THE CANADIAN BAR REVIEW

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☞ **Articles and notes of cases must be typed before being sent to the Editor, Cecil A. Wright, Osgoode Hall Law School, Osgoode Hall, Toronto 2, Ontario.**

CASE AND COMMENT

ADMINISTRATIVE LAW—BIAS.—The judgment of the Ontario Court of Appeal in *Re Township of York By-law 11996, Grimshaw Bros. Ltd.* v. *Township of York*[1] has the effect of adding another situation to those in which the courts must differentiate between judicial and administrative functions.[2] Although the actual result in that case is explicable on another ground,[3] both Fisher and Gillanders JJ.A. indicated that the rule of disqualification on account of bias was inapplicable to persons exercising administrative functions.[4]

That rule, as stated and applied in *Cottle* v. *Cottle*,[5] does not depend on any bias in fact but on establishing that the complaining party might reasonably form the impression that the case will not be given an unbiassed hearing. "It is of fundamental importance", said Lord Hewart in *Rex* v. *Sussex JJ., Ex parte McCarthy*,[6] "that justice should not only be done but should manifestly and undoubtedly be seen to be done". In dealing with the "bias" principle in *Frome United Breweries Co.*

[1] [1942] O.R. 582.

[2] See Note, (1942) 20 Can. Bar Rev. 464.

[3] The functionary in question was a referee appointed under the Township of York Act, 1935 (Ont.), c. 100, in connection with a proposed sewer change. He was a taxpayer who would be affected as such if the change were carried through. The majority of the Court did not think that this constituted bias from pecuniary interest. Riddell J.A., who seemed to think otherwise, took the position that since the referee's report had no legal effect in itself, there was no reason for disqualification.

[4] Although Riddell J.A. stated that disqualification would have followed as of course if the report had any legal effect in itself, it is not clear whether he would draw any distinction between judicial and administrative acts in this respect.

[5] [1939] 2 All E.R. 535.

[6] [1924] 1 K.B. 256.

Ltd. v. *Bath JJ.*,[7] Viscount Cave stated that "this rule has been asserted not only in the case of Courts of justice and other judicial tribunals but in the case of authorities which, though in no sense to be called courts, have to act as judges of the rights of others". It would seem from this, as well as from other parts of his judgment, that the rule as to bias, if applicable to administrative authorities, applies only to their "judicial" functions. What are judicial functions, from the standpoint of the rule as to bias, will be discoverable only by reference to situations in which bias operates as a disqualification. It is futile, save perhaps under a broad view of "judicial", to look for tests which would enable courts to distinguish judicial from administrative acts[8] in order thereafter to apply the appropriate principles of law. The distinction is usually made in the very application of these principles.

In a number of Canadian cases dealing with the right of a person to practice a profession or calling which is legislatively controlled, the courts have shown a pronounced disinclination to apply the rule as to bias to the administrative authorities set up as the controlling agencies.[9] The right of persons to professional status would seem to fall within Viscount Cave's reference to "authorities which . . . have to act as judges of the rights of others",[10] unless this phrase is to be confined to situations in which there are adversary parties in some strict sense. It may be possible on this basis to work out a distinction between judicial and administrative functions for the purpose of applying the bias rule. But this would be tantamount to exclusion of bias as a disqualification in respect of a considerable portion of administrative activity. It is, for example, incorrect to say that there is no "judicial" function connected with assessment matters.[11] There may be in some aspects and not in others. Thus, in the case at bar, which involved the functions of a referee appointed to value and adjust claims of ratepayers in connection with a sewer project, Riddell J.A. refused to apply the "bias" rule because the referee's report had no legal effect in itself, but he stated that he would have applied it had the report been legally effective.

[7] [1926] A.C. 586.

[8] For example, *Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation*, [1931] A.C. 275, which is cited by the Court, is at best only negatively helpful.

[9] *Cf. Re Hayward*, [1934] O.R. 133; *Re Ashby*, [1934] O.R. 421; *McAlister* v. *Board of Examiners under the Barbers Act*, [1939] 3 W.W.R. 250 (B.C.C.A.).

[10] *Supra*, note 7.

[11] See *Rex* v. *Westminster Assessment Committee*, [1940] 3 All E.R. 241.

The difficulties surrounding the problem of "judicial" and "administrative" functions have a constitutional flavour in Canada because of s. 96 of the British North America Act,[12] and there is a tendency to categorize functions as judicial in so far as they are of a type discharged by the ordinary courts.

The position taken in the principle case may well be considered in the light of recent pronouncements by Canadian courts that administrative authorities must act in good faith.[13] Thus, in *Lower Mainland Dairy Products Board* v. *Turner's Dairy Ltd.*,[14] Duff C.J. remarked :

> Such an administrative body as the Board in exercising its statutory powers—powers affecting the rights and interests of private individuals—is under an obligation not only to observe the limits of its powers and to act conformably to the procedure laid down; it is under a strict duty to use its powers in good faith for the purposes for which they are given.

Duff C.J.'s reference to "powers affecting the rights and interests of private individuals" may make this case distinguishable from the *Township of York Case.* It may be, too, that for the purpose of the "bias" rule administrative functions will be narrowly confined. This would appear to be the likely course, so long as the courts find it necessary to distinguish judicial from administrative functions.[15]

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NEGLIGENCE—OCCUPIER'S LIABILITY—FUNCTIONS OF JUDGE AND JURY—*Crewe* v. *North American Life Assurance Co. & Star Publishing Co. Ltd.*[1] was an action for damages suffered by an employee of a sign company who was injured, while proceeding with equipment to the roof of a building to paint a neon sign, in a fall from the platform of a fire escape, when a hinged guard rail usually held by a safety catch gave way. The sign had been installed for the North American Life Assurance Co., registered owner of the building, which had leased ground floor offices, together with the right to use the roof for advertising purposes,

[12] See Willis, *Section 96 of the British North America Act,* (1940) 18 Can. Bar Rev. 517.

[13] *Cf. McAlister* v. *Board of Examiners under the Barbers Act,* [1939] 3 W.W.R. 250 (B.C.C.A.); *Turner's Dairy Ltd.* v. *Williams,* [1939] 3 W.W.R. 241 (B.C.).

[14] [1941] 4 D.L.R. 209, at p. 211.

[15] *Cf.* Report of the Committee on Ministers' Powers, 1932, Cmd. 4060, p. 75 *ff.*

[1] [1942] 4 D.L.R. 75 (B.C.C.A.).

from the Star Publishing Co., purchaser in default under an agreement of sale. Neither the contract for the sign nor the lease contained any directions relative to the method of access to the roof, and none were given by or asked of the Star Publishing Co. It knew of some arrangement between the lessee and the sign company but not the details or the fact of the use of the fire escape. Employees of the sign company had used the fire escape on previous occasions but there were alternative routes to the roof, one of which had never been used by the sign company and the other requiring three men instead of two, which was the number employed on this occasion. The North American Life Assurance Co., had arranged with the lessor to manage the building without being considered a mortgagee in possession, and later, without consulting the lessor, it appointed an agent for that purpose. Under a city by-law it was unlawful to obstruct fire escapes. The injured employee sued both companies as joint occupiers and alternatively each as sole occupier. The trial Judge found that the lessee was managing the building for the lessor who was sole occupier and dismissed the action against the lessee. The jury found that the plaintiff acted reasonably in using the fire escape and judgment was entered in his favour against the lessor. On appeal, a majority, O'Halloran, J. A., dissenting, dismissed the action on the ground that the plaintiff was a trespasser with respect to use of the fire escape, although perhaps an invitee in regard to the roof, and that the Star Publishing Co. did not owe him any duty which it had failed to perform.

The British Columbia Court of Appeal has, in recent years, probably given more attention to the complicated problems involved in an occupier's liability for dangerous condition of the premises than any other court in the Dominion. Particularly noteworthy have been the opinions of O'Halloran J. A., in *Power* v. *Hughes*[2] and *Kennedy* v. *Union Estates Ltd.*,[3] in both of which he made an attempt to free this department of law from rigid categorization. Again, in the present case, the same judge examined this branch of law in the light of "general principles" of the law of negligence. The fundamental problem in these cases centres, as do so many problems in negligence, on the respective functions of judge and jury[4], O'Halloran J. A. wishing, apparently, to give juries unlimited power of determining whether the occupier was negligent. There seems no doubt, however, that the question whether a

[2] [1938] 4 D.L.R. 136, 53 B.C.R. 64.
[3] [1940] 1 D.L.R. 662, 55 B.C.R. 1.
[4] See GREEN, JUDGE AND JURY.

duty of care was owing is a question of law for the judge,[5] as is also the task of instructing the jury on the standard of care to be applied in each case.[6] To accept fully the view that the standards of conduct of a reasonable man determine both the question of duty of care and the negligence issue of fact, while undoubedly capable of support in language used in many cases, seems to collapse the two functions, would prevent any distinction detween the respective roles of judge and jury, and, indeed, some writers believe, render the "duty" concept superfluous.[7] The fact remains, however, that courts must determine first, whether any duty of care was required of the defendant in a given situation (there are still many cases where courts hold no duty even although a reasonable man would think otherwise),[8] and, in addition, the problem of translating to a jury the variations of standards of "reasonableness" in given situations is one for the court.[9] It would be possible, perhaps, for a court to instruct the jury to take into account the fact that the plaintiff was a trespasser, or that he was a person from whose presence the defendant expected no material advantage and allow the jury to determine reasonableness in the light of those, amongst other, circumstances. To make matters more concrete, the courts have perhaps fallen into a too rigid classification of categories and standards[10] and O'Halloran J. A.'s efforts to break down such catagories are commendable. The difficulty, however, probably lies in attempting to confine every situation to the Procrustean bed of "three catagories only" indicated by the House of Lords in *Addie* v. *Dumbreck*.[11] "Licensee with an interest" does not fit this scheme, although English judges have used it[12] despite the fact that it has latterly been frowned upon.[13]

Although categories should not be rigid, it is doubtful if, because of the respective roles of judge and jury, they can be entirely avoided, and even O'Halloran, J. A. would not throw the whole matter to the jury for their unfettered discretion on the basis of the "reasonable man." The latter— a creature of

[5] *Palsgraf* v. *Long Island Ry.* (1928), 248 N.Y. 339.
[6] See Wright, Cases and Materials on the Law of Torts, C. 4, at p. 155 *ff.*
[7] See Winfield, *Duty in Tortious Negligence*, (1934) 34 Col. L. Rev. 41.
[8] *Cf.* Wright, *Negligent "Acts or Omissions"* (1941), 19 Can. Bar Rev. 465, at pp. 468 *ff.*
[9] *E.g.*, Statutes making a certain course of conduct unlawful may be a clue to what a reasonable man would do in the circumstances, about which the court must instruct the jury.
[10] See Note, (1939) 17 Can. Bar Rev. 445.
[11] [1929] A.C. 358.
[12] See *Hayward* v. *Drury Lane Theatre*, [1917] 2 K.B. 899, 913, referred to in *Sutcliffe* v. *Clients Investment*, [1924] 2 K.B. 746.
[13] See *Weigall* v. *Westminster Hospital* [1936] 1 All E.R. 232, per Scott L.J.

the courts—must be created by the courts for each case, and as so created, he is handed to the jury for manipulation. It is extremely doubtful, to say the least, whether O'Halloran J. A.'s repeated statement that the decision of the British Columbia Court of Appeal in *Power* v. *Hughes*[14] must be taken as overruled by *Union Estates Ltd.* v. *Kennedy*.[15] The latter case may have broadened the category of invitees, but that the Supreme Court of Canada intended to wipe out all categories is scarcely credible. What is required, as the decision in *Haseldine* v. *Daw*[16] indicates, is an approach that will permit of classification and treatment by courts—for the benefit of juries—that does not attempt to reconcile the irreconcilable or to subsume distinct fact situations under one rubric.

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LABOUR LAW—INTERLOCUTORY INJUNCTION — SCOPE OF PROHIBITION.—In the last decade, resort to the injunction to settle labour disputes has been most marked.[1] Taking a lead from the United States rather than from England, Canadian employers found that the injunction was the most expeditious as well as the cheapest means of avoiding harassment from trade unions. The interlocutory injunction especially gave prompt relief, and, if the history of the United States is any criterion,[2] made it unnecessary in many cases to worry about the merits of the proceeding. The uncertain state of the law respecting the legality of picketing,[3] the easy showing of nuisance and of conspiracy to injure[4] made proof of irreparable damage almost merely formal. Back of the purely legal aspects of the matter was the fact that social and economic beliefs militated against the trade unions.[5]

If the trade unions complained about the use of the injunction, particularly of the interlocutory one, they had more reason to complain of the scope of such injunction. Canadian courts may not have gone as far in this respect as have some courts in the United States, but prohibition of normally lawful activities was no abnormal feature.[6]

[14] [1938] 4 D.L.R. 136, 53 B.C.R. 64.
[15] [1940] 3 D.L.R. 404 (Can.).
[16] [1941] 3 All E.R. 156.
[1] A perusal of the standard digests since 1935 will verify this assertion. By contrast, the prior decade reveals one reported case on the labour injunction. The criminal law was usually invoked against trade union action. See, Laskin, *The Labour Injunction in Canada: A Caveat*, (1937) 15 Can. Bar Rev. 270, note 2.
[2] *Frankfurter and Greene, The Labor Injunction.*
[3] Finkelman, *The Law of Picketing in Canada*, (1937–38) 2 Univ. of Tor. L.J. 67, 344.
[4] See Note, (1942) 20 Can. Bar Rev. 636.
[5] *Supra*, note 2.
[6] *Supra*. See the injunction granted in the present case.

It is these considerations which lend so much importance to the judgment of the Quebec Court of King's Bench in *Shane* v. *Lupovich*.[7] In modifying the terms of an interlocutory injunction against representatives of a trade union, the Court, speaking through Mr. Justice Barclay, made a statement of principle and of policy which deserves reproduction in full:[8]

> I am of the opinion, however, that the injunction should not have been granted in the terms in which it was granted. It is in a sort of blanket form, copied from the conclusions of the petition prepared by the respondents' attorneys, with the effect of paralyzing completely all possible acts of the appellants, legal or illegal. There is, in my opinion, nothing to justify such a comprehensive injunction. There were very few real cases of actual violence and the threats of violence had ceased long before the interim injunction was granted. Collective bargaining, the existence of trade unions and the right to strike as a means of obtaining demands are now all recognized by our law. In fact, it is now a crime, since 1939, to refuse to employ or to dismiss a man because he belongs to a union. When a grievance exists, an employee can sue to remedy that grievance under the laws of this Province, but that is only one remedy. By far the greatest remedy for non-observance of the law is the calling of a strke. The right to strike, being an exceptional right, must of course be exercised within strict limits, but the calling of any strike is bound to create bad feelings and to give rise to some disorder; no union, however perfect, should be held responsible for all cases of disorder nor be enjoined as soon as any disorder occurs. An injunction should be the last, not the first remedy. If any breaches of a criminal law occur, the police are there to enforce order.

Mr. Justice Archambault added another proposition:[9]

> The Courts should use their power to grant an injunction only with great circumspection, and the restraints set out in the injunction should relate only to illegal acts and not deprive workers of their legitimate rights.

The facts of the present case exhibit some of the characteristics which make the injunction an inappropriate remedy in labour disputes. Thus, while there were acts of violence on the

[7] [1942] 4 D.L.R. 390.
[8] *Ibid.*, at p. 397.
[9] *Ibid.*, at p. 393.

part of members of the trade union, there were similar acts on the part of the employers, and the evidence was insufficient to establish who was responsible for starting the trouble. The terms of the injunction were copied from the pleadings of the employers' solicitors. The scope of the injunction extended beyond the necessities of the situation because things had calmed down and the employers were no longer in need of protection as alleged.

These matters, among others, have induced legislative action in the United States to curb resort to the injunction in labour disputes.[10] Recently, Ontario has taken a step in this direction by confining the duration of an *ex parte* interim injunction in a labour dispute to four days.[11] Further legislative action may well become unnecessary if the decision in *Shane* v. *Lupovich* becomes an acceptable guide to judicial action. Ontario courts have indicated that they tend in that direction.[12]

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[10] See Laskin, *The Labour Injunction in Canada: A Caveat*, (1937) 15 Can. Bar Rev. 270.

[11] The Judicature Act, R.S.O. 1937, c. 100, s. 16a, added by 1942 (Ont.), c. 34, s. 18.

[12] *Cf. Canada Dairies Ltd.* v. *Seggie*, [1940] 4 D.L.R. 725.