could not have prevented the successful invocation of the defence. Cory J. treated both parties as being sufficiently sober *at the time of the accident* to have been aware of the risks of their activity. The defendant was seen as having been negligent for having given his car over to an incompetent driver, despite being aware of the fact that the car was difficult to drive, that the plaintiff had been drinking, was inexperienced and so forth. The plaintiff was held to have been 50% contributorily negligent because he was or should have been aware of his impairment, the dangerous nature of the car and the road, and the problems involved in roll starting it. In other words, contrary to the trial judge's findings, both parties were given the responsibilities and knowledge of a sober person.

In the years following *Miller v. Decker*, the joint venture, or common purpose, rationale has frequently been used to justify the defence's application.³¹ As I have argued elsewhere, however, I am not persuaded that even "joint venture" wrongdoing makes an implied acceptance of legal risks a more plausible finding.³² Rather, it makes the moral reprehensibility involved in

³⁰ *Ibid.*, at pp. 630 (S.C.R.), 2-3 (D.L.R.). There were actually three youths involved in the evening's activities.

³¹ For a list of cases accepting the defence on this basis, see L. Klar, *Tort Law* (1991), footnote 149, p. 325. For cases rejecting the defence's application, see Klar, *ibid.*, footnote 150, p. 325.

³² Klar, *ibid.*

compensating the wrongdoing plaintiff more acute. Thus, underlying *volenti*, as *ex turpi*, has always been a moral judgment.

If moral judgments about compensating wrongdoing plaintiffs are unacceptable bases for denying compensation in so far as *ex turpi* is concerned, they are equally unacceptable bases for denying compensation under the guise of *volenti*. If an implied acceptance of a legal risk is the only basis for the *volenti* defence, then *volenti* ought to be abolished.³³

The Purpose of Negligent Accident Law

The view that negligence law, particularly in cases where liability insurance is extensively carried by defendants, is only a "front" for compensating accident victims, and thereby distributing losses from insurance funds has been prevalent in academic writings, law school lectures, and "knowing" discussions about tort law for decades. An argument, therefore, that fault-based compensation should be based on moral concerns about wrongdoing and not on compensation and loss distribution will undoubtedly come across to most as naive and even heartless. It is an argument, however, which I make.

The Supreme Court of Canada seems to have swung towards the compensation/loss-distribution theory in *Hall v. Hebert* and in some other recent cases. What is interesting about this development is not that some of the judges on the court subscribe to the view that the fault aspect of fault-based compensation should not be accorded a high priority,³⁴ but that this approach has become part of the overt reasoning of some of the judges.

Cory J.'s reasoning in *Hall v. Hebert* illustrates the tilt. In discussing the "essence and aim of tort law", Cory J. emphasizes the compensatory function of tort law. Rather than seeing tort law primarily³⁵ as an expression of the fundamental importance of the value of corrective justice in our legal system, it is seen as a mechanism whereby compensation for injuries can be accommodated. Cory J. states, for example, that "a primary object of the law of torts is to provide compensation to persons who are injured as a result of the actions of others".³⁶ While it is true that Cory J. concedes that the compensation is paid

³³ Some would argue that for all intents and purposes *volenti* has been successfully applied so infrequently that it no longer exists. The problem with this reasoning is that as long as *volenti* is a possible defence, it can be raised, with arbitrary and random consequences. It would therefore be consistent with *Hall v. Hebert* for the Supreme Court to state clearly that, as with *ex turpi*, moral indignation over joint, criminal wrongdoing is an inappropriate reason to invoke *volenti*, that tort law's purpose is to compensate the victims of wrongs, and that implicit agreements to accept legal risks do not exist in the real world. Therefore, *volenti* should be abolished.

³⁴ Presumably this opinion is one which has been held by the judges, as it has by many others, for a long time.

³⁵ Some, like Professor Weinrib, would say "exclusively". See E. Weinrib, *The Special Morality of Tort Law* (1989), 34 McGill L.J. 403; E. Weinrib, *Understanding Tort Law* (1988), 23 Val. U.L. Rev. 486.

³⁶ *Supra*, footnote 16 at pp. 206 (S.C.R.), 141-142 (D.L.R.), 118 (C.C.L.T.). Cory J. refers to academic writings which put compensation in the forefront of tort law's goals.

as a result of the “wrongful” conduct of others, one wonders whether it is the “compensation” or the “wrongful” conduct which he sees as the *raison d’être* of tort.³⁷

In this vein it is instructive to note that although one of the grounds of appeal in *Hall v. Hebert* was the issue of the defendant’s duty, and the nature of his fault, very little attention was paid to this issue by most of the judges in their reasons for judgment. The issue of the defendant’s fault was, for example, not mentioned *at all* by McLachlin J.³⁸ It is also evident that although Cory J. implied his displeasure with the defendant’s conduct,³⁹ and relied on the judicial authorities which have imposed a duty on those who control cars to ensure that impaired persons do not drive them, the issue which preoccupied Sopinka J. and the Court of Appeal, that is, the extent of the duty to prevent a person from harming himself, was not a problem for Cory J. As noted before, he approached the case *as if* the defendant and plaintiff, *at the time of the accident*, were capable of making sober and rational decisions and applied the existing authorities accordingly. It was only Sopinka J., in dissent, who saw the imposition of a duty of care on the defendant as being the critical issue in this case, and the court’s decision to impose liability as a “quantum leap” for Canadian tort law.

If one looks at the property damage and pure economic loss arena, the desire to jettison fault and to replace it with economic analysis as the basis of liability is even more pronounced. One may look for example to the court’s judgment in *C.N.R. v. Norsk Pacific Steamship Co.*⁴⁰ McLachlin J., writing for herself, L’Heureux-Dubé and Cory JJ., referred to the “economic theory” which was advanced in the case in order to determine whether pure economic losses should be recoverable in negligent accident cases. According to McLachlin J., the arguments advanced under this theory “proceed from the premise that a certain

³⁷ Although Cory J. mentions “wrongful” conduct as being linked to compensation, he also in other places in his judgment states that compensation is the primary purpose of tort law without mentioning the requirement of “wrongful” conduct. For example, Cory J. states that “although compensation may be the primary purpose of tort law”; *ibid.*, at pp. 201 (S.C.R.), 142 (D.L.R.), 119 (C.C.L.T.), and further that tort “is based upon the desire to achieve fairness by compensating, in appropriate cases, those who have been injured by the conduct of others”; *ibid.*, at pp. 205 (S.C.R.), 145 (D.L.R.), 121-122 (C.C.L.T.).

³⁸ McLachlin J. discusses the notion of duty based upon reasonable foreseeability in general terms. There is no discussion about what the nature of the defendant’s duty was in this case and how it was breached.

³⁹ Cory J.’s statement of the “factual background” seems to side with the plaintiff. Cory J. notes, for example, that the defendant’s car had “a compelling seductive charm that would attract young men of all ages”, that the plaintiff “had every intention of walking home when the party was over”, that it was the defendant who was doing the drinking at the party and who brought out the beer at the baseball park and “shared these” with the plaintiff, that it was the defendant who had the responsibility of determining the plaintiff’s state of intoxication, and in this respect the defendant’s criterion was “to say the least, relaxed”, and so forth.

⁴⁰ [1992] 1 S.C.R. 1021, (1992), 91 D.L.R. (4th) 289, 11 C.C.L.T. (2d) 1. This was a pure economic loss dispute and therefore raises different issues. However, the general discussion is useful to illustrate the contention that the judges are paying attention to non-fault factors in deciding liability based upon fault.

type of loss *should not be seen in terms of fault* but seen rather as the more or less inevitable by-product of desirable but inherently dangerous (or "risky") activity".⁴¹ Thus, whether to impose liability upon the defendant or let the losses lie with the plaintiff would be determined by considering issues such as insurance, loss spreading, and the contractual allocation of risk. This type of approach would, as conceded by McLachlin J., "arguably amount to a *rejection or diminution of the concept of personal fault on which our law of tort (and the civil law of delict) is based*".⁴² While the economic arguments were ultimately rejected by McLachlin J. they were considered. One of the reasons for their rejection, but not apparently the overriding one, was that the theory "overlooks the historical centrality of personal fault to our concept of negligence or 'delict' ...".⁴³

La Forest J., in his dissenting judgment in *C.N.R. v. Norsk*, which was concurred in by Sopinka and Iacobucci JJ., was unequivocal regarding the role that moral fault should play in deciding issues of recovery for pure economic losses. According to La Forest J., "liability in this particular area should not be established based on the court's perception of the extent of the defendant's moral fault".⁴⁴ The issue of the defendant's liability is to be determined by the concern for deterring accidents and allocating losses "in a reasonable and efficient manner".⁴⁵

It is not the purpose of this commentary to delve into La Forest J.'s detailed reasoning in *C.N.R. v. Norsk*, and to deal with the very difficult matter of liability for pure economic losses. Nevertheless, certain questions immediately present themselves to me arising from La Forest J.'s approach. For example, is fault to play no role in liability issues involving economic losses? Who can victims of economic losses legitimately sue under this approach - all those who are better "loss absorbers", or is the economic theory only useful for eliminating rather than for establishing liability?⁴⁶ Is contributory negligence not relevant to this type of liability? What types of evidence can be introduced to establish the "economic" arguments?

No matter whether one looks at *Hall v. Hebert* from the perspective of the defence of *ex turpi, volenti*, or the existence of a duty of care on a person who is in custody of a car not to allow an incompetent person to drive it, important

⁴¹ *Ibid.*, at pp. 1156 (S.C.R.), 372 (D.L.R.), 29 (C.C.L.T.). (Emphasis added).

⁴² *Ibid.* (Emphasis added). McLachlin J. considered these non-fault arguments which in this case were advanced in order to deny the defendant's liability and let the losses lie with the plaintiff. She rejected the assumptions upon which they were based.

⁴³ *Ibid.*, at pp. 1159 (S.C.R.), 374 (D.L.R.), 32 (C.C.L.T.).

⁴⁴ *Ibid.*, at pp. 1115 (S.C.R.), 344 (D.L.R.), 105 (C.C.L.T.).

⁴⁵ *Ibid.*, at pp. 1116 (S.C.R.), 344 (D.L.R.), 105 (C.C.L.T.).

⁴⁶ It would at first hand appear that "fault" is to be maintained as the *sine qua non* of a defendant's liability, and that the economic theory is to be used only to limit a negligent defendant's liability. On the other hand there is some implication in the judgment that the economic rationale can be useful for both justifying limiting liability as well as creating it. For example, La Forest J. concedes that the presence of insurance is responsible for many of the extensions of tort liability that have occurred over the last 50 years.

moral issues present themselves. Should youths who actively engage in an evening of drinking and driving, and who are thereby injured, be able to look to the "fault" of each other in promoting the evening's activity, thus obtaining access to an insurance pool of funds raised in response to a fault-based compensation regime? What is the extent of a car owner's responsibility to ensure that incompetent others do not drive? Should this responsibility be imposed on passengers as well as those "in custody" of the car?

Let me briefly consider these issues. From the point of view of *ex turpi*, the argument was made by both Cory and Sopinka JJ. that the integrity of the legal system would not be wounded if the plaintiff in this case were permitted to recover damages for his injuries. Cory J. stated that "to permit him [the appellant] to recover would not offend or shock the conscience of reasonable right thinking members of the community fully apprised of the facts".⁴⁷ Sopinka J. stated that "the administration of justice would suffer no disrepute in the eyes of the public if the Court lends its assistance to the appellant".⁴⁸

The first obvious point one can make in reaction to these sentiments is that surely Sopinka and Cory JJ. do not know what would offend the conscience of right thinking members of the community. As conceded by Cory J. himself, this type of approach "by its very nature invites the pronouncement of arbitrary and personalized conclusions from the bench".⁴⁹ One cannot therefore take seriously the proposition that the judgment in *Hall v. Hebert* would not appear bizarre, if not offensive, to ordinary people. The courts could, if they wished, permit evidence in to determine what "right-thinking" persons think about wrongdoers recovering damages,⁵⁰ but I would venture to say that this would not be seen by the courts as a desirable option. That being the case, it is better to leave the matter of what offends right-thinking persons out of the issue altogether.⁵¹

⁴⁷ *Supra*, footnote 16, at pp. 224 (S.C.R.), 158 (D.L.R.), 135 (C.C.L.T.).

⁴⁸ *Ibid.*, at pp. 192 (S.C.R.), 136 (D.L.R.), 140 (C.C.L.T.).

⁴⁹ *Ibid.*, at pp. 215 (S.C.R.), 153 (D.L.R.), 129 (C.C.L.T.).

⁵⁰ For example, in defamation law, evidence as to whether the plaintiff's reputation was diminished in the eyes of right-thinking members of society establishes whether a statement was defamatory or not.

⁵¹ In view of the comments by Sopinka and Cory JJ., I decided to present a questionnaire to my first year tort law students, after they had been in my torts class for slightly over two months. We had not yet studied *Hall v. Hebert*, nor any of the specific issues, such as duty, duty to assist, *volenti*, *ex turpi*, which arose in the case. I asked the students to answer the questionnaire based on what they thought a fault-based compensation system ought to do, and not by speculating as to what they thought the courts actually decided in *Hall v. Hebert*. In other words, I was not looking for the "correct" legal answer, but merely wanted their opinions. The students were presented with a statement of the facts of the case, as it more or less appears in the introduction to this comment. They were then told that Hall sued Hebert in negligence, alleging that Hebert was negligent in allowing Hall to drive. They were asked whether in a system based on fault, they thought that Hall should recover all of his damages from Hebert, part of his damages from Hebert, or none of his damages from Hebert. They were also asked to explain their answers.

Of the 47 law students who handed back their questionnaires, 34, or 72%, were of the opinion that there ought to have been no recovery at all. 13, or 28%, stated that there

One of the principal arguments presented by McLachlin J. in denying the *ex turpi* defence in tort cases, is that since compensation is not "profit", a wrongdoer does not profit from his participation in an illegal activity by being compensated should he be injured. Presumably, if compensation were seen as profit, the court would as a matter of public morality not want to be seen as assisting the wrongdoer. Can compensation, however, not be seen as a "profit"? That is, are we not, for reasons of morality, deeming that certain victims ought to be entitled to more and better compensation than other victims? If that is so, there may indeed be a legitimate moral issue when deciding whether to allow a plaintiff who has actively created his situation of need to be entitled to access this exceptional pool of funds.⁵²

One might also reflect on the decision in *Hall v. Hebert* by considering a different set of facts. Let us assume that, as was very possible, Hebert was also injured in the accident. Since the court held that the parties in this case were equally at fault for the accident, then Hebert would have been able to collect 50% of his damages from Hall. Thus, both boys, fully responsible for their own injuries would collect one half of their damages from each other. Hall's damages would come from Hebert's insurer, and presumably Hebert's money would also come from his own insurer.⁵³ An intoxicated Hebert would be far better off financially to take his chances by allowing an intoxicated Hall to drive than to risk an accident by deciding to drive himself. For if he had decided to drive himself and became injured, he would have no recourse for his damages.⁵⁴

ought to have been partial recovery. The predominantly given reason for no recovery was that Hall was responsible for his own acts of stupidity and negligence, took the risks, and ought therefore not look to Hebert for compensation. Those who thought that there should be partial compensation based it on Hebert's responsibility as owner of the car to make sure Hall did not drive.

Although this survey is certainly not "scientific", I think it demonstrates that a majority of these respondents would in fact have been offended by the judgment. My hunch is that this would in fact be representative of most ordinary respondents.

⁵² In a completely unrelated judgment, *Whitbread v. Walley* (1988), 51 D.L.R. (4th) 509 (B.C.C.A.), McLachlin J., then a member of the British Columbia Court of Appeal, distinguished between the injuries which a person suffers in an accident, and damages recovered for those injuries. She argued that the injuries exist whether or not the plaintiff recovers money, and that in that sense the money does not make up for those injuries. Thus to deprive a plaintiff of damages is not to deprive him of life, liberty and security, for Charter purposes. In *Hall v. Hebert*, McLachlin J.'s view seems to approximate more closely the injuries suffered and damages received for them, arguing in effect that the money does not "profit" the victim since it merely replaces what was lost.

⁵³ Since Hall would be driving the car with Hebert's consent, and thus would be a deemed insured under Hebert's own policy. If for some reason Hebert could not recover his damages from Hall based on his own insurance policy, or an uninsured motorist fund, then he could of course get it directly from Hall. Hall would of course now have money, namely the damages which he collected from Hebert.

⁵⁴ This type of accident scenario is in fact now on its way up to the Supreme Court of Canada. In the case of *Anderson v. Regan*, [1993] B.C.J. No. 379, Gary Regan and Gordon Anderson sued each other for the grievous injuries which they each suffered in a single vehicle car accident. The two young men in their early twenties went out in Anderson's car for an evening of drinking. They both got drunk. Later that night Anderson's car went

This scenario of course really points out the centrality of automobile insurance to the actual decision in the case. Since Hall's money was coming not from Hebert but from his insurer, the court could help Hall without hurting Hebert. If, however, there was no insurance possibility here, it is an open question whether the court would have financially punished Hebert to assist Hall.

Of the Supreme Court judges who decided this case, it was only Sopinka J. who, in dissent, made the fault issue on the part of Hebert the main issue. Sopinka J. refused to see in Hebert's action a breach of a duty to Hall. While not excusing the conduct of either party, it struck Sopinka J. as "extraordinary" that Hall had any reasonable expectation that Hebert would have owed him any duty of care in these circumstances.

In *Hall v. Hebert*, the issue of Hebert's liability to Hall was not an easy one. The court was faced with having to resolve some difficult issues. Did Hall voluntarily assume the risks of driving by asking to drive Hebert's car? Was Hall's accident caused by Hebert's acquiescence in allowing Hall to drive or by Hall's own conduct? How far should the duty of those who are owners or custodians of automobiles extend? Was the decision in this case a logical step from *Jordan House v. Menow*⁵⁵ and *Crocker v. Sundance*,⁵⁶ or a "quantum leap" forward? What strikes me as interesting about the court's decision in *Hall v. Hebert* is not the actual result of the case, with which I have some sympathy, but the lack of consideration which was paid to these issues. This leads me to believe that for most of the judges the case was not really about fault, but about compensation.

It is on this point that I would conclude this comment. To argue that negligence law should be based upon fault, and not on insurance, or loss distribution, is not to make an argument that persons injured by their own acts or by the acts of chance or circumstance, should not be compensated. It is merely to argue that they should not be compensated based upon a system of

into a telephone pole and was literally torn in half. Both Anderson and Regan claimed that the other was driving the car, and sued each other on that basis. The trial judge found that Regan was in fact the driver. He then held that Regan was negligent for the manner in which he drove, and Anderson was negligent for having allowed Regan to drive. Liability was apportioned 50/50. The defences of *ex turpi causa* and *volenti* were not pursued at trial. The Court of Appeal, following its own decision in *Hall v. Hebert*, rejected Regan's action against Anderson, as it had Hall's action against Hebert. With respect to Anderson's action against Regan, the Court of Appeal found that Anderson had been a party to Regan's criminal conduct, per s. 21 of the Criminal Code. That being the case, the doctrine of *ex turpi* which was successfully applied against Regan was applied against Anderson, and Anderson's action was dismissed. Note that it was the insurer, I.C.B.C., which had appealed the decision.

Now that this case is to be decided by the Supreme Court, leave to appeal having been granted, the scenario mentioned above will be tested. Since *ex turpi* can no longer be used against either party, we will see whether the court will allow both youths to recover half of their damages from each other, but more correctly from the I.C.B.C.

⁵⁵ *Supra*, footnote 26.

⁵⁶ *Ibid.*

fault. If compensation is to be offered to such victims, it must be offered on the basis of a no-fault, social insurance, or private first party insurance scheme. The attempt to use fault-based compensation to accomplish no-fault compensation objectives is a non-starter. It makes a mess of tort law, and provides a terribly inefficient and expensive safety net. If fault-based compensation ignored issues of insurance and loss distribution, and concentrated on the issue of corrective justice, then the true gaps in our compensation network would be properly revealed. Social welfare and insurance programs based on priorities, needs, means, and costs could be developed rationally. I would venture to say that in such a scheme Hall might not have fared nearly so well.