Recent Cases

PUBLIC INTERNATIONAL LAW — SOVEREIGN IMMUNITY — DISTINCTION BETWEEN PUBLIC *(Jure Imperii)* AND PRIVATE *(Jure Gestionis)* ACTS OF A STATE. *Le Gouvernement de la République Démocratique du Congo* v. *Venne*, [1969] B.R. 818, [1969] 5 D.L.R (3d) 128 *(sub nomine, Venne* v. *Democratic Republic of the Congo).*

The recent expansion of government activities, principally in economic and trade endeavours outside the territorial limits of the state, has brought about a partial desintegration of the concept of sovereign immunity. From a once absolute principle, sovereign immunity has recently been restricted to what modern writers call the *jure imperii*, the public or political acts of a state, as opposed to the *jure gestionis*, the acts of a private law nature of a state. This doctrine is, however, far from being universally accepted.[1]

But, in Quebec courts, the acceptance of the distinction between acts of a public or private nature of a government is gaining momentum. As a result of "Expo' 67", the Superior Court of the Province of Quebec became seized of several disputes between foreign governments and Canadian individuals, centering around the designing, building and maintenance of the pavillions of participating States. In the reported cases of *Allan Construction Ltd.* v. *Le Gouvernement de Vénézuela*[2] and *Venne* v. *Le Gouvernement de la République Démocratique du Congo*,[3] the Superior Court, in both instances, applied the distinction between public and private acts of a government and held that both governments were not entitled to claim sovereign immunity in a dispute with respect to the construction of their pavillions at "Expo' 67", as such contracts were acts of a private law nature and not public acts.[4]

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[1] See generally, (1968), 14 McGill L.J. 334 and the authorities therein cited.

[2] [1968] C.S. 523, R.P. 145. (Reed, J.). See the comments in (1968), 14 McGill L.J. 334 ff.

[3] [1968] R.P. 6. (Leduc, J.). See the comments in (1968), 14 McGill L.J. 334 ff.

[4] See also, *Erickson* v. *The Government of Venezuela*, S.C.M. 739,980, October 26, 1967, Mr. Justice René Duranleau; *Claude Blouin* v. *Le Gouvernement de la République du Venezuela*, S.C.M. 733,505, November 28, 1967, Mr. Justice Rodolphe Paré, *Sicard Inc.* v. *Le Gouvernement de la République du Venezuela*, S.C.M. 742,504, January 25, 1968, Mr. Justice André Montpetit.

This view has now been affirmed by the Court of Queen's Bench in Appeal in the case of *Le Gouvernement de la République du Congo* v. *Venne*.[5] Notwithstanding that the Supreme Court of Canada has never espoused the doctrine of qualified or restrictive sovereign immunity, their Lordships were unanimously of the opinion that absolute sovereign immunity was "outdated and inapplicable to today's conditions".[6] Mr. Justice Owen went further:

> This theory may have been workable in the past when government acts were more limited in scope. It may have been an apt theory when foreign sovereigns were in many cases personal despots. *However today, instead of starting from the principle that every sovereign State enjoys jurisdictional immunity unless the other party can demonstrate some established exception to this rule, I believe we should reverse the process.* Sovereign immunity is a derogation from the general rule of jurisdiction. Any attorney seeking immunity from jurisdiction on behalf of a sovereign State should be called upon to show, to the court's satisfaction, that there is some valid basis for granting such immunity. *Mere proof that the party seeking immunity is a sovereign State or any agency thereof and the invocation of the doctrine of absolute sovereign immunity is no longer sufficient.*[7] (emphasis added).

Mr. Justice Brossard, after reviewing the evolution of the law on the subject in recent Canadian, British and foreign decisions and treatises,[8] concludes:

> L'évolution de notre jurisprudence, les efforts des juristes anglais pour modifier la leur, les tendances prononcées de la jurisprudence des autres pays *justifient*, me semble-t-il, *une conclusion que la règle non seulement n'est plus absolue mais qu'elle assujettie*, dans chaque cas, *aux circonstances de* reason and good sense, *d'assentiment réciproque* des Etats dont la souveraineté est mise en cause, *de la matière en jeu dans le litige* dans lequel la règle est invoquée, *de la nature purement privée ou commerciale (jure gestionis)* de cette matière ou, suivant le cas, *de la relation directe qui peut exister entre cette matière et l'exercice par l'Etat souverain de son jus imperii*.[9] (emphasis added).

Mr. Justice Taschereau, concurring with the view of his brothers on the Bench, stated that this view was very similar to that of the Secretary of State of the United States of America in a letter addressed to the ambassador of the Republic of Guinea dated January 31, 1968, which he reproduced *in extenso* in his notes.[10] This letter is interesting in so far as it refused absolute sovereign immunity to the Republic of Guinea in a case pending before the

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[5] [1969] B.R. 818.
[6] *Ibid.*, at p. 827, *per* Owen, J.
[7] *Id.* See the authorities cited by Mr. Justice Owen, at pp. 820-826.
[8] *Ibid.*, at pp. 829-835.
[9] *Ibid.*, at p. 835.
[10] *Ibid.*, at pp. 835-836.

Supreme Court of the State of New York, styled *New York World's Fair Corporation 1964-65* v. *Republic of Guinea,* an action on a contract for the rental of exhibition space at the fair grounds. The Secretary of State reaffirmed the American position, previously taken in the now famous "Tate Letter".[11]

The decision of the Court of Appeal has been appealed to the Supreme Court of Canada,[12] and it will be interesting to see which approach the Supreme Court opts for. In two comparatively recent decisions,[13] our federal tribunals avoided the issue altogether.

The Exchequer Court, in *Château-Gai Wines Limited* v. *Le Gouvernement de la République française,* refused to hear an application for the expungement of a trade mark by way of an originating notice under s. 56 of the *Trade Mark Act,* 1-2 Eliz. II, S.C. 1952-53, c. 49 on the ground that the named respondent, the Government of the Republic of France, had not submitted to the jurisdiction of the Court. The President suggested that the notice and statement of fact be amended "so that they neither are, nor have the appearance of being, a proceeding against the Government of the Republic of France".[14]

The Supreme Court of Canada, in *Flota Maritima Browning de Cuba S.A.* v. *The Steamship Canadian Conqueror* and *The Republic of Cuba,* held that ships belonging to the Government of the Republic of Cuba could not be seized by warrant of arrest. The majority was of the opinion that:

> The ships in question were "public ships" owned by and in the possession of a foreign sovereign state and were, for this reason, immune from arrest in the Exchequer Court. Although the ships might ultimately be used by Cuba as trading or passenger ships, there was no evidence as to the use they were destined, and the Court was not in a position to say that these ships were going to be used for ordinary trading purposes. The defendant ships were to be treated as "the property of a foreign state devoted to public use in the traditional sense,"...[15]

The words of Ritchie, J., however, as pointed out by Mr. Justice Owen,[16] might lead us to believe that the Supreme Court may also

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[11] 26 Department of State Bulletin 984, (1952).

[12] An appeal to the Supreme Court of Canada was filed December 11, 1968, docket No. 11,344. The case has not yet been heard.

[13] *Flota Maritima Browning de Cuba S.A.* v. *The Steamship Canadian Conqueror* and *The Republic of Cuba,* [1962] S.C.R. 598, (1962), 34 D.L.R. (2d) 628; *Château-Gai Wines Limited* v. *Le Gouvernement de la République française,* (1967), 61 D.L.R. (2d) 709 (Exch.).

[14] (1967), 61 D.L.R. (2d) 709, at p. 713.

[15] [1962] S.C.R. 598, at p. 599 headnote).

[16] [1969] B.R. 818, at p. 826.

be ready to abandon the concept of absolute sovereign immunity. After citing Oppenheim,[17] and Cheshire,[18] the learned judge concluded:

> With the greatest respect for those who hold a different view, I do not find it necessary in the present case to adopt that part of Lord Atkin's judgment in *The Christina*, [*Compania Naviera Vascongado* v. *S.S. Christina*, [1938] A.C. 485], in which he expressed the opinion that property of a foreign sovereign State "only used for commercial purposes" is immune from seizure under the process of our Courts, and I would dispose of this appeal entirely on the basis that the defendant ships are to be treated as (to use the language of Sir Lyman Duff) "the property of a foreign state devoted to public use in the traditional sense,..."

It is hoped that the Supreme Court will not disturb the judgment of the Court of Appeal in this case, and, in fact, will assert the principle that a foreign sovereign body who enters into relations of a private law nature with individuals, whether private or corporate, should not be allowed to retreat behind the veil of sovereign immunity in an attempt to avoid its obligations. This is a much more rational approach than absolute sovereign immunity. Whether, however, the individual will be able to enforce his judgment is altogether a different problem.

L.S.

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[17] *International Law*, vol. 1, 8th ed., H. Lauterpacht ed., (London, 1955), p. 278.

[18] *Private International Law*, 6th ed., (London, 1961), pp. 96-97. See 7th ed., at p. 98.

CONSTITUTIONAL LAW — SPECIAL ACT OF THE LEGISLATURE OF THE PROVINCE OF QUEBEC — CONFERRING ON A MUNICIPALITY RIGHTS TO EXPROPRIATE CERTAIN DESIGNATED IMMOVEABLES — WHETHER WITHIN THE EXCLUSIVE JURISDICTION OF THE PROVINCES UNDER THE B.N.A. ACT — MOTION TO QUASH NOTICE OF EXPROPRIATION — THE CANADIAN BILL OF RIGHTS — APPLICABLE ONLY TO ACTS OF THE DOMINION PARLIAMENT — BRITISH NORTH AMERICA ACT, 1867, 30-31 VICT., C. 3, SS. 92(8), (13), (16) — THE CANADIAN BILL OF RIGTHS, 8-9 ELIZ. II, S.C. 1959-60, C. 44 — AN ACT RESPECTING THE TOWN OF BOUCHERVILLE AND THE CORPORATION OF THE PARISH OF SAINTE-ANNE-DE-VARENNES, 16-17 ELIZ. II, S.Q. 1967-68, c. 104. *Péloquin* v. *La Ville de Boucherville, et al.*, [1969] C.S. 503.

The Town of Boucherville and the corporation of the Parish of Sainte-Anne-de-Varennes were given by a *Special Act* of the Legislature [1] certain powers to expropriate designated immoveables for the purposes of granting thereafter servitudes to a petroleum company to lay a pipeline. The underlying intention of the *Act* was to speed up and facilitate the building of the pipeline. The *Act* established the procedure to be followed and provided for the indemnification of the expropriated parties.

The Petitioner, Péloquin, was one of the affected parties whose property in the Town of Boucherville was to be expropriated. By way of motion before the Superior Court, he sought to have the notice of expropriation quashed on several grounds. He alleged generally irregularities in the procedure followed and that the whole procedure was illegal under the *Cities and Towns Act*.[2] More particularly, he complained that more land than necessary was being expropriated, the whole being unconstitutional, and contrary to *The Canadian Bill of Rights*.[3]

The *Act* was a measure of expediency designed apparently to protect the public interest. It removed from the individual property owner the right to deal in the most absolute manner with his property, a fundamental right of the *Civil Code*.[4] The Preambule of the *Act* provides:

> Whereas the town of Boucherville and the corporation of the parish of Sainte-Anne-de-Varennes have represented that they would be disposed

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[1] *An Act respecting the Town of Boucherville and the corporation of the Parish of Sainte-Anne-de-Varennes*, 16-17 Eliz. II, S.Q. 1967-68, c. 104.

[2] R.S.Q. 1964, c. 193.

[3] 8-9 Eliz. II, S.C. 1969-60, c. 44.

[4] Article 406 C.C.

> to acquire land and then grant servitudes to a petroleum company to enable it to proceed with the construction of pipelines;
>
> Whereas the public interest requires that such two municipalities be empowered to acquire fortwith by expropriation the lands necessary for such purposes;
>
> Whereas any delay to complete the work in hand would be quite prejudicial to the economic development of the region where it is in progress; ...

Thus, by the enactment of this *Act*, the petroleum company was able to negociate the acquisition of the necessary servitudes over the course of the pipeline route with two municipal bodies only, at a cost probably considerably lower, rather than acquiring such rights of way from each of the individual owners.

Nowithstanding the definition of ownership quoted above, the *Civil Code* provides for the expropriation of property, but only in certain limited circumstances. Article 407 C.C. provides:

> No one can be compelled to give up his property, except for *public utility* and in consideration of a just indemnity previously paid. (Italics added).

A private petroleum company hardly qualifies as a public utility. Even if a pipeline is considered a/or of public utility, is the expropriation of land by a municipality or town for the purpose of thereafter granting servitudes, which could have been as effectively granted by the individual owners, justifiable under the guise of public interest, expediency and convenience for the intended grantee of the servitudes?

The Court considered each of the grounds alleged in the motion to quash and summarily dismissed the allegations of irregularities in the procedure followed, finding in fact that the procedure, as prescribed in the *Act*, was followed. It also rejected the argument that the procedure followed was illegal under the *Cities and Towns Act* on the basis that the *Cities and Towns Act* was unapplicable where a *Special Act* of the Legislature had been passed.

The Court considered next the argument that more land then required was being expropriated. The *Act* empowered the two municipalities to expropriate certain designated properties. These properties were described in two schedules to the *Act*, Schedule "A" for the property in Boucherville and Schedule "B" for the property in Sainte-Anne-de-Varennes. Each schedule described the land affected by its cadastral number, its location, its boundries and its surface. The Court held that since Schedule "A" did not refer to parts only of the lots described, the municipalities were empowered to expropriate the whole of the lots subject to the *Act*. Thus, in the case of Petitioner Péloquin, the municipality was held empowered to expropriate 600,000 square feet of land when it actually

needed only 235,000 square feet to carry out the purposes of the *Act*. The Court apparently refused to consider whether this exercise of a statutory right constituted an abuse of right or an unwarranted exercise of such right. The Court was content to state that since the right to expropriate, given to the municipalities was not restricted to whatever parts of the designated lots they needed for their purposes they could expropriate the whole. The *Act* was of a special nature. It restricted the rights of the individual land owner to deal with his property in the public interest. Assuming that the building of the pipeline by a private petroleum company could be considered a "public utility", then expropriation with compensation would be justified. But it is respectfully submitted that, notwithstanding the *Special Act* of the Legislature, the expropriation of more land than is necessary for the purposes of public utility is never justified. The municipality acquired indirectly valuable land which it would never have been permitted to expropriate under the ordinary rules of our law and therefore should not have been allowed to do indirectly what it would have been prohibited to do directly. The Court should have construed restrictively the *Special Act*.[5]

The Court finally considered the last of Petitioner's grounds: that the whole was unconstitutional, and contrary to the provisions of *The Canadian Bill of Rights*.

The Court had no difficulty in holding that the *Act* was within the exclusive legislative authority of the Provincial Legislature. Its subject-matter could easily fall within anyone of three heads of exclusive legislative competency of the province under s. 92 of the *British North America Act*:

(8) Municipal Institutions in the Province.

...

(13) Property and Civil Rights in the Province.

...

(16) Generally all Matters of a merely local or private Nature in the Province.

The Court held, in accordance with the leading jurisprudence,[6] that once a province exercises its legislative authority, in accord-

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[5] Challies, *The Law of Expropriation*, 2nd ed., (Montreal, 1963), pp. 12-13.

[6] See *Hodge* v. *The Queen*, (1883-84), 9 A.C. 117, at p. 132; *A.G. Canada* v. *A.G. Ontonrio*, [1898] A.C. 700, at p. 713; *Re Barrett*, (1880), 5 O.A.R. 206, at p. 211; *Smith* v. *The City of London*, (1910), 20 O.L.R. 133, at p. 137; *Florence Mining Co. Ltd.* v. *Cobalt Lake Mining Co.*, (1909), 18 O.L.R. 275, at p. 279, conf. by the Privy Council, (1919), 43 O.L.R. 474, (1910), 102 L.T.R. 375.

ance with our Constitution, the Courts are powerless to interfere and cannot question the propriety of such exercise of legislative authority. The Provinces are paramount within their exclusive sphere of legislative competency to the same extent as the Dominion Parliament is within its sphere.[7] But was this the issue in the case at bar? The issue, it is respectfully submitted, is not whether the Legislature is empowered to enact such legislation as that contained in the *Special Act,* but whether, once it is enacted, it is subject to the rule of law that expropriation is permitted only for the purposes of public utility.

The Court cited in support Challies' authoritative book on expropriation:[8]

> There is in Canada no constitutional principle that private property cannot be taken without due process of law, like the fifth and fourteenth constitutional Amendments in the United States. It has been said of the Imperial Parliament that it can do anything except make a man a woman. The Dominion Parliament and the Provincial Legislatures within their spheres are just as supreme.
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> "As to the question whether Parliament has the power to expropriate land for *public purposes* without compensation, there cannot be any doubt".[9] (Italics added).

There is no doubt that the Dominion Parliament and the Provincial Legislatures are empowered to expropriate for *public purposes* land, even without compensation, but are they empowered to expropriate land for other purposes?[10] It is submitted that they would hardly try such expropriation and, even if they should attempt it, it would probably be struck down by our Courts. Thus is it not the same for a municipality who, having received the power to expropriate for public purposes, abuses that power and seeks

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[7] See *Florence Mining Co. Ltd.* v. *Cobalt Lake Mining Co., supra,* n. 6; *Glassco* v. *Montreal Transportation Commission,* [1953] C.S. 19, at p. 21.

[8] *Op. cit., supra,* n. 5, at p. 75.

[9] The concepts of "public purposes" and "puhlic utility" are fundamental to our law. See the review of Roman, French and English law and their influence on our law in Challies, *op. cit., supra,* n. 5, at pp. 1-8. Article 407 C.C. was not new law. See De Lorimier, *Bibliothèque du Code Civil,* Vol. 3, (Montreal, 1874), p. 372 who refers to the same authorities as cited in the *Codifiers' Report,* Vol. 3, p. 454.

[10] See Challies, *op. cit., supra,* n. 5, where he reproduces every relevant Canadian, Quebec and Ontario statutes. All the statutes reproduced grant powers to expropriate for *"public purposes"* only.

to expropriate more land than is necessary for its purposes.[11] As to whether *The Canadian Bill of Rights* was applicable in the circumstances, the Court held that, on it's face; it purports to apply only to *Acts* of the Dominion Parliament and not to *Acts* of the Provincial Legislature.[12]

L.S.

INSURANCE — BROKER — ACTING AS AGENT OF THE APPLICANT FOR AUTOMOBILE INSURANCE — LIABILITY, THEFT AND FIRE — REPRESENTATIONS OF BROKER — POLICY TO BE IN FORCE AS OF THE SIGNING OF THE APPLICATION — APPLICATION SUBJECT IN FACT TO INSURER'S ACCEPTANCE OF THE RISK — THEFT OF VEHICLE — BETWEEN DATE OF APPLICATION AND DATE OF REFUSAL OF RISK — LIABILITY OF BROKER TOWARDS THE APPLICANT — C.C. 1079 *et seq. Lemieux* v. *Dessureault,* 1969 C.S. 383.

The Plaintiff purchased an automobile and called his broker to obtain insurance on the vehicle. The broker sent one of his employees, Lanari, to Plaintiff's house with an application form which was completed by the employee and signed by the Plaintiff, who then tendered his personal cheque of $50. on account of the total premium of $307.

The application form stipulated that the application was subject to the acceptance by the insurer of the risk and, in the event of his refusal, that the application was null and void. The automobile was stolen between the date of the signing of application and the date of the refusal of the risk.

Both Plaintiff and his wife testified that the employee Lanari had represented to them that they were insured from the signing of the application. The Court accepted their testimony as the most plausible; the Plaintiff and his wife were planning a trip out of town the next day and would not have left had they been told that

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[11] See Montpetit & Taillefer, *Traité de Droit Civil du Québec,* vol. 3, (Montreal, 1945), p. 117, where in referring to the expropriating powers of municipalities, the authors state: "Mais ce droit d'expropriation n'existe qu'en fonction de l'intérêt public, pour la confection de travaux effectués vraiment dans l'intérêt public et non dans l'intérêt de quelques contribuables seulement." See the authorities cited therein, at nn. 12 & 13.

[12] See ss. 2 & 5 thereof.

the insurance contract was subject to the acceptance of the insurer. Furthermore, the Plaintiff cancelled another general liability insurance on the automobile, which had also been obtained on his behalf by Defendant broker. The Court reasoned that these facts were consistent with Plaintiff's testimony.

The Plaintiff did no claim damages against the insurer directly for his failure to act diligently on Plaintiff's application,[1] but sued the broker alleging breach of his professional obligations towards him. In any event, an action against the insurer would probably have failed as the company notified the broker of its decision who was, for such purposes, the agent of the applicant.[2]

The broker's obligations are of two types. Firstly, he is the mandatary or agent of the applicant and, as such, he must act, in the most efficient manner, according to his instructions, and within the limits of his mandate. Secondly, he has a general duty to inform and counsel his clients. The Court held that he failed to carry out this second duty.

The Court held that the broker has a duty to inform his clients on the conditions and essential elements of the contract they are about to undertake, on the nature and extent of the risk provided for in the policy, and on the date on which the contract is supposed to come into force. The broker cannot plead the negligence of the applicant who failed to read carefully the torms and conditions of the application, which reading would have revealed that the application was subject to the insurer's acceptance and void upon his refusal to accept the risk. In *Blackburn* v. *Bossche*,[3] it was held:

> Celui, qui emploie un courtier pour se procurer une assurance et lui fait connaître toutes les circonstances, a droit de s'attendre que celui-ci agira avec l'habileté convenable et tous les soins d'un bon père de famille, et il n'est pas obligé de vérifier, par la lecture de la police, si le mandat a été fidèlement accompli.[4]

It must be considered one of the main function of the broker, the Court went on, to explain to his clients the meaning of the often

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[1] See generally: *Sévigny* v. *Stevenson*, [1957] 1 I.L.R. para. 1-249; *Dion* v. *Great American Insurance Co.*, [1953] C.S. 270; R. Sanders, *The Effect of the Insurer's Delay in Acting on an Application for Insurance*, (1962), 36 Temple L.Q. 84.

[2] *Wolosianski* v. *General Security Insurance Co.*, [1952] I.L.R. para. 1-066; Douglas-A. Barlow, *Le Courtier professionnel d'assurance devant la loi*, (1946), 6 R. du B. 464, at p. 476.

[3] [1949] B.R. 697.

[4] At p. 697 (headnote).

obscure, and technical clauses found in insurance contracts. The client cannot be expected to be able to appreciate, in every detail, the nature and extent of those clauses, which are usually steeped in historical content.[5]

The broker, having therefore a duty and an obligation to inform his client on the extent of the risk covered under the insurance contract,[6] and on the sufficiency of the risk,[7] *a fortiori*, he must also inform accurately his client as to the time at which the policy will come into force. If, contrary to his expressed verbal representations, the policy does not meet the required standards and conditions, he will be held personally liable.[8] By analogy, if the policy does not come into force at the time indicated by the broker, or any of his employees, he must also then be held personally liable.

Thus the failure of the broker's employee to adequately explain that the policy was subject to the acceptance of the insurer and that it would be null and void upon his refusal constituted a fault for which the broker was liable. In the instant case, the broker was condemned to indemnify the Plaintiff for the value of the automobile lost by theft, a risk which would have been covered by the insurance policy had it been in force.

L.S.

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[5] See L.P. Pigeon, *L'Agent d'assurance mandataire de l'assureur*, (1959), 19 R. du B. 390, at p. 392.

[6] See *Great-West Life Assurance Co.* v. *Paris*, [1959] B.R. 348, [1959] I.L.R. para. 1-339.

[7] See *Société Cabinet X...* v. *Société "Le Garage Wagran"*, Cass. 10 nov. 1964, J.C.P.1965.II.13,981.

[8] *Durocher* v. *Gevry*, [1961] B.R. 283; *Côté* v. *Labrecque*, [1960] I.L.R. para. 1-368.

ASSAULT AND BATTERY — DEFENCES — BLOWS STRUCK IN COURSE OF LAWFUL SPORT — WHETHER PRIVILEGED. *Martin et al.* v. *Daigle,* [1969] 6 D.L.R. (3d) 634.

All Western systems of law contain some provision which covers the situation where an individual causes damage to another either wilfully, or else unintentionally through neglect, imprudence or want of skill. The extent to which such a general liability provision applies to participants in a lawful sport has recently been the subject of a decision of the Appeal Division of the New Brunswick Supreme Court.

The facts are brief and simple. Plaintiff, a high school student, brought an action to recover damages for an assault committed upon him by the defendant in the course of a hockey game in which both parties were active participants. Defendant admitted striking plaintiff but in his defense argued that he thought it was merely part or the game.

The trial judge recognized that hockey is a game in which there is an ever-present risk of injury, but injuries cannot be excused if caused by a blow of the fist, as was the fact in the case under discussion. Consequently, damages were granted to plaintiff. An appeal was lodged by plaintiff who sought an increase in the monetary award. The Appeal Division felt it necessary to comment on the question of law, although not requested to do so. Mr. Justice Hughes took the view that there is an immunity from liability accorded to participants in a lawful sport, but such immunity does have its limits. Since the blow struck by the defendant was clearly intended to cause bodily hurt to the plaintiff, and did in fact inflict bodily hurt, it was actionable.[1]

In his work on torts the learned English author Pollock discussed the legal basis on which such immunity rests as follows:

> Harm suffered by consent is, within limits to be mentioned, not a cause of civil action. The same is true where it is met with under conditions manifesting acceptance, on the part of the person suffering it, of the risk of that kind of harm. The maxim by which the rule is commonly brought to mind is *Volenti non fit injuria.* 'Leave and licence' is the current English phrase for the defence raised in this class of cases. On the one hand, however, *volenti non fit injuria* is not universally true. On the other hand, neither the Latin nor the English formula provides in terms for the state of things in which there is not specific will or assent to suffer something which,

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[1] This legal principle was enunciated by Halsbury, 3rd. ed., vol. 38, p. 762 as follows: "An unlawful blow which is struck in anger or which is likely or intended to do bodily hurt is actionable, but a blow struck in the course of a lawful sport is not actionable; ..."

> if inflicted against the party's will, would be a wrong, but only conduct showing, that for one reason or another, he is content to abide the chance of it. Some learned persons would make this a distinct ground of excuse under the name of 'assumption of risk'.[2]

The manner in which the principle of "assumption of risk" is applied to modern day sports was dealt with in another recent decision of the Queen's Bench of Manitoba.[3] Mr. Justice Bastin therein stated:

> Since it is common knowledge that... injuries are not infrequent, this supports the conclusion that in the past those engaged in this sport [hockey] have accepted the risk of injury as a condition of participating. Hockey necessarily involves violent bodily contact and blows from the puck and hockey sticks. A person who engages in this sport must be assumed to accept the risk of accidental harm and to waive any claim he would have apart from the game for trespass to his person in return for enjoying a corresponding immunity with respect to other players. It would be inconsistent with this implied consent to impose a duty on a player to take care for the safety of other players corresponding to the duty which, in a normal situation, gives rise to a claim for negligence. Similarly, the leave and licence will include an unintentional injury resulting from one of the frequent infractions of the rules of the game.
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> The conduct of a player in the heat of the game is instinctive and unpremeditated and should not be judged by standards suited to polite social intercourse.
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> But a little reflection will establish that some limit must be placed on a player's immunity from liability. Each case must be decided on its own facts so it is difficult, if not impossible, to decide how the line is to be drawn in every circumstance. But injuries inflicted in circumstances which show a definite resolve to cause serious injury to another, even when there is provocation and in the heat of the game, should not fall within the scope of the implied consent.[4]

It is respectfully submitted that both Mr. Justice Hughes and Mr. Justice Bastin have more than adequately and realistically dealt with a serious problem which is becoming more and more prevalent in body contact sports. They have recognized that such sports necessarily involve violence and physical punishment, which in turn lead to flaring tempers, but they have also recognized that some limitation must be placed on players who become involved in personal duels. Such decisions will not eliminate fighting, but it is hoped they will at least lead to a reduction in the number of fights. Too many promising athletes have not only had careers threatened, but their lives endangered.

S. W.

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[2] *Pollock on Torts*, 15th ed., p. 112.

[3] *Agar* v. *Canning*, (1966), 54 W.W.R. 302; confirmed in appeal, (1966), 55 W.W.R. 384.

[4] (1966), 54 W.W.R. 302, at p. 304.