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Public Law and Private Law : The Frontier from the Perspective of a Tort Lawyer

Allen M. LINDEN*

I Introduction

A thousand years ago there was virtually no dichotomy between public law and private law in our legal culture. If a person wrongfully injured or killed another, he was required to pay money to that other person or to his family as compensation. The underlying purpose of this system was the appeasement of the clan of the victim in order to reduce their desire to take physical revenge.¹

Eventually, the public law intruded into this essentially private system of dispute resolution, when the King required certain wrongdoers to pay him some money. In the thirteenth century, the "public" prosecution of serious wrongdoers became the primary technique of violence control, when wrongdoers were prohibited from buying their freedom by paying off the clans of their victims.² This did not mean, however, that a private action could not be taken by the victim *in addition* to the public prosecution; it only meant that public prosecution could not be avoided merely by paying compensation. This is still the law of Canada.³

For the last seven hundred years, therefore, public law has interfered with the resolution of disputes between private citizens. Indeed, the role of public law has steadily expanded, at the expense of private law, to the point where it now so dominates our daily life that the Law Reform Commission of Canada has concluded that we must begin to decriminalize our society by diversion and other similar techniques.⁴

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1. See MALONE, "Ruminations on the Role of Fault in the History of the Common Law of Torts", (1970) 31 *La. L. Rev.* 1.

2. See *Criminal Code*, R.S.C., c. 34, s. 129; Jeffery, "The Development of Crime in Early English Society", in *Crime and the Legal Process*, 1969.

3. *Criminal Code*, s. 10.

4. L.R.C.C., Working Paper 7, *Diversion* (1975).

In recent years, however, public and private law are once again beginning to lose their distinctiveness. Many of the notions historically employed in resolving private disputes are now being used in public law disputes. On the other hand, private law is adopting certain public law tools, such as legislation, to resolve private disputes. Moreover, entire areas that were formerly in the realm of private disputes, such as workman's compensation, are being taken over by public law institutions. Indeed, it has become almost impossible to distinguish the current task of public law from that of private law, for there has been a considerable blurring of their functions. In many situations, an aggrieved victim has the choice of pursuing a public remedy or a private remedy, and often he may even press for both remedies.

This paper is a preliminary foray in the frontier area where public and private law intersect. My assignment was to focus on certain aspects of tort law, how it has affected and how it has been affected by public law, primarily penal law. I am all too conscious of the fact that I am only scratching on the surface of the issues raised, but we must begin somewhere.

II

Distinction between Public and Private Law

It is no easy matter to define with any precision the difference between public and private law. It would be overly facile to observe that public law is meant to include such fields as criminal, administrative and constitutional law, whereas private law encompasses such areas as tort, contract, restitution and property law. Such a categorization is incomplete, because public and private law cannot be so easily dichotomized. They are not separate, watertight compartments; rather, public and private law often overlap and infiltrate one another's territory. The truth is that the distinctions between public and private law are not as sharp as might be supposed.

Let us, nevertheless, consider three of the alleged distinctions between public and private law to see whether any workable guidelines can be discerned.

1. Aims

One of the differences between public and private law is said to be that public law aims to protect the public interest whereas private law seeks to protect only private interests. The great Blackstone, for

example, observed that crimes infringed public rights, while torts invaded only civil or private rights. Crimes, he contended, affected the "whole community", striking at the "very being of society", whereas civil injuries were "immaterial to the public".⁵

It is now pretty well agreed that Blackstone's distinction overstated the case, for tort law is not concerned only with the private interests; it also serves the public interest. Tort law, just like the criminal law, seeks to deter socially undesirable conduct. Tortious conduct, in the same way as criminal conduct, may interfere with the public interest and should, therefore, be discouraged by sanctions. This notion was once dramatized by the words of Lord Devlin, when he proclaimed that "it is necessary to teach a wrongdoer that tort does not pay."⁶

Indeed, almost all criminal conduct can attract tort liability as well as state punishment. A criminal assault or rape invariably amounts to a civil assault or battery as well.⁷ Conduct that would render someone guilty of theft or fraud in the criminal courts is always tortious as well. The same kinds of social concerns that have led to the creation of criminal liability for these acts have also generated tort responsibility for them.

Leon Green has eloquently pointed out that tort law is very much "public law in disguise"⁸ because it takes into account the public interest in the resolution of private disputes. John Austin was of the same opinion and has asserted that, "all offences affect the community, and all offences affect individuals". He also argued that "the difference between civil injuries and crimes can hardly be found in any difference between the ends or purposes of the corresponding sanctions".⁹ Consequently, although as a matter of emphasis, criminal law may be somewhat more concerned with the public interest than is private law, private law also takes very much into consideration the public interest.

5. *Commentaries*, Book 3, p. 2; Book 4, p. 5; Hall, "Interrelations of Criminal Law and Torts", (1943) 43 *Colum. L. Rev.* 753, at p. 757.

6. *Rookes v. Barnard*, [1964] A.C. 1129, at p. 1227.

7. See, generally: Linden, "Victims of Crime and Tort Law", (1969) 12 *Can. Bar J.* 17.

8. Green, "Tort Law Public Law in Disguise", (1960) 38 *Tex. L. Rev.* 1, 251. See also Blum and Kalven, "Public Law Perspectives on a Private Law Problem — Auto Compensation Plans", (1964) 31 *U. Chi. L. Rev.* 641.

9. *Lectures on Jurisprudence*, 4th Ed., 1879, at p. 417 and at p. 520; see also Holmes, *The Common Law*, 1881, at p. 35.

2. Sanctions

A second difference between public and private law is supposed to lie in the type of sanctions that are administered to offenders. Penal sanctions are more severe and varied than civil ones. The sanctions exacted for criminal activity include fines, imprisonment and, until recently, flogging or death. For tortious conduct, on the other hand, the sanction is usually the payment of damages by the defendant to the plaintiff,¹⁰ although other remedies like injunctions are sometimes granted.

This is certainly one important distinction between public and private law, but even the differences between the sanctions, on closer scrutiny, tend to blur. Nowadays, the range of criminal sanctions includes some that possess the attributes of civil sanctions and some that are barely sanctions at all. For example, a Canadian criminal court may order restitution¹¹ and even compensation.¹² Moreover, the criminal sanction of absolute or conditional discharge¹³ can often be less severe than the civil one that might be imposed for the same conduct. It is a very common occurrence today that the fine imposed for a highway traffic offence is less in amount than the damages awarded against the same driver, if he is sued civilly for an accident that results from the offending conduct.

One novel development in modern penal legislation is the granting of civil remedies to the victims of criminal conduct. For example, recent amendments to the Criminal Code, seeking to protect privacy, provide not only for ordinary penal sanctions against offenders, but also for the payment by the accused to the person aggrieved an amount not exceeding \$5 000 as punitive damages.¹⁴ Other examples of civil remedies being granted for criminal or quasi-criminal activity abound.¹⁵

Moreover, private law litigation can lead to public law sanctions being ultimately imposed. Someone who refuses to abide by the judgment of a civil court, for example, may be found guilty of

10. Blackstone, *Commentaries*, Book 4, at p. 6; Salmond, *The Law of Torts*, 16th Ed., 1973, at p. 8; Winfield and Jolowicz, *On Tort*, 9th Ed., 1971, at p. 14.

11. *Criminal Code*, ss. 616, 663 (2) (e).

12. *Criminal Code*, ss. 654, 655.

13. *Criminal Code*, s. 662.1.

14. *Criminal Code*, s. 178.21.

15. *Trade Marks Act*, see *MacDonald v. Vapor Canada* (Jan. 30, 1976, S.C.C.); *Liquor Licence Act*, R.S.O. 1970, c. 250, s. 68; *U.S. Sherman Act*, treble damages, etc.

contempt and punished criminally.¹⁶ So, too, a defendant in a motor vehicle collision, who fails to pay a civil judgment awarded against him, may have his driver's licence revoked, at least until he arranges to pay the award.¹⁷

Private law suits can still yield substantial punitive damage awards in Canadian courts, despite a marked retreat from this area by the English courts.¹⁸ Here, the court, in a civil action, expressly seeks to punish the defendant for his flagrant conduct. The sanction may still be civil, in the sense that money is paid by the defendant to the plaintiff, but it is clearly penal in purpose. This is manifested by the fact that civil courts take into account any criminal penalty that has been imposed, as a mitigating circumstance, prior to assessing the amount of punitive damages.¹⁹

The sanctions in public law, therefore, may be broader and more severe than they are in private law, but the differences are often less than might be imagined at first blush.

3. Parties

In public law litigation, the party that triggers the proceeding and generally carries it to its conclusion is the state or one of its agencies. In private law, the activating party is usually an aggrieved individual or corporation, called the plaintiff. This plaintiff has control over the pace of the proceeding, decides whether to settle or to press on to judgment, and chooses whether or not and how to enforce a judgment, if one is obtained.

But here, too, private disputes may take on public attributes and vice versa. For example, a private commercial dispute for deceit or fraudulent misrepresentation, can be transformed into a penal prosecution for fraud if an aggrieved party notifies the police about the defendant's conduct. In certain situations, as in public nuisance, private complaints can *only* be proceeded with by the Attorney-General on behalf of all the aggrieved individuals.²⁰

Public law, however, can also be affected by private parties. Certain procedures now exist whereby citizens may appear before

16. *Re Shepherd v. Shepherd* (1976), 10 O.R. (2d) 19: \$500 fine imposed.

17. *Motor Vehicle Accident Claims Act*, R.S.O. 1970, c. 281, s. 5(6).

18. See Fridman, "Punitive Damages in Tort", (1970) 48 *Can. Bar Rev.* 373.

19. *Amos v. Yawler* (1969), 6 D.L.R. (3d) 234.

20. See, generally: McLaren, "The Common Law Nuisance Actions and the Environmental Battle", (1972) 10 *O.H.L.J.* 505; Estey, "Public Nuisance and Standing to Sue", (1972) 10 *O.H.L.J.* 563.

boards and even the Supreme Court of Canada to present evidence and argument as to the public interest or as to their own collective private interests.²¹ Moreover, in a criminal case, the fact that the aggrieved person does not want to press charges, or wants to withdraw charges already laid, has a considerable influence (though certainly not a decisive one) on whether the prosecution proceeds to charge or try a wrongdoer.

Another strange proceeding that is permitted under Canadian criminal law is a private criminal prosecution that may be pursued by an individual without the aid of the Crown prosecutor. Here, a private citizen may lay an information and conduct an entire criminal prosecution on behalf of the public. The Attorney-General is able, in most cases, to take over such a prosecution, but rarely does so.²²

Procedure may also distinguish public law from private law, but that is too lengthy and peripheral to my purpose for me to consider it in this paper.²³

In sum, therefore, the differences between public and private law are perhaps more imagined than real. There is much overlapping and blurring of functions. Public law is said to be more concerned with the public interest than with private concerns, but private law is also devoted to serving the public interest. Public law is alleged to involve more serious sanctions, but civil sanctions may sometimes be more severe than criminal ones. Public law is more the preserve of officials than of private citizens, but private citizens can also participate in public law litigation. The differences between public law and private law, it may be suggested, are less dramatic than is sometimes realized; they are differences of degree, rather than of quality.

Let us now examine a few torts areas where public law has infiltrated private law's domain.

III

Public Law's Infiltration of Private Law

The invasion of private law by public law is nothing new. In the past, this has generally occurred when the private law approach proved inadequate to the task of controlling certain types of activities or

21. See, generally: Emond, "Participation and the Environment: A Strategy for Democratizing Canada's Environmental Protection Laws", (1975) 13 *O.H.L.J.* 783.

22. See Burns, "Private Prosecutions in Canada: The Law and a Proposal for Change", (1975) 21 *McGill L.J.* 267.

23. See, generally: Williams, "The Definition of a Crime", (1955) 8 *Current Legal Prob.* 107.

of providing adequate compensation for the victims of anti-social conduct. Public law has been employed to buttress up private law controls when it becomes apparent that they have failed to perform acceptably. Thus, the development of public criminal law was largely in response to the inability of the private system of payments to keep the peace. More recently, the establishment of governmental workmen's compensation schemes, early in this century, was a reaction to the incapacity of the tort system to resolve satisfactorily the problems associated with worker injuries. The unholy trinity of common law defences — contributory negligence, voluntary assumption of risk and the fellow employment rule — made it virtually impossible for a workman to recover tort damages from his employer, even where the latter was negligent. The situation demanded reform and a public law compensation scheme was created. Another large field, that of labour relations, was largely removed from the aegis of private law, in part because the type of regulation furnished by private law proved too oppressive for the community at large. In still more recent times, the inadequacy of tort and contract remedies in the field of consumer protection has led to a whole series of new public law initiatives in this field.²⁴

Another public law scheme, established to mollify the failings of tort law, was the plan to compensate victims of crime. In the late '60's, it became apparent that, although, in theory, victims of violent crime could sue their assailants in tort, in practice, less than 2 percent were ever successful in securing any tort recovery.²⁵ The provinces began to establish public schemes whereby these victims could secure compensation from the public treasury, instead of being required to sue their attackers. The various Boards were given the right to sue the attackers, by subrogation, on behalf of those who were paid reparation.²⁶

The debate over auto insurance reform is in this tradition of public law being invoked to repair the private law. Those advocating the replacement of tort law by a universal accident compensation scheme²⁷ are doing so because they have concluded that tort law has

24. For example, *Food and Drugs Act*, R.S.C. 1970, c. F-27; *Hazardous Products Act*, R.S.C. 1970, c. H-3; *Motor Vehicle Safety Act*, R.S.C. 1970, c. 26 (1st Supp.).

25. Linden, *Osgoode Hall Study on Compensation for Victims of Crime*, 1968.

26. See, generally: Burns and Ross, "A Comparative Study of Victims of Crime Indemnification in Canada", (1973) 8 *U.B.C.L. Rev.* 105.

27. Ison, *The Forensic Lottery*, 1967; Atiyah, *Accidents, Compensation and the Law*, 2nd Ed., 1975.

failed to compensate fairly and quickly the hordes of victims of auto accidents and that a complete public law scheme is required to remedy the situation.

These examples are well known, and are not worth more than a cursory mention. What I want to dwell on for a little longer, however, are a few of the more subtle incursions of public law into the area of private law. These more indirect influences are not as well recognised or well understood.

1. Violation of Criminal Statutes

a) *Negligent Conduct and Penal Law*

One of the most important areas where public law has infiltrated tort law is in the civil courts' treatment of penal violations. When it appears, in a negligence case, that the defendant has infringed a criminal statute, the court usually feels that it must consider whether that fact is relevant to the resolution of the civil dispute. In doing so, the court usually insists on examining the statute to determine its intention with regard to conferring a civil cause of action.²⁸

Now, if there is an express intention included in the statute, or even if one can fairly imply such an intention from the context, this is sensible enough. However, in the vast majority of situations, there is really no evidence in the legislation of what the intention of the legislature is on this matter. The court, therefore, is on its own — it may decide to rely on the evidence of breach or it may ignore it, depending on whether it feels that its use would be helpful.

Although rarely expressed to be such by the judiciary, this decision is primarily one of policy, not of discovering an illusory intention.²⁹ One reason for using the legislative standards, particularly in highway and safety matters, is that the courts can crystallize the otherwise overly vague standard of the reasonable person. Some courts, reluctant to let the jury decide every case afresh, (even where the defendant has breached some statutory provision) use legislation to particularize and to give guidance to the jury. Another policy rationale is the desire for consistency between public and private law. It would look very strange indeed, if someone were found guilty in a

28. *Cunnigham v. Moore*, [1972] 3 O.R. 269, aff'd [1973] 1 O.R. 358; *MacIsaac v. Beretanos* (1972), 25 D.L.R. (3d) 610; *Henzel v. Brussels Motors Ltd.* (1972), 31 D.L.R. (3d) 131.

29. See Alexander, "Legislation and the Standard of Care of Negligence", (1964) 42 *Can. Bar Rev.* 243; Linden, "Tort Liability for Criminal Nonfeasance", (1966) 44 *Can. Bar Rev.* 25.

criminal prosecution for the violation of some statute, and then was relieved of civil responsibility for the same conduct. Tort and criminal liability should correspond, if possible. Another purpose of using penal statutes in tort cases is to buttress the deterrent force of the criminal law. In addition to whatever penal sanctions are imposed on the offender, tort sanctions may also be exacted, thus rendering the wrongdoer doubly responsible both to the state and to the individual. Here, tort law is operating as the partner of the criminal law, strengthening whatever prophylactic power it exerts over the public. Public law is being wisely used here, despite confusion surrounding where and how it will be invoked.

The fact of a statutory violation is not even relevant in a civil case, however, unless (1) it is aimed at preventing the kind of accident that has occurred; (2) it is meant to protect the claimant, and (3) the offending conduct caused the accident complained of.

In most situations, where the legislation is felt to be relevant, it is now clear that evidence of a breach of a criminal statute is treated in a civil case as *prima facie* evidence of negligence.³⁰ What was meant by this phrase is not crystal clear, however. The best explication of the procedural effect accorded a breach of statute derives from *Queensway Tank Lines Ltd. v. Moise*,³¹ where Mr. Justice MacKay of the Ontario Court of Appeal observed as follows:

If the person failed to have his car equipped or operating in accordance with the Act or regulations, or contravened any of the rules of the road, and such conduct was shown to be a cause of the accident, it would, as Cartwright J., as he then was, said in the *Sterling Trust* case, be *prima facie* evidence of negligence and unless he could show by the evidence that the failure of his equipment or breach of the traffic rules occurred through no fault or want of care on his part, he would be liable.

On the basis of this decision, it is clear, at least until otherwise held by the Supreme Court, that a defendant who has violated a highway traffic statute bears the onus of disproving that he was negligent. If he fails to do so, then a plaintiff who relies upon the violation of the statute is entitled to recover.³²

30. See *Sterling Trusts Corporation v. Postma and Little*, [1965] S.C.R. 324; see also Alexander, "The Fate of *Sterling Trusts Corporation v. Postma*", (1961) 2 *Ottawa L. Rev.* 441. See generally, Linden, *Canadian Negligence Law*, 1972, chapter 4.

31. [1970] 1 O.R. 535.

32. See also *Blakney v. Le Blanc et al.* (1971), 13 D.L.R. (3d) 180 (N.B.C.A.); *Jordan v. Coleman* (1976), 57 D.L.R. (3d) 256 (S.C.C.); *Gagnon v. La Reine*, [1970] Ex. C.R. 716, at p. 736 (Noël J): "presumption".

There is another group of situations, not dealing with highway traffic legislation, however, where it appears that evidence of a violation of statute is given more weight than merely *prima facie* evidence of negligence. In cases where dangerous activities and the violation of pure food statutes are involved, the violation of a statute can amount to negligence *per se*, a form of strict liability. In *Ostash v. Sonnenberg*,³³ for example, the Alberta Court of Appeal was faced with a violation of the *Gas Protection Act* of Alberta. Although the court was able to decide the case on the basis of dangerous things, the court went on, in a *dictum*, to deal with "an additional ground". Smith C. J. A. reasoned:

I have no doubt that the provisions of the Gas Protection Act and the Regulations made under it and the Installation Code adopted and brought into force pursuant to it, were all enacted for the protection of persons in the position of the Ostash family amongst others. The duty to take care to avoid injury was therefore established; the particular standard of care was thereby established. The duty to the injured person to take care was prescribed by the statute, Regulations and Code. The breach was proven. All the essentials of negligence in my opinion are present.

This decision seems to place a type of strict liability upon any violator of a statute such as the *Gas Protection Act*.³⁴

A newer case treating a statute in this way is *Northern Helicopters Ltd. v. Vancouver Soaring Association et al.*,³⁵ where a helicopter collided in mid-air with a glider, killing both pilots. Both pilots had violated the Air Regulations passed under the authority of the *Aeronautics Act*, R.S.C. 1952, Ch. 2. Mr. Justice Berger rationalised his use of these provisions as follows:

We have the *Air Regulations*. They law down a set of rules governing aircraft. They can be applied to the case at bar. They establish a reasonable standard of care. In my view, the court ought to apply those Regulations in a sensible way that takes into account the nature of flight and the special characteristics of the aircraft that collided here... To apply the law as developed in automobile cases or in collisions at sea, would involve the risk of introducing rules that might well be arbitrary and insensitive to the peculiarities of flight.

Now, the *Air Regulations* are not a code governing civil liability on aircraft collisions. But they do represent a reasonable standard of care to be observed. A failure to observe that standard is negligence.

33. (1968), 67 D.L.R. (2d) 311.

34. See also *Van Oudenhove v. D'Aoust et al.* (1970), 8 D.L.R. (3d) 145 (Alta. C.A.): Electrical Protection Act violation amounting to "evidence of negligence" [sic].

35. (1972), 31 D.L.R. (3d) 321 (B.C.S.C.).

In this case, both pilots were in breach of their statutory duty and liability was split 66-2/3 against the plaintiff and 33 1/3 against the defendant.

There is another recent case where legislation has been invoked in tort litigation. In *Stavast v. Ludwar*,³⁶ the defendant's son left his automobile unlocked with the engine running on a parking lot of a beer parlour while he went inside to talk to his parents. The car was stolen by an unknown person who, while driving it, collided with the plaintiff's vehicle, causing damage. Judge Gansner imposed liability upon the defendant for the damage so caused. He relied, in part, upon s. 182 of the Motor-vehicle Act of British Columbia which made it an offence for any person to leave his motor vehicle standing or parking without having stopped the engine, locking the ignition, removing the key and braking the vehicle. In his reasons for judgment the learned trial judge concluded:

Obviously s. 182 was enacted with a view to reducing the opportunities for the theft of motor vehicles. An unattended vehicle left temporarily on a little-travelled country road with its motor running is unlikely to provide many opportunities for theft. Another so left unattended on a city street is, of course, in graver danger of being stolen. It is rather difficult to conceive of a riskier place to leave a motor vehicle with its engine running than at night on a street 10 feet away from the door of a beer parlour.

His Honour felt that the violation of this statute was an "effective cause" of the loss and, therefore, imposed responsibility.

The courts are wise to rely on criminal statutes in civil cases, at least to some extent. Utilizing them as *prima facie* evidence of negligence is sensible, as a general rule, because it places the onus upon an offending defendant to disprove negligence. This demonstrates that the violation of a penal statute is taken seriously in civil courts and not ignored. At the same time, it permits evidence of excuse to be offered by a defendant who has one. There is nothing inconsistent in civil courts affording even greater force to penal statutes involving dangerous activities or the distribution of food, and treating their violation as negligence *per se*, for the law should permit no excuse at all to those who cause damage while engaging in these activities. Any contravention of such statutes should lead inevitably to liability for any damage that results.

There is one anomaly that I should like to point out. Even though evidence of facts that prove that there has been a *violation* is admissible in a tort case, under *Hollington v. Hewthorne*,³⁷ proof of a

36. [1974] 5 W.W.R. 380 (Gansner Co. Ct. J.).

37. [1943] K.B. 587.

criminal *conviction* for this conduct is inadmissible as evidence. If there has been a guilty plea, however, this is admissible as an admission.³⁸ The fact of a conviction of a criminal offence, as a result of the conduct being complained of, should be admissible as *prima facie* evidence of negligence in a civil case.³⁹ This should reduce expense and bring tort law and criminal law into closer correspondence.

b) Violation of Penal Statute by Plaintiff

Many examples exist of a plaintiff's violation of a penal statute amounting to contributory negligence.⁴⁰ Such conduct by a plaintiff is treated in exactly the same way as if it were by a defendant. It is similarly justified.

There has been a bizarre new development, however, that deserves mention for there is a danger that the old harshness of the common law, in its treatment of contributory negligence, will be reactivated. In addition to the defences of contributory negligence and voluntary assumption of risk, Canadian courts seem to have resurrected an ancient defence, based on the principle of *ex turpi causa non oritur actio*, which I prefer to describe as the defence of illegality. In the event that an injured plaintiff is guilty of criminal conduct at the time he is injured, some courts have seen fit to deny him recovery altogether, even though this has been strenuously criticised by scholars.⁴¹

One recent case invoking this defence is *Tomlinson v. Harrison*.⁴² The plaintiff, the defendant and a third person, after having drunk a large quantity of beer, stole a car. They went for a drive, with the defendant at the wheel, drinking beer as they roared along at 100 m.p.h. They were spotted by a police cruiser which gave chase. In trying to elude apprehension, the car went off the road and the plaintiff was injured. Mr. Justice Addy held that the action was barred, both because of the principle of *ex turpi causa non oritur actio* and because of voluntary assumption of risk.

38. *Ferris v. Monaghan* (1956), 4 D.L.R. (2d) 539 (N.B.C.A.).

39. *The Compensation for Victims of Crime Act*, S.O. 1971, c. 51, s. 11, treats evidence of a conviction as conclusive proof that a crime was committed.

40. See *Satterlee v. Orange* (1947), 177 P. (2d) 279.

41. Gibson, "Illegality of Plaintiff's Conduct as a Defence", (1969) 47 *Can. Bar Rev.* 89; see also Fridman, "The Wrongdoing Plaintiff", (1972) 18 *McGill L.J.* 275; Weinrib, "Illegality as a Tort Defence", (1976) 26 *U.T.L.J.* 28.

42. [1972] 1 O.R. 670.

His Lordship felt that the plaintiff was an active party to several offences, including theft of both cars, drinking while driving, driving while intoxicated, and reckless or dangerous driving. His Lordship explained:

... there was a common intention to pursue not only an unlawful purpose but a criminal purpose at the time of the accident and the damage suffered by the plaintiff was a direct and readily foreseeable result of that common purpose.

His Lordship reasoned further:

I feel that the defence of *ex turpi* is part and parcel of the law of torts in the province and is available as a defence when all the necessary elements are present. When two criminals are pursuing a joint criminal venture and, in the attainment of the criminal object, one of them happens to be injured, and when the occurrence from which the injury results is a natural and probable consequence of the attempt to attain the criminal object, I fail to see why our courts should give any relief to one of them who happens to be injured in the process, or how, or why our courts, in such a case, should proceed to apply to the conduct of one of them the test of what a reasonable man would do in those circumstances in order to give some relief to the other. Although there might possibly be some question whether today, in this jurisdiction, the defence of *ex turpi* is available as between two parties involved in an unlawful act constituting a mere breach of a penal statute or a minor offence of the nature of those formerly known at common law as misdemeanours, it is available, as in the present case, between two parties involved in the commission of an indictable offence.

Another decision involving this matter is *Tallow v. Tailfeathers*.⁴³ A group of young men stole a car following some heavy drinking. Predictably, serious injury and death ensued when a car crash ended the revelry. The majority of the Alberta Court of Appeal ruled that the plaintiff's action must be dismissed on the ground of voluntary assumption of risk. Mr. Justice Clement concurred, but preferred to rest his decision on *ex turpi causa*. During the course of a long and learned opinion, these comments appeared:

... I understand that the positive law, of which Lord Mansfield spoke in the context of an immoral or illegal act, [in a contract setting] is one that prohibits the commission of an act that has such a quality of turpitude that it must be regarded as anti-social. The cause of action must arise out of the commission of that act, and the participation of the claimant in the act.

Thus, the applicability of the rule is dependent on behaviour on the part of the plaintiff which in its nature and degree is inimical to the interests of society, and on his claim against the defendant "arising" out of

43. [1973] 6 W.W.R. 732 (Alta. C.A.); cf. *Bigcharles et al. v. Merkel et al.*, [1973] 1 W.W.R. 324 (B.C.S.C.): burglar, who negligently shot by defendant during escape, held 75 percent contributorily negligent.

that behaviour. Both must concur to warrant denial of his claim. Judgment must be based, not on the social and legal structure of a past century, but on the present changes and changing conditions of society and the proliferating controls of conduct in the pervasive juridical system by which it is governed...

Another decision, that raises the tantalizing possibility of invoking the *Negligence Act* in cases of illegality, is *Lewis v. Sayers*.⁴⁴ An intoxicated owner of a vehicle allowed an intoxicated friend to drive them both on a short trip in the course of which the driver negligently collided with a parked car. The defence of *volenti* was held not to apply because there was no bargain, express or implied, to give up his right of action. Gould D. C. J., nevertheless, apportioned liability 50-50 on the ground that the Ontario Negligence Act covered such conduct. He explained:

The defendant relied mainly upon the maxim *ex turpi causa non oritur actio* and this matter was argued at length and requires serious consideration. If the defendant should succeed in establishing either of these special defences, my previous findings as to negligence and respective degrees of fault would be of no importance, as the plaintiff would be absolutely debarred from recovering against the defendant. I was referred to the article on this subject by Mr. Dale Gibson printed in 47 Can. Bar Rev. 89 (1969), and to a long list of cases, many of which are referred to in the article...

These cases, of course, make it very clear that the maxim *ex turpi causa non oritur actio* under proper circumstances applies and is frequently used in our courts.

The two Manitoba cases of *Ridgeway v. Hilhorst* and *Rondos v. Wawrin*, although different in their facts from the present case, both suggest that the *ex turpi causa* doctrine might apply here. An important consideration, however, is that the Manitoba statute which corresponds to s. 4 of the Ontario Negligence Act is worded differently, in that it refers only to negligence rather than to fault or negligence. The result would appear to be that the Ontario statute applies to a considerably wider range of situations than the Manitoba Act. Section 4 of the Ontario Negligence Act reads as follows:

4. In any action for damages that is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff that contributed to the damages, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively.

It appears to me that in a case to which, by reason of its facts, s. 4 of the Negligence Act applies, the Ontario Legislature has quite deliberately substituted for the *ex turpi causa* rule a positive direction that the court shall make a finding as to the degree of fault or negligence to be attributed to each party and shall apportion the damages accordingly. I realize of

44. (1971), 13 D.L.R. (3d) 543 (Ont. Dist. Ct.).

course that s. 4 was enacted primarily to do away with the absolute defence formerly available in cases of contributory negligence, but the wording is equally apt in relation to the defence now under discussion, to which the added words "fault or" seem to apply with particular force. The defence *ex turpi causa non oritur actio* seems necessarily to involve a situation where both parties are alleged to be at fault, and so long as it is remembered that s. 4 applies only where the fault of each has contributed to the damages, in my opinion the section leaves no room for the application of the maxim.

If the defence of *ex turpi causa* is to be re-introduced into tort law to deny people recovery altogether because of their wrongdoing, it would be too harsh a doctrine to accept. To ignore a plaintiff's wrongdoing, however, is also unsuitable. It just does not seem appropriate, when their losses arise out of wrongdoing, to award an injured burglar or car thief damages in the same way as an innocent plaintiff. An acceptable compromise might be the one hinted at by Gould D. C. J. in *Lewis v. Sayers*: that is, the plaintiff's illegal conduct, if it contributed to his injury, could be relied on to reduce his recovery under the Negligence Act, but not to deny him recovery altogether. Hence, the defence of illegality would be incorporated into the defence of contributory negligence, which is a much more humane and flexible instrument.

2. Compliance with the Criminal Law

Although violation of penal statute has been relied on in civil cases to impose liability, compliance with legislation has not been permitted invariably to excuse otherwise tortious conduct. The courts have wisely concluded that a violator of a penal statute is not only criminally liable, but he should normally be held civilly liable for the damage he has caused. They have also rightly determined that, merely because someone's conduct has *not* violated any *criminal* law, he should not necessarily escape *civil* liability. One can be liable civilly without attracting any criminal responsibility whatsoever, although, if one is criminally liable, he should normally also be civilly responsible for any loss resulting. There is a great deal of overlap between civil and criminal law, but they are not, and should not be, identical. Certain conduct may deserve to attract civil responsibility but may not be so reprehensible as to attract penal responsibility. That is the whole point of two separate regimes of social control.

Let us examine several areas where this approach has been manifested:

a) Compliance with Statute Not An Excuse

Civil courts have recognized that, merely because a defendant acts in compliance with the criminal law, he is not necessarily immune from tort liability. For example, even though a motorist violates no penal speeding law, he may still be found liable for travelling too fast in the circumstances. Mr. Justice Orde once declared that "mere compliance with statutory and motor vehicle regulations is not sufficient".⁴⁵ Consequently, even though a motorist is not guilty of any speeding offence, he can be held civilly negligent for excessive speed in circumstances of poor visibility,⁴⁶ heavy pedestrian traffic,⁴⁷ dangerous road conditions,⁴⁸ and substandard vehicular equipment.⁴⁹

There are some railway cases, where the courts have refused to relieve the defendant railway from liability when it was argued that they could not be found negligent if they complied with all the provisions of the Railway Act. The Supreme Court of Canada has repeatedly indicated that it is not always enough for a railway merely to comply with the legislation, and that liability for negligence can be found if there are "special circumstances" that require more than the usual precautions.⁵⁰

One leading case exploring these questions is *Bux v. Slough Metals Ltd.*,⁵¹ where the plaintiff injured his eye when he was splashed by some molten metal which he was moving from a furnace. The evidence indicated that if he had been wearing the safety goggles which the employer was required by Regulation to supply, he would not have been injured. The goggles had been provided to the workers but, to the employer's knowledge, they were not used because the lenses tended to mist up very quickly. The employer did not enforce the wearing of the goggles. The court found that there was no breach of statutory duty but, nevertheless, held the employer negligent at common law for not

45. *Whitten v. Burtwell* (1920), 48 O.L.R. 210, at p. 215. See also *Martin v. Powell* (1928), 62 O.L.R. 436.

46. *Gregory v. Pepe* (1954), 34 M.L.R. 93; *Ruttan v. O'Connor-Fenton* (1929), 44 O.L.R. 208 (C.A.); *Ristow v. Weinstein*, [1934] S.C.R. 128, at p. 131; see *Canadian Negligence Law*, 1972, at p. 145 ff.

47. *Stanley v. National Fruit Co.*, [1931] S.C.R. 60, at p. 68; *Canadian Negligence Law*, at p. 147 ff.

48. *Goldsmith v. Bentley*, [1937] O.W.N. 280; see *Canadian Negligence Law*, at p. 149.

49. *Wing v. Banks*, [1947] O.W.N. 897: bad tire.

50. *Paskiviski v. C.P. Ltd.* (1976), 57 D.L.R. (3d) 280; *Weiss v. Larson* (1965), 55 D.L.R. (2d) 330 (Alta. C.A.).

51. [1974] 1 All E.R. 262 (C.A.).

forcing the employees to use the goggles or for not providing better ones. The employer argued that compliance with the statutory duty absolved him from any breach of his common law duty. In response to this, Stephenson L. J. stated:⁵²

There is, in my judgment, no presumption that a statutory obligation abrogates or supersedes the employer's common law duty or that it defines or measures his common law duty either by clarifying it or by cutting it down — or indeed by extending it. It is not necessarily exhaustive of that duty or co-extensive with it and I do not, with all due respect to counsel for the defendants' argument, think it possible to lay down conditions in which it is exhaustive or to conclude that it is so in this case. The statutory obligation may exceed the duty at common law or it may fall short of it or it may equal it. The court has always to construe the statute or statutory instrument which imposes the obligation, consider the facts of the particular case and the allegations of negligence in fact made by the particular workman and then decide whether, if the statutory obligation has been performed, any negligence has been proved. In some cases such proof will be difficult or impossible; in others it may be easy.

In imposing statutory duties whose breach may give an injured workman a right of action against his employer, Parliament cannot be presumed to have intended to take from the courts their duty of deciding whether his employer has taken reasonable care of the workman and what the extent of that duty is. In this case I venture to think in every case where a plaintiff has alleged a breach of statutory duty, he is entitled to allege negligence at common law and to ask the court to answer the question whether he has proved negligence, irrespective of his having proved a breach of statutory duty. In this case the plaintiff, having failed to prove a breach of statutory duty, can certainly ask the court to decide whether a prudent employer ought to have done more for his safety by way of persuading, instructing or ordering him to wear goggles than his employers did.

The court also held that the plaintiff was contributorily negligent to the extent of 40 percent.

There are other situations where legislation requires certain safety measures, which if complied with, do not always guarantee immunity to the defendant. Take, for example, the safety features mandated for automobiles. Even though a manufacturer incorporates all the required equipment into its vehicles, it can still be argued that others, not required by law, should also have been included.⁵³ Similarly, obedience to legislative provisions for labelling may not suffice to meet the standard of the reasonable person in all cases.⁵⁴

52. *Ibid.*, at pp. 272–273.

53. See *Larsen v. General Motors* (1968), 391 F. (2d) 495.

54. Compare with *Lambert v. Lastoplex Chemicals* (1971), 25 D.L.R. (3d) 121.

This is a wise strategy for private law. The penal standards in the safety area are properly viewed as a *minimum*, below which actors cannot fall without incurring *civil* responsibility in addition to criminal liability. This does not and should not mean, however, that tort law cannot be more demanding of actors than is the criminal law. Because it deals only with civil sanctions, in the context of an injured person seeking financial recompense, tort law could well decide to exert its gentler influence for safety by imposing civil liability, even though no penal infraction has occurred.

b) Nuisance, Strict Liability and Legislative Authority

Another interesting area, where public law and private law intersect, is tort law's treatment of legislative authority in nuisance and strict liability situations. The basic principles of tort law are affected to some extent by this intrusion of public law, but they are not obliterated altogether. The basic principle emerging from the cases, as always, is one of compromise — where an activity is legislatively authorized, no nuisance or strict liability is imposed, unless the defendant is found to have been "negligent".

This partial immunity was first enunciated in 1860 in the case of *Vaughan v. Taff Vale Railway Co.*,⁵⁵ where it was said that, when the legislature has "sanctioned the use of particular means... the parties are not liable for any injury... unless they have contributed to it by some negligence".⁵⁶ Consequently, courts have distinguished between one group of activities, which may subject an enterprise to nuisance or strict liability, and another group of legislatively authorized activities, which do not import liability, except where some fault is proven.⁵⁷

The main rationale for this partial immunity (in addition to history) is the old standby of the intention of the legislature. It is pretty obvious, however, that no intention with regard to civil liability is usually articulated in the statute. It is, therefore, up to the courts to determine the best way to treat these legislatively authorized activities.

As might be expected, the common law courts have sought to preserve the protection afforded individuals by its principles and have stoutly resisted the invasion of public law. Various legal devices have

55. (1860), 5 H. & N. 679.

56. *Ibid.*, at p. 396, *per* Cockburn J.

57. See Linden, "Strict Liability, Nuisance and Legislative Authorization", (1966) 4 *O.H.L.J.* 196.

been employed in this endeavour. One such device is to construe strictly the legislation authorizing the activity in question. One court has proclaimed that grants of legislative authority are not "charters to commit torts".⁵⁸ Nor do they grant a "carte blanche" to create nuisances.⁵⁹ Consequently, unless the legislation clearly authorizes the particular activity in question, the civil courts will impose liability as they normally do. The courts have held that there was no legislative intention to grant any immunity where some locomotive sparks set fire to a haystack,⁶⁰ where sewage was emitted from an authorized building,⁶¹ where a nuisance was caused by a sewer,⁶² a smallpox hospital,⁶³ or a horse stable,⁶⁴ and other similar situations.

Another technique used by the courts to limit the impact of legislative authorization has been to restrict the notion of implied authority. The courts will imply a legislative intention to authorize certain harm only where the damage is a necessary or inevitable result of the authorized act.⁶⁵ Consequently, an intention to excuse the defendant from liability is rarely implied, but it once was where vibrations were caused by a locomotive, on an authorized railway, because this could not possibly be avoided.⁶⁶

A similar interpretation method adopted by certain courts is that the authorizing legislation was not intended to legalize damage because it was "permissive" only and not "imperative".⁶⁷ A variation on this language has been urged by Salmond, who suggests that the legislation should be examined to discover whether the authority is "absolute" or "conditional".⁶⁸ If it is absolute, the immunity should be invoked, but if it is conditional, it should be concluded that the legislature intended the act to be done only if it could be done without harming anybody. These spurious rationales make little sense, but they do manifest the lengths to which courts will go to try to reduce the impact of public law on historic tort rights.

58. *Quebec Railway Co. v. Vandry*, [1920] A.C. 662, at p. 679.

59. *Midwood v. Manchester*, [1905] 2 K.B. 597, at p. 606.

60. *Jones v. Festiniog Railway* (1868), 3 Q.B. 773, cf. *C.P.R. v. Roy*, [1902] A.C. 220.

61. *A.G. v. Colney Hatch Lunatic Asylum* (1869), 19 L.T.R. 708; *Burgess v. Woodstock*, [1955] O.R. 814.

62. *A.G. v. Leeds* (1870), 22 L.T.R. 320, at p. 331.

63. *Metropolitan Asylum v. Hill* (1881), 6 App. Cas. 193.

64. *Rapier v. London Tramways*, [1893] 2 Ch. 588.

65. *Manchester v. Farnworth*, [1930] A.C. 171; *Whitehouse v. Fellowes* 10 C.B. (N.S.) 765, at p. 870.

66. *Hammersmith v. Brand*, L.R. 4 H.L. 171.

67. See *Burniston v. Corp. of Bangor*, [1932] N.I. 178.

68. *The Law of Torts*, 16th Ed., 1973, at p. 520.

Civil courts have also shifted the onus of proof in these cases to the defendant to demonstrate that his otherwise tortious conduct was authorized by the legislation and that the damage caused was inevitable.⁶⁹

The courts have also manifested their antipathy toward the immunity by fashioning a specialized definition of the word "negligence", as used in the context of the partial immunity. Ordinarily, negligence is the absence of reasonable care in the circumstances, having regard to the gravity of the harm, the likelihood of its occurrence and the utility of the defendant's conduct. Rather than adopt this normal meaning in this context, the courts have narrowed it by holding that "if the damages could be prevented it is, within the rule, 'negligence' not to make such reasonable exercise of powers".⁷⁰ Similarly, it has been suggested that "it is negligence to carry out work in a manner which results in damage unless it can be shown that that, and that only, was the way in which the duty could be performed".⁷¹ The defendant who wishes to rely on legislative authority as a defence, therefore, must convince the court that the activity was carried on in the only way possible; if he fails, he will be held to be "negligent" and, consequently, outside the protection of the partial immunity.

In deciding whether a court will restrict the operation of these legislatively authorised activities, various policy factors are taken into account, which is as it should be. The immunity will tend to be invoked and recovery denied where a plaintiff is seeking to gain increased compensation by avoiding a statutory compensation scheme, where the defendant is a non-profit-making operation, where the authority is by statute rather than by an inferior legislative enactment, and where a particularly important industry is involved. On the other hand, courts will tend to avoid the immunity and impose nuisance or strict liability where the defendant is a profit-making organization, where the legislative authority is a by-law or governmental contract, where the defendant's conduct was particularly reprehensible and where the loss could easily have been avoided.⁷²

Consequently, there is visible a healthy tension between the established private law and the public law intruder. Private law in this area has been altered to some extent by the public law, but the civil

69. Linden, *op. cit. supra*, footnote 57, at p.

70. *Geddis v. Bann* (1878), 3 App. Cas. 430, at p. 455.

71. *Provencher Millers v. Southampton*, [1940] 1 Ch. 131, at p. 140.

72. See Linden, *supra*, footnote 57, at p. 206.

courts have not surrendered completely. They have struggled to circumscribe the impact of authorizing legislation and have preserved, as best as they could, the pre-existing private rights. The philosophy that emerges from the cases is that, if legislatures wish to immunize certain activities for the public good, they should do so expressly and provide for alternative compensation to the victims of this exercise of public power. If they do not do so expressly, the duty of private law is to protect the private rights of the individuals damaged without doing violence to the legislation.

c) Specific Defences in Criminal Code : S.25(4)

Sometimes the civil courts do not resist sufficiently the encroachment of public law and fall prostrate before it. Take, for example, tort law's treatment of s. 25(4) of the Criminal Code which reads:

- (4) A peace officer who is proceeding lawfully to arrest, with or without warrant, any person for an offence for which that person may be arrested without warrant, and every one lawfully assisting the peace officer, is justified, if the person to be arrested takes flight to avoid arrest, in using as much force as is necessary to prevent the escape by flight, unless the escape can be prevented by reasonable means in a less violent manner.

The leading case on this point is *Priestman v. Colangelo and Smythson*.⁷³ Smythson, a 17-year-old youth, stole a car and was driving along Donlands Avenue in East York, when he was detected by two police officers who were patrolling in a police car. The boy quickly drove off along Mortimer Ave., a side street, and the policemen pursued him in an attempt to apprehend him. The police car tried to pass the stolen car on three occasions, but each time Smythson pulled over to thwart this. One of the policemen then fired a warning shot into the air. The youth's vehicle only increased its speed. The officer then took aim at the left rear tire and fired. Unfortunately, the police vehicle at that moment hit a bump, and the bullet went through the rear window of the vehicle, striking the driver in the neck, and causing him to lose consciousness. The car went out of control and fatally injured two young girls, who were waiting for a bus. The Supreme Court of Canada, in a three-two decision, ultimately dismissed the claims of the girls' families against the police officers, on the ground that the hazard they created was not too great in the light of the social value of capturing a "criminal whose actions... constitute

73. *Priestman v. Colangelo and Smythson*, [1959] S.C.R. 615.

a menace to other members of the public". In attempting to stop this fleeing car, the policemen were not obligated to risk their lives again and "no other reasonable or practical means of halting the car [had] been suggested than to slacken its speed by blowing out one of the tires". The court observed that the police could not do anything that came into their mind in order to apprehend a criminal, but certain reasonable risks could be taken for this purpose. For example, it would be permissible to bump into someone while pursuing a pickpocket in a crowd or to damage private property in order to catch a bank robber who was hiding there or to shoot at an escaping bank robber who had murdered a bank employee and was firing his revolver at the police officers who were pursuing him. A policeman, however, cannot fire into a crowd in the hope of stopping a fleeing criminal who was obscured from view. Mr. Justice Locke, writing for the majority, relied, in part, on s. 25 of the Criminal Code (and the Police Act) which he felt might furnish a "complete defence" in certain circumstances.

Mr. Justice Cartwright, dissenting, after balancing the serious risk and the utility of apprehending the offender, concluded that the officer was negligent, and that he was not excused by s. 25(4) of the Criminal Code. In explaining his position, Cartwright J. reasoned:

The question of difficulty is whether the justification afforded by the subsection is intended to operate only as between the peace officer and the offender who is in flight or to extend to injuries inflicted, by the force used for the purpose of apprehending the offender, upon innocent bystanders unconnected with the flight or pursuit otherwise than by the circumstance of their presence in the vicinity. The words of the subsection appear to me to be susceptible to either interpretation and that being so I think we ought to ascribe to them the more restricted meaning. In my opinion, if Parliament intended to enact that grievous bodily harm or death might be inflicted upon an entirely innocent person and that such person or his dependants should be deprived of all civil remedies to which they would otherwise have been entitled, in circumstances such as are present in this case, it would have used words declaring such intention without any possible ambiguity...

I conclude that the first main ground upon which Priestman's appeal is based fails and pass to the second, which raises the question whether the two fatalities were contributed to by negligence on the part of Priestman.

Under s. 45 of the Police Act, R.S.O. 1950, c. 279, Priestman was charged with the duty of apprehending Smythson... This duty to apprehend was not, in my opinion, an absolute one to the performance of which Priestman was bound regardless of the consequences to persons other than Smythson. Co-existent with the duty to apprehend Smythson was the fundamental duty *alterum non laedere*, not to do an act which a reasonable man placed in Priestman's position should have foreseen was likely to cause injury to persons in the vicinity.

The opinion of Cartwright, J. is preferable to that of the majority. By interpreting narrowly the language used, it restricts the operation of s. 25(4) of the Code so as not to apply to innocent third persons. This is sound. His Lordship might even have restricted the section further, so as to immunize the police officers only from *criminal* liability to the escaping offender and not from civil liability to him. Or, he might even have interpreted the section to authorize the force used only as long as there was no negligence displayed in its use. Such an interpretation would correspond more closely to the sturdy independence of tort law, as evinced in the legislative authorization cases. Indeed, one might even have argued that Parliament has no business interfering with private rights, which are within the exclusive legislative jurisdiction of the provinces.⁷⁴

A contrasting case is *Beim v. Goyer*,⁷⁵ where a policeman accidentally shot a car thief he was chasing over rough ground. The officer was carrying his gun at the time and had previously fired several warning shots. The policeman was held liable by the Supreme Court of Canada because an unarmed boy running away on foot posed no danger to the officer or to anyone else. Mr. Justice Ritchie distinguished *Priestman v. Colangelo* since, in that case, it was reasonably necessary for the policeman to fire at the tire. Mr. Justice Martland dissented, and suggested that there was nothing wrong with firing some warning shots into the air while running, because, if the officer had stopped before firing, the chances are that the person would have escaped. He distinguished *Priestman*, where the shot was deliberately fired, from this case where the gun was discharged accidentally. According to Mr. Justice Martland, it was not even necessary for the officer to rely upon s. 25(4) of the Criminal Code to excuse his conduct.

See also *Woodward v. Begbie*,⁷⁶ where a similar result ensued when the plaintiff, a prowler, was accidentally shot by one of two policemen who fired their pistols intending to hit the ground near the fleeing suspect. Mr. Justice McLennan held that s. 25(4) did not immunize the defendant because "more force was used than was necessary and the escape could have been prevented by the more reasonable means of overtaking the plaintiff..."

74. See, generally: McDonald, "Use of Force by Police to Effect Lawful Arrest", (1966-1967) 9 *Crim. L.Q.* 435.

75. (1966), 57 D.L.R. (2d) 253 (S.C.C.).

76. [1962] O.R. 60.

Another recent decision is *Poupart v. Lafortune*,⁷⁷ where the Supreme Court of Canada dealt with the question of whether s. 25 applied to exempt a police officer from liability for a gun shot wound he accidentally inflicted on an innocent bystander, when some armed robbers opened fire on him after he tried to apprehend them. Fauteux C. J. C. stated:

First, I should say that if only because of the decision of this Court in the *Priestman* case, *supra*, there is no reason to doubt, in my view, that the justification created by the aforementioned provisions of s. 25 relieves the police officer of any civil or criminal liability, not only in respect of the fugitive but also in respect of any person who accidentally becomes an innocent victim of the force used by such an officer in the circumstances described in those provisions...

... in contrast with the driver of an automobile, Lafortune was not engaged merely in performing an act permitted by law, but, which is quite a different matter... he was engaged in the hazardous performance of a grave duty imposed on him by law. In carrying out such a duty a peace officer must undoubtedly refrain from making any unjustifiable use of the powers relating to it...

However, while a police officer is not relieved of a duty to take reasonable care, that is care the degree of which must be determined in relation to the particular circumstances of the case to be decided, the actions of Lafortune cannot, in a case like that before the Court, be evaluated as they would be if it were a case in which the precautions to be taken in accordance with the duty not to injure others were not conditioned by the requirements of a public duty. In short, the police officer incurs no liability for damage caused to another when without negligence he does precisely what the legislature requires him to do: see *Priestman* case, *supra*. Interpreted otherwise the justification provided by s. 25(4) would be reduced to a nullity.

One might conclude that, since there was a finding of no negligence on the facts of *Poupart*, s. 25 was totally irrelevant to the decision of the case. In other words, no liability was found because there was no negligence — not because of s. 25.

Even if there is a finding of negligence, however, s. 25 should not be used to immunize the police from the civil consequences of their negligence. It should be restricted in scope only to excuse the police from criminal liability for their conduct. Such an interpretation would be more in harmony with the treatment of public law by private law in other contexts. Just because someone is not criminally liable for his conduct, this does not mean that he should escape civil liability for it. The civil law might well choose to impose liability for certain substandard conduct if harm is caused thereby, whereas the criminal

77. (1974), 41 D.L.R. (3d) 720 (S.C.C.).

law would not wish to invoke its harsher sanctions to control the conduct. It may well be that, although negligently shooting someone on occasion is acceptable policy for the criminal law, it is not permissible for purposes of private law. In other words, even though penal law permits injury to individuals during law enforcement, tort law may require compensation to the victim.

IV

Private Law's Infiltration of Public Law

Although the invasion of private law by public law is a familiar phenomenon, the intrusion of private law into public law's preserve is relatively novel. The reason for private law's infiltration into public law is the same as that which fuels public law's intervention into private law — that is, the performance of public law is perceived by aggrieved individuals to be less than satisfactory. In other words, the tools of public law, although normally adopted to rectify the failures of private law, sometimes prove inadequate to the task. It should come as no surprise that public law, too, can be insensitive and unresponsive. Public law, too, can be ineffective, sluggish and too costly. It, too, can be oppressive and appear to be the enemy of the people, rather than their friend. Government and public agencies often appear undemocratic and unaccountable to anyone. As the public demands more responsiveness from those who exercise power in society, challenges to the exercise of public power are increasing in frequency. One method whereby governmental power may be questioned is the private action for damages, which, on occasion, may be even more effective than other protective techniques.

I have argued elsewhere that tort law can function very much like an ombudsman.⁷⁸ Not only are the damages paid a deterrent to wrongdoing, but the publicity sanction, that can be directed against a defendant, may also encourage greater care. Negative publicity can hurt the defendant in three ways: (1) it can cost him money by reducing sales, the value of shares or the amount of public money appropriated on his behalf; (2) bad publicity may bring about a loss of prestige; and (3) it can induce governmental intervention if it discloses conditions that are felt to require a legislative response. Consequently, the power of a tort suit should not be underestimated.

78. "Tort Law as Ombudsman", (1973) 51 *Can. Bar Rev.* 155.

Let me examine several recent examples of private law's intrusion into public law. I will deal with tort cases in the main, but there are examples in most other fields of private law.

1. Control of the Police

Private law performs a valuable function in seeking to control the conduct of the police. That this task is thought to be of critical import to society is witnessed by the number of special studies that have been commissioned on the question in the last few years.⁷⁹ It must be admitted that the criminal law is largely impotent as a technique for the control of the police, because policemen themselves are largely in charge of the criminal process and, not unexpectedly, they are less than zealous in regulating themselves thereby.⁸⁰ Similarly, the exclusionary rules of evidence are of little consequence in Canada. The best hope for supervision of the police is probably administrative self-regulation, but these methods, too, lack the necessary objectivity and credibility to be widely accepted by the public.⁸¹

By default, therefore, and not by choice, tort law has emerged as one of the prime techniques for filling the vacuum. As in other situations, the perceived failure of public law to perform the task of control adequately has stimulated individuals to rely on private law tools for their protection. The old tort remedies such as assault, battery, trespass, false imprisonment and negligence are available as weapons to be used by citizens against wrongdoing policemen and, if they are successful, the police chief is made financially responsible in addition to the offending officer.⁸² The chances of success are much better in a tort action before a jury, or before a Judge other than a Provincial Court Judge, who may come to trust the veracity of police officers too much because of continuous contact with them. Since financial damages are awarded to the plaintiff, with exemplary damages in addition possibly, he has a financial incentive to pursue this remedy in addition to any others he may have. As a result of these civil actions the public may be informed about the allegations of the complainant, the defence of the police, and the result. A mere private

79. Studies have been conducted by Mr. Justice Morand, His Honour Judge Shapiro, His Honour Judge Morin and by Arthur Maloney, Q.C.

80. Weiler, "The Control of Police Arrest Practices: Reflections of a Tort Lawyer", in *Studies in Canadian Tort Law*, 1968.

81. Grant, "The Control of Police Behaviour", in *Some Civil Liberties Issues of the Seventies*, Tarnopolsky, ed., 1974.

82. *Police Act*. R.S.O. 1970, c. 351, s. 24(1): municipality may pay.

complaint to a police commission may be too easily buried and may never attract any public attention at all. Consequently, tort law serves as *one* way of overseeing police activity, and may provide some deterrence of substandard police behaviour.

It is actually quite surprising to see the number of tort actions against the police that have been successful. For example, in the area of faulty arrest procedures, there is the landmark case of *Christie v. Leachinsky*,⁸³ where it was held that the police could not use a phony charge to detain a suspect. The police must tell a person the true reason for his arrest and detention, or they may be held civilly liable. Similarly, a policeman cannot just stop anyone on the street and question him without reasonable grounds for suspecting him of some criminal offence. If the policeman tries to do so, he may be resisted, and damages for assault or false imprisonment may be awarded against him.⁸⁴

The police must also avoid arresting suspected shoplifters, unless they have solid grounds on which to found their action.⁸⁵ Merely because someone refuses to pay a bill in a restaurant, if there is a rational reason for withholding payment, this is not sufficient ground for an arrest.⁸⁶ If the wrong person is arrested by a police officer, he may not be held liable if his error is a reasonable one,⁸⁷ but, once he discovers his mistake, he must release the person forthwith or pay damages.⁸⁸ Even though the actions are not always successful, policeman may be openly challenged by citizens in tort litigation for assault⁸⁹ or for improperly entering private premises.⁹⁰ These unsuccessful claims still serve to notify the public of the problem.

These occasional tort suits, therefore, may remind the police that, even if they escape disciplinary or criminal proceedings for their misconduct, they may be answerable in a civil suit for their wrongdoing. This cannot help but render the police more cautious and responsive to the interests of the individuals with whom they must deal in their everyday work.

83. [1947] A.C. 573.

84. *Koechlin v. Waugh and Hamilton* (1968), 11 D.L.R. (2d) 447: liability of police to teenager; *Sandison v. Rybiak* (1974), 1 O.R. (2d) 74.

85. *Lebrun v. Highlow Foods* (1968), 69 D.L.R. (2d) 433.

86. *Bahner v. Marwest* (1969), 6 D.L.R. (3d) 322, aff'd (1970), 12 D.L.R. (3d) 646 (B.C.C.A.); *Perry v. Fried* (1972), 32 D.L.R. (3d) 589 (Cowan C.J.).

87. *Fletcher v. Collins* (1968), 70 D.L.R. (2d) 183; *Crowe v. Noon*, [1971] 1 O.R. 530.

88. *Romilly v. Weatherhead* (1975), 55 D.L.R. (3d) 607, (Hinkson J., B.C.).

89. *Levitz v. Ryan*, [1972] 1 O.R. 435, aff'd [1972] 3 O.R. 783 (C.A.).

90. *Eccles v. Bourque* (1974), 41 D.L.R. (3d) 392, aff'd 27 C.R. (N.S.) 325 (S.C.C.).

a) *New Obligations*

There has been some push to enlarge the responsibility of the police beyond the traditional scope of the nominate torts and negligence law. New civil duties have been placed upon police officers, in recent years, which did not exist before. The leading case is now *O'Rourke v. Schacht*.⁹¹ A well-lighted barrier, that marked a detour around some construction work, was knocked over by a car at night, so that it was no longer visible to other motorists on the highway. The Ontario Provincial Police investigated the accident, but failed to take steps to warn the traffic about the danger on the road. The plaintiff was injured when he drove his automobile into the unmarked excavation. The Police Act of Ontario required that the Ontario Provincial Police, *inter alia*, "shall maintain a traffic patrol". The Highway Traffic Act of Ontario also empowered the police to "direct traffic" in order to "ensure orderly movement" and "to prevent injury or damage to persons or property".

In the Ontario Court of Appeal, Mr. Justice Schroeder permitted the plaintiff to recover part of his damages against the police administration. Recognising that the case was a novel one, Mr. Justice Schroeder stated:

Police forces exist in municipal, provincial, and federal jurisdictions to exercise powers designed to promote the order, safety, health, morals, and general welfare of society. It is not only impossible but inadvisable to attempt to frame a definition which will set definite limits to the powers and duties of police officers appointed to carry out the powers of the state in relation to individuals who come within its jurisdiction and protection. The duties imposed on them by statute are by no means exhaustive. It is infinitely better that the courts should decide as each case arises whether, having regard to the necessities of the case and the safeguards required in the public interest, the police are under a legal duty in the particular circumstances...

Section 55 of the Police Act which sets out the duties of members of a municipal police force declares that they "have generally all the powers and privileges and they are liable to all the duties and responsibilities that belong to constables". This is a legislative recognition of the fact that while constables have certain duties imposed upon them by statute, they are, in addition, subject to the traditional duties of police officers of which cognizance is taken under the common law.

The respondent police officers were under a statutory duty to maintain a traffic patrol of the highway in question. The word "patrol" is used in reference to police passing along or over highways or streets in the performance of their duties. The word is sometimes used to refer to duties

91. (1973), 30 D.L.R. (3d) 641 (C.A.); varied (1975), 55 D.L.R. (3d) 96 (S.C.C.).

assigned to soldiers in reference to a camp, or to the duties of a caretaker of large buildings to protect the property against fire and burglary. There is a definite purpose in requiring the police to patrol the highways under their jurisdiction, namely, to ensure that traffic laws will be obeyed, to investigate road accidents, and to assist injured persons. All this is directed to the prevention of accidents and the preservation of the safety of road users. If an unlighted truck or other large obstruction presenting a danger to traffic were on a highway after nightfall any traffic officer, sensible of his duty, would feel obligated to adopt reasonable means of ensuring that adequate warning was given of their presence on the highway. A cavity such as existed here would be even less visible to a road user, and clearly presented a much greater hazard than an obstruction located above the road surface.

Negligence as commonly defined includes both acts and omissions which involve an unreasonable risk of injury. In earlier times the common law furnished redress only for injury resulting from affirmative misconduct, and inaction was regarded as too remote to furnish a ground for the imposition of legal liability. Much as the humanitarian spirit which motivated the conduct of the good Samaritan has been lauded, it was rooted in a moral philosophy, hence from the legal standpoint the *laissez-faire* attitude of the priest and the Levite was condoned. A member of a traffic detachment of the Ontario Provincial Police in the situation of Constable Boyd and Corporal Johnston is in an entirely different position from the ordinary citizen or the priest and the Levite. These officers were under a positive duty by virtue of their office to take appropriate measures in the face of a hazardous condition such as they encountered here to warn approaching traffic of its presence...

Looked upon superficially the passivity of these two officers in the face of the manifest dangers inherent in the inadequately guarded depression across the highway may appear to be nothing more than non-feasance, but in the case of public servants subject not to a mere social obligation, but to what I feel bound to regard as a legal obligation, it was non-feasance amounting to misfeasance. Traffic officers are subject to all the duties and responsibilities belonging to constables. The duties which I would lay upon them stem not only from the relevant statutes to which reference has been made, but from the common law, which recognizes the existence of a broad conventional or customary duty in the established constabulary as an arm of the State to protect the life, limb and property of the subject...

... Each case must, in the final analysis, depend upon its own peculiar circumstances, but to hold that the proven neglect attributed by the learned judge to both defendant police officers in the most emphatic terms was not an actionable wrong which attracted liability to the plaintiff in the degrees apportioned by the learned judge would be to make the phrase "police protection" hollow and meaningless.

The Supreme Court of Canada affirmed, although it excused one of the several police officers involved. Mr. Justice Spence quoted at length from Mr. Justice Schroeder's opinion, which he described as "forthright and enlightened" and concluded:

I have the same view as to the duty of a police officer under the provisions of the said s. 3(3) of the Police Act in carrying out police traffic patrol. In my opinion, it is of the essence of that patrol that the officer attempt to make the road safe for traffic. Certainly, therefore, there should be included in that duty the proper notification of possible road users of a danger arising from a previous accident and creating an unreasonable risk of harm.

In a dissenting opinion, Martland J., Judson and Pigeon JJ. concurring, stated that he found nothing in the legislation that would "indicate an intention on the part of the Legislature to impose a liability upon a member of that Force who fails to carry out a duty assigned to him under the statute".

In *The Queen v. Cote et al.*,⁹² Mr. Justice Galligan, at trial, held the provincial police partly to blame for a car accident because they failed to notify the Department of Highways about a dangerous icy condition on a highway. He stated:

[T]here is a basic and fundamental duty on the part of the police officer to observe and report dangerous conditions seen by him on his patrol...

In my opinion, [the police officer] was negligent in both his observation and report. He was negligent in my opinion in failing to recognize on his earlier visit to the scene that the situation was dangerous and a great hazard to motorists. He was negligent in the report he gave to the Department of Highways by not impressing upon them that the situation was one of extreme danger and of emergency. In my opinion, on the balance of probabilities this negligence was a contributing factor to the loss and damage in this case.

On appeal, the Court of Appeal did not pass upon the *duty* of the police, but reversed the holding of liability against the police, on the ground that there was no causal connection between their failure to notify and the accident that occurred. In other words, even if they had warned the Department of Highways, it would have made no difference in preventing the accident.

As for the liability of the Minister of Highways, the trial judge had held them and the police 75 percent at fault. The Court of Appeal affirmed, but the Supreme Court of Canada reduced their liability to 25 percent, the defendant driver bearing 75 percent of the blame. The Supreme Court of Canada relied upon the provisions of the Highway Improvement Act.⁹³ Mr. Justice Dickson warned, however, that the decision "does not import recognition of any general duty to salt or sand highways, failure in the discharge of which would expose the

92. [1971] 2 O.R. 155, varied [1972] 3 O.R. 224 (C.A.), varied (1975), 51 D.L.R. (3d) 244 (S.C.C.).

93. Now R.S.O. 1970, c. 201, s. 30.

Minister to civil claims", but was limited to the extremely dangerous conditions at that particular location, which the trial judge had described as a "killer strip", about which the Department should have known.

The obligation of police officers, therefore, has been enlarged considerably to protect the public as well as to avoid injuring or imprisoning them. It may well be that, one of these days, a Canadian crime victim will sue his police department for failing to take adequate steps to protect him from criminal conduct, as was done in a recent New York decision.⁹⁴ It would make a fascinating law suit.

2. Liability in Negligence of Governmental Officials

The expansion of governmental activity has led to more and more public servants interfering more and more in people's lives. Although once immune from liability, governments have gradually allowed themselves to be held civilly responsible for their wrongful acts, despite some lingering procedural problems.⁹⁵ Since the public system of control over these employees (training, discipline, firing, etc.) has proved somewhat imperfect, tort law has been used as *one* method of combatting some of the misconduct of certain public officials. Tort law has recognized that ordinary citizens rely for protection and advice on government employees, and that they are entitled to competent service.

There has been a flurry of recent cases holding certain governmental officials liable for their negligent conduct. Government inspectors, for example, must perform their inspections carefully or risk tort liability for any damage they cause. Thus, in *Ostash v. Sonnenberg*,⁹⁶ a provincial gas inspector (and his employer, the Crown) was held partially responsible for the death of someone from carbon monoxide poisoning, which he helped to cause by failing to inspect a chimney properly, as required by provincial legislation. Similarly a municipal inspector, who failed to detect a defect in a water-valve box, was held liable for a flood this caused years later.⁹⁷ In

94. See *Riss v. New York* (1968), 240 N.E. (2d) 860, no liability.

95. Goldenberg, "Tort Actions Against the Crown in Ontario", *Special Lectures on New Developments in the Law of Torts*, 1973; Slutsky, "The Liability of Public Authorities for Negligence: Recent Canadian Developments", (1973) 36 *Mod. L. Rev.* 656.

96. (1968), 67 D.L.R. (2d) 311.

97. *Armstrong v. City of Regina*, [1922] 1 W.W.R. 685 (Sask. Q.B.).

the well-known decision of *Dutton v. Bognor Regis U.D.C.*,⁹⁸ liability was also imposed on a municipal inspector (as well as others) for failing to detect an old rubbish tip under the foundation of a house, which neglect caused loss to a subsequent purchaser, when the house subsided.

One attempt to impose liability on a government inspector failed on appeal, although it had been successfully utilized at trial. In *McRae v. White Rock*⁹⁹ the B.C. Court of Appeal held that there was no duty owed by the inspector, as a result of a by-law authorising the inspection of certain buildings, unless the inspector was notified that he was required to do so; because he received no notification in this instance he, therefore, was under no obligation to inspect. It would undoubtedly have been otherwise, however, if the notification had in fact been given.

Certain governmental employees who exercise custodial functions have rendered their public employers civilly liable. Perhaps the best-known case is *Home Office v. Dorset Yacht Co.*,¹⁰⁰ where the House of Lords held that the Home Office could be held liable for the negligence of its employees in supervising some Borstal boys, who escaped from an island on a yacht and damaged the plaintiff's boat. Similarly, inmates of Canadian penitentiaries have been awarded damages against the Crown for the negligence of a prison doctor¹⁰¹ and for the negligence of some guards who required prisoners to work under dangerous conditions, leading to injury.¹⁰²

If there is no negligence, however, no liability will be attached,¹⁰³ as where a prisoner was stabbed by another prisoner when there was no reasonable anticipation of this happening,¹⁰⁴ or where a prisoner fell from a truck after being hit by another prisoner.¹⁰⁵

The provincial Crown has also been held responsible for its negligent supervision of a deaf-mute student at a school for the deaf,

98. [1972] 1 All E.R. 462.

99. (1975), 56 D.L.R. (3d) 525, reversing (1973), 1 W.W.R. 514 (Berger J.).

100. [1970] 2 All E.R. 294.

101. *Daoust v. The Queen*, [1969] 2 Ex. C.R. 129.

102. *Danard v. The Queen*, [1971] F.C. 417: prisoner hurt by power mower while cutting grass on hill; *MacLean v. The Queen*, [1973] S.C.R. 2, at p. 6, (1972), 27 D.L.R. (3d) 365, at p. 368 (S.C.C.): bale of straw knocked prisoner to ground, crippling him.

103. See *Ellis v. Home Office*, [1953] 2 All E.R. 149, at p. 154, no liability.

104. *Howley v. The Queen*, [1973] F.C.R. 184.

105. *Timm v. The Queen*, [1965] 1 Ex. C.R. 174, at p. 178; cf. *Sturdy v. The Queen* (1975), 47 D.L.R. (3d) 71 (Fed. Ct.): no liability for bear attack on visitor to national park.

when his hand was injured by an unguarded power saw.¹⁰⁶ A mental hospital has been held to owe a duty to supervise its patients carefully to prevent them from attacking and injuring other patients.¹⁰⁷ Although, in this case, the defendant was not strictly a governmental agency, there is every reason to believe that this decision would extend to cover government-operated mental hospitals.

Government employees involved in serving the public in a variety of other tasks are required to do so with reasonable care. One example of such a case is *Grossman v. The King*,¹⁰⁸ where the maintenance foreman of an airport negligently failed to place warning flags around a ditch on the runway. This caused an airplane to be destroyed and a passenger to be injured. It was held that a duty was owed by the employee not only to his employer, the Crown, but also to pilots, who "were entitled to rely" on him to properly discharge his duty. In *Hendricks v. The Queen*,¹⁰⁹ the Crown was held 50 percent to blame for a boating accident, in which the wife of the suppliant drowned as a result, in part, of the negligent failure of the servants of the Crown to replace a sign which warned about a waterfall, after it had been knocked over. Mr. Justice Spence felt that the Crown had not merely failed to warn, but had actually created the danger to navigation by the dam obstruction they had built below the water level.

A recent case, *The Queen v. Nord-Deutsche et al.*,¹¹⁰ went even further than this in imposing liability on the Crown for a maritime collision between two ships. The Crown employees had negligently permitted a set of range lights, upon which a ship's pilot relied, to become displaced. Noel J., at trial,¹¹¹ had based the liability of the Crown on the ground that the Department had "engendered reliance on the guidance afforded by [the lights]", and, therefore, was required to use care in seeing that they remained in good working order or to give warning if they were not. In the Supreme Court of Canada, Mr. Justice Ritchie divided liability between the Crown and both ships and stated that there was a "breach of duty on the part of the servants of the Crown responsible for the care and maintenance of the range

106. *Dziwenka v. The Queen*, [1972] S.C.R. 419; see also *Thornton v. Board of School Trustees* (1976), 57 D.L.R. (3d) 438: liability, aff'd C.A., damages varied.

107. *Lawson v. Wellesley Hospital* (1976), 9 O.R. (2d) 677 (C.A.).

108. [1952] 1 S.C.R. 571, at p. 614, per Kellock J. Cf. *The King v. Anthony*, [1946] S.C.R. 569: no liability for military activity of firing tracer bullets that caused fire since neglect of military duty but not private one.

109. [1970] S.C.R. 237.

110. [1971] S.C.R. 849, at p. 863; cf. *Cleveland-Cliffs v. R.*, [1957] S.C.R. 810.

111. [1969] 1 Ex. C.R. 117, at p. 196.

lights... upon which lights mariners were entitled to place reliance". This decision may well create a whole range of new liabilities of the Crown in situations where they commence activities upon which others rely.¹¹²

a) *Negligent Advice*

With the advent and expansion of *Hedley, Byrne v. Heller*,¹¹³ governmental officials have also been held liable for giving negligent advice leading to economic loss. In *Ministry of Housing v. Sharp*,¹¹⁴ for example, a local council was held liable for the negligence of one of its clerks in connection with his negligence in preparing a certificate during the search of a title at the council's Registry Office. A similar case is *Windsor Motors v. Corporation of Powell River*,¹¹⁵ where liability was found when a municipal licence inspector negligently informed the plaintiff that a certain location was suitable for an automobile dealership, when in fact the zoning regulations prohibited such a use. In reliance upon this advice, the plaintiff rented the land, was given a licence by the inspector and conducted the business profitably for a time, until the error was discovered and he was forced to move, causing him economic loss. Another surprisingly alike case is *Gadutsis v. Milne et al.*,¹¹⁶ where liability was imposed against a municipality when it negligently issued a building permit, which was later revoked, to someone who began to build in reliance upon it. Mr. Justice Parker explained:

... the employees in the zoning department of the municipality were there to give out information as to zoning. [They] must have known that persons inquiring would place reliance upon what they said. [The employee] gave out incorrect information in the course of employment directly to the person seeking information. Under these circumstances I find that the municipality owed a duty of care... that it failed to discharge such duty and that as a consequence, the plaintiffs suffered loss.

Similarly, in *Couture v. The Queen*,¹¹⁷ it was decided that if a C.R.T.C. officer's negligence leads a person to believe that he has a

112. Cf. *Soulsby v. City of Toronto* (1907), 15 O.L.R. 13: no liability of railway crossing guard; *O'Donnell v. The Queen*, [1972] F.C.R. 966: no liability of Department of Transport for certificate of airworthiness, but no cause proven.

113. [1964] A.C. 465.

114. [1970] 1 All E.R. 1009.

115. (1969), 68 W.W.R. 173 (B.C.C.A.).

116. [1973] 2 O.R. 503.

117. (1972), 28 D.L.R. (3d) 301 (Fed. Ct.).

licence, when in fact he does not, and he relies on this to his detriment, liability may be found.¹¹⁸ Liability may also be imposed on a Hydro-Electric Power Commission if they negligently estimate the cost of heating a swimming pool, but not if they are careful.¹¹⁹

Health authorities may also attract liability if they fail to exercise their powers cautiously. In *Collins v. Haliburton, Kawartha Pine Ridge District Health Unit*,¹²⁰ the defendant authority, after receiving written complaints from his neighbours, notified the plaintiff that his business operations, which he had been carrying on for over a year — namely the freezing, storing, processing and packaging of poultry offal for mink ranchers — constituted an offensive trade under the Public Health Act of Ontario and that it must be carried out elsewhere. This notice, which became known to everyone in the area, caused the ruin of the plaintiff's business. The defendant was found to be negligent in giving the notice, which he should have known would become public knowledge, without making a proper investigation and inspection, and without giving the plaintiff an opportunity to put forward his position.

Mr. Justice Donoghue declared :

Now if in *Donoghue v. Stevenson* the manufacturer of a bottled soft drink owed a duty of care to the purchaser of such drink from a shop to guard such purchaser from noxious material in the drink, it seems to me that the defendant here owed a duty of care to the plaintiff. If it should be said that the defendant here is a public body carrying out specific assigned duties and therefore is not liable for negligence which damaged the plaintiff, I would reply that this distinction was not made in the *Dutton v. Bognor* case...

This action was later dismissed because the limitation period had elapsed.¹²¹

b) *Limitation to Business Powers*

There are limitations on the ability of tort law to regulate the conduct of governmental agencies. An insight into the boundary-line was provided in *Welbridge Holdings Ltd. v. Metropolitan Corporation of Greater Winnipeg*.¹²² A municipality passed a by-law upon

118. See [1972] F.C. 1137 : leave to amend granted.

119. *Hodgins v. Hydro Electric*, [1972] 3 O.R. 332, rev'd, duty, but no negligence (1976), 10 O.R. (2d) 713.

120. [1972] 2 O.R. 508, 26 D.L.R. (3d) 73.

121. See *Collins v. Haliburton, Kawartha Pine Ridge District Health Unit* (N° 2), [1972] 3 O.R. 643 (Donoghue J.).

122. (1972), 22 D.L.R. (3d) 470 (S.C.C.).

which a builder relied and spent money to prepare plans for an apartment building. When the by-law was declared invalid after an attack by some rate-payers, the builder had to abandon his plans, with consequent financial loss. The builder's action against the municipality, on the ground that its loss was suffered as a result of the negligent passage of the by-law, was ultimately dismissed. Mr. Justice Laskin observed that a municipality could incur liability both in contract and in tort during its exercise of "administrative or ministerial, or perhaps better categorized as business powers".¹²³ However, where a municipality errs while exercising its "legislative capacity" or its "quasi-judicial duty", it is immune from civil liability, even though it acts improperly, in the same way as is a provincial legislature or the Parliament of Canada. No duty of care is owed in such circumstances.

The function of negligence law is, thus, to be limited primarily to the review of lesser officials and the way in which they conduct ordinary business. It will have little impact upon the discretionary or quasi-judicial functions of the more senior civil servants, who will remain subject to other remedies. In support of this view, Mr. Justice Laskin suggested that "the risk of loss from the exercise of legislative and adjudicative authority is a general public risk and not one for which compensation can be supported on the basis of a private duty of care. The situation is different where a claim for damages for negligence is based on acts done in pursuance or in implementation of legislation or of adjudicative decrees."¹²⁴ Although such a distinction unquestionably reduces the potential power and scope of negligence suits against public officials, this may be necessary for the smooth functioning of the bureaucracy.

3. Abuse of Governmental Power

Although beyond the reach of negligence law, perhaps, senior public officials are not totally beyond control by private law actions. If senior officials, including even Ministers of the Crown, deliberately abuse their power, and thereby cause loss to citizens, they may be answerable in damages. Of course, there are many other ways of checking such abuses of governmental power, but a tort action serves as *one* possible method of combating such conduct. It may not always be effective as a remedy, but it can spotlight the impugned conduct, so that the public can be made aware of the allegations made and the response offered.

123. *Ibid.*, at p. 477.

124. *Ibid.*, at pp. 478-479.

Perhaps the most celebrated case, in this area, is *Roncarelli v. Duplessis*.¹²⁵ The plaintiff, the proprietor of a restaurant, had a licence to sell intoxicating liquor. The defendant, who was the Premier of Quebec at the time, caused his licence to be revoked in order to punish him because he was a member of and frequently assisted the Witnesses of Jehovah by arranging bail for them. The Supreme Court of Canada majority held that damages could be awarded against Premier Duplessis, because the cancellation of the licence was caused as a result of his unauthorised direction. The court indicated that a public officer "is responsible for acts done by him without legal justification". Although there is some reliance on Article 1053 of the Civil Code, the Judges treated the principle as though it was also part of the common law. Mr. Justice Rand indicated that something more than just the unlawful exercise of a discretion, something called "malice", was required before liability would be imposed:

Malice in the proper sense is simply acting for a reason and purpose knowingly foreign to the administration, to which we have added here the element of intentional punishment by what was virtually vocation outlawry.

Public officials, consequently, have a wide latitude in which to exercise their legitimate decision-making power, but they are not totally insulated from review by private action.

Another well-known case is *Farrington v. Thompson*,¹²⁶ where some police officers, purporting to exercise their power under the Licensing Act, which provided that conviction of a third offence would render a licence forfeited, required the plaintiff to close down his hotel. There was no third conviction, according to the Judge, and the jury found that the defendants failed to exercise due care in ascertaining whether a third conviction had been obtained. The court found, nevertheless, that the defendants were liable for "misfeasance in a public office". Mr. Justice Smith said that "if some other public officer does an act, which, to his knowledge, amounts to an abuse of his office, and thereby causes damage to another person, then an action in tort for misfeasance in a public office will lie".¹²⁷ There was apparently sufficient knowledge of lack of jurisdiction to satisfy the court that liability was called for.

125. [1959] S.C.R. 121.

126. [1959] V.R. 286.

127. *Ibid.*, at p. 293. See also Molot, "Tort Remedies Against Administrative Tribunals for Economic Loss", Law Society of Upper Canada, *Special Lectures on New Developments in the Law of Torts*, 1973, at p. 425.

If it is a mere error in the exercise of discretion, without any intention to do any harm, however, it seems as though no liability will be imposed. In *Harris v. Law Society of Alberta*,¹²⁸ the Benchers of the Law Society of Alberta used incorrect procedures, in violation of their statute, to disbar a lawyer. The court held that the Benchers had no power to make the order in question, which was thereby rendered null and void. Despite this, it dismissed the action for damages, because the order that the Benchers made was done "in what they *bona fide* believed to be the exercise of a judicial discretion" and which "happened, without their actual knowledge, to lack authority and validity". The facts of *Harris*, therefore, are in distinct contrast with the *Roncarelli* decision, where the defendant possessed both the knowledge of wrongdoing and the desire to inflict injury on the plaintiff.

There is some recent authority that appears to have relaxed the requirement of malice or intentional wrongdoing. In *McGillivray v. Kimber*,¹²⁹ a pilot, licenced at Sydney, Nova Scotia, under the Shipping Act, was dismissed from the service by the Sydney Pilotage Authority before his licence expired. Although the minority of the court felt that malice had to be proven for liability for a quasi-judicial act, the majority decided that the Authority was responsible. It had failed to abide by the statutorily required procedures of giving the plaintiff notice and an opportunity to be heard. Mr. Justice Anglin stated: "They committed an unwarranted and illegal act which subjected them to liability to the plaintiff for such damages as he sustained as a natural and direct consequence thereof." Mr. Justice Idington observed that "the respondents were acting entirely without jurisdiction and so acting must be held liable".

The Courts of Quebec have been most diligent in this area. In *Lapointe v. Le Roi*,¹³⁰ the petitioner, who was holder of a fishing licence, had it revoked by the Minister who lacked the statutory power to do so. The court ordered the Minister to compensate the petitioner for his loss. Another case is *Leroux v. The City of Lachine*,¹³¹ where a licence permitted the plaintiff to operate a dance hall. The city revoked the licence, without permitting him an opportunity to be heard. The court awarded damages on the ground that this was an "unwarranted and negligent action" on the defendant's part, amounting to an abuse of rights.

128. [1936] S.C.R. 88.

129. (1950), 52 S.C.R. 146.

130. (1924), 87 B.R. 170.

131. [1942] C.S. 352.

These cases are just a few of many that require governmental officials to exercise their power, at the least, honestly and in good faith, and at the most, legally and carefully. Wide latitude should be permitted to governmental officials in the legitimate conduct of their activity, but the courts seem to be moving toward holding them liable in much the same way as other professionals.¹³²

a) Three Recent Challenges to Government

Three recent cases dramatize the capacity of tort law to assist citizens in challenging governmental decisions in the law courts. Even if such lawsuits are unsuccessful, they still provide a forum whereby citizens, who are unhappy with governmental decisions, may ventilate their grievances.

A successful challenge of governmental conduct was made in *Central Canada Potash Co. Ltd. v. Attorney General for Saskatchewan*,¹³³ where Mr. Justice Disbery imposed liability against the Saskatchewan government for \$1 500 000. The plaintiff company was in the mining business in Saskatchewan, and had an agreement to supply potash to its United States based shareholder. As a result of over-production of potash and a drastic drop in world prices, the potash industry in New Mexico, which had been the major producer in the past, became depressed. A deal was made between the Government of Saskatchewan and the Government of New Mexico to control the production and sale of potash. Under the scheme, each producer in Saskatchewan was allowed, under a licence from the Minister, to sell a certain amount of potash. The object was to limit the supply of potash in world markets and to control its price. The scheme was changed to some extent in 1971 to control, through an export association, all exports of potash.

The plaintiff company objected to this scheme on the ground that it interfered with its contractual obligations with its United States based shareholder. An application for a licence permitting it to comply with its contract was refused, and the Deputy Minister, by letter to the plaintiff company, threatened to cancel its existing licence because it was exceeding its quota in order to meet its contractual obligations. The plaintiff company yielded to the threat and, thereupon, commenced this action for declarations that the regulations

132. See, generally: R. J. Gray, "Private Wrongs of Public Servants", (1959) 47 *Calif. L. Rev.* 303; Rubinstein, "Liability in Tort of Judicial Officers", (1964) 15 *U.T.L.J.* 217.

133. (1975), 57 D.L.R. (3d) 7.

passed under the Act were *ultra vires* the provincial legislature, and that all action pursuant to them were null and void. In addition, the plaintiff sought damages for intimidation.

The Trial Judge declared the marketing scheme *ultra vires* and awarded \$1 500 000 damages for the tort of intimidation against the Government of Saskatchewan. During the course of his lengthy judgment, which is now under appeal, he remarked:

It is quite clear from the cases that the threat complained of must be a threat to do an act which is in itself illegal. So to make a coercive threat to sue on an overdue promissory note or to disinherit a child of the intimidator would not be actionable because the intimidator has the legal right to sue or to disinherit. On the other hand where a debtor threatened his creditor that he would pay no part of his debt unless the creditor accepted a lesser sum in full satisfaction, such threat was illegal:

...

The Courts are always open to do justice according to the law as given to them by the people's representatives in Parliament and the Legislatures. The Courts have always been opposed to persons seeking "to do their own justice" in whatever way they themselves desire to adopt. The cult of the heaviest clout, which is too often seen in the world today, is, of course, the very antithesis of the rule of law.

It is, thus, clear that governments in future will have to exercise more restraint in the conduct of their affairs, or else expose themselves to multi-million dollar litigation, as well as the attendant negative publicity resulting therefrom.

A case in which the government decision was unsuccessfully attacked is *Berryland Canning Co. Ltd. v. The Queen*,¹³⁴ where a canning company sued the Government of Canada because of its decision to ban the sale of cyclamates under its Food and Drugs Act powers. It was alleged that this was negligently done and that it was *ultra vires*. The court concluded that the regulations were *intra vires* the Governor-in-Council and that there was no proof of negligence by the government. In a *dictum*, the Court indicated that, even if illegality had been proven, there would be no responsibility on the principle of *Welbridge Holdings*. Further, the Court concluded that the officials of the Food and Drug Directorate acted

prudently, expeditiously and reasonably in the public interest. To have acted otherwise, in the circumstances herein related, might well have exposed them to a charge of negligence or breach of duty. In addition to the United States and Canada, some thirty other countries have likewise announced a ban on cyclamates as a food additive. Accordingly, I have no hesitation in rejecting the plaintiff's allegations of impropriety in the actions of the Food and Drug Directorate.

134. (1974), 44 D.L.R. (3d) 568 (Federal Ct., Heald J.).

Another case in which a decision of Cabinet officers was challenged, without success, is *Roman Corporation Ltd. v. Hudsons Bay Oil & Gas Company et al.*,¹³⁵ where the Supreme Court of Canada dismissed, on the pleadings, an action against Ministers of the Crown for announcing that they would not permit the sale of the plaintiff's interests in a uranium mine to a company controlled by non-Canadians. An agreement had been made between the plaintiff and a buyer but, upon hearing of this agreement, the Prime Minister and the Minister of Energy, Mines and Resources of Canada made statements in the House of Commons, which they confirmed by telegram, that the Government would prohibit this sale and enact legislation for that purpose, if it was necessary to do so. As a result of these statements by the Cabinet Ministers, the sale did not go through.

The appellants brought an action in damages for procuring breach of contract, conspiracy, intimidation and unlawful interference with the economic interests of the plaintiff. The respondents moved to strike out the statement of claim as disclosing no cause of action. The statement of claim was struck out; this was affirmed on appeal and further affirmed by the Supreme Court of Canada.

The Supreme Court held that these statements were made in good faith, as representative of the policy of the Government of Canada with respect to this important matter of public concern and, therefore, there was no attempt to induce a breach of contract in these circumstances. The appellant could not secure damages for intimidation either, because the government did not threaten any unlawful act, which is a requirement of that tort. It indicated only that it would enact appropriate legislation, if necessary, in the public interest, which is certainly not an unlawful act. In addition, because there was no desire to harm the plaintiffs, damages for conspiracy were not available either. Consequently, the statement of claim was struck out.

Thus, although the plaintiffs were unsuccessful in the latter two actions, they at least had the opportunity to challenge the decisions of government at the highest level and to expose its method of investigation and decision-making in public. This is a valuable exercise in a democratic society, because it makes the public more aware of the way in which governments make decisions. Further, it renders governmental officials more attentive to the public consequences of their decisions, because they may have to justify them under oath in court.

135. (1973), 36 D.L.R. (3d) 413.

V

Conclusion : Peaceful Coexistence

As in all things, there is an ebb and flow to public and private law. When private law falters, and fails to respond adequately to social needs, it is taken over by public law. Similarly, when public law appears unresponsive to human aspirations, it will be challenged by private law. I believe that this is as it should be. It is not necessary for one regime to achieve predominance over the other. Rather, we should seek a healthy balance between the two, a form of peaceful coexistence, where public and private law may compete in the quality of service they provide to the people they are supposed to serve.

If public law moves in to take control over some area of social interaction that is fine. The full power of the state, through the police or an administrative agency, can be brought to bear on wrongdoers. The full range of penal sanctions will be available to the Judge or board before whom the complaint is heard. This method of proceeding is usually expeditious and inexpensive for the aggrieved person. However, the complainant's influence over the process is limited, he is generally unable to secure compensation, and the sanctions administered can be tough on the accused.

If public law institutions are felt to be unresponsive, an aggrieved citizen can take up the challenge in a private suit and become a crusader, an ombudsman, a one-person lobby. Only civil sanctions will be available to the Court before which the dispute is heard, but, added to the bad publicity that can be directed against the defendant, this can be formidable enough. It may certainly be more expensive for the plaintiff to proceed this way, but, if he does, he has more control over the proceedings, he may recover some compensation (including substantial reimbursement for his legal costs), and the result may be less harsh on the defendant.

In conclusion, I believe that Canadian society would be better served by less public law and less government and by more private law and more tort suits. Rather than eliminating tort remedies, we should strengthen them. Tort law should not be allowed to die, but it should be given a blood transfusion. Let us enlarge the role of legal aid in civil cases, let us unleash some consumer ombudsmen to serve individuals, let us expand the use of contingency fees, let us permit more class actions, and let us broaden the availability of punitive damage awards.

These measures would make private law suits more attractive and economically feasible. These reforms would also help us to achieve a healthier balance between public and private law, between ordinary citizens and other powerful citizens, and between all individuals and their governments.