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## Legislation and Civil Liability: Public Policy and the "Equity of the Statute"

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The author examines the judicial use of "public policy" as a basis for decision-making. He argues that a court is on firmer ground in invoking public policy where the policy concerned is supported by legislation. This view finds historical justification in the old common law doctrine of the "equity of the statute". The author proceeds with an examination of the judicial history of *The Queen v. Saskatchewan Wheat Pool*, culminating with a close analysis of the Supreme Court decision in that case. He concludes that, although the decision is a positive step in so far as it eliminates the search for a non-existent "intention of Parliament" upon which to base a civil cause of action, it does not go far enough. The article concludes with a plea for a more creative use of statutes by the judiciary.

L'auteur analyse l'utilisation de la notion d'« ordre public » dans le système judiciaire. Il soutient qu'un tribunal invoque plus aisément le principe lorsqu'il est appuyé par une disposition du droit positif inscrit dans la loi. D'un point de vue historique, cette opinion se fonde sur l'ancienne doctrine anglaise de *equity of the statute*. L'auteur examine ensuite les étapes successives de l'arrêt *La Reine c. Saskatchewan Wheat Pool* et fait une analyse attentive de la décision de la Cour suprême. Il conclut que, bien que cette décision constitue un pas certain vers l'élimination de la recherche inutile de l'« intention du Parlement », sur laquelle se fonde une cause d'action civile, elle n'est pas satisfaisante. L'auteur propose dès lors une utilisation plus créatrice des lois par le pouvoir judiciaire.

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**Introduction**

Today, no one doubts that courts make law, perhaps in much the same way as legislatures do.<sup>1</sup> Recently, the Supreme Court of Canada affirmed this truism in its important judgement in *The Queen v. Saskatchewan Wheat*

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<sup>1</sup>J.S. Bell, *Policy Arguments in Judicial Decisions* (1983) at 244-5. *Contra*, R. Dworkin, *Taking Rights Seriously* (1978). In *Reference re Residential Tenancies Act* (1981), [1981] 1 S.C.R. 714, 123 D.L.R. (3d) 554, the Supreme Court of Canada seems to have accepted Dworkin's thesis that there is a qualitative distinction between the tasks of courts and legislatures. In giving judgement for the Court in a constitutional case involving s. 96 of the *Constitution Act, 1867*, Dickson, J. (as he then was) said, at 571-2:

Thus the question of whether any particular function is "judicial" is not to be determined simply on the basis of procedural trappings. The primary issue is the nature of the question which the tribunal is called upon to decide. Where the tribunal is faced with a private dispute between parties, and is called upon to adjudicate through the application of a recognized body of rules in a manner consistent with fairness and impartiality, then, normally, it is acting in a "judicial capacity". To borrow the terminology of Professor Ronald Dworkin, the judicial task involves

*Pool*.<sup>2</sup> In rejecting the prevailing specious judicial pursuit of non-existent legislative intention when breach of statute arises in a tort action, the Court accepted judicial responsibility for the effect of such a breach. It was for the court to say what impact, if any, the breach should have on the tort action where the statute was silent. In making its decision about impact, the court might be influenced by the public policy underlying the statute.

Originally, I intended to write a case comment on *Sask. Wheat Pool*, a significant case, deserving of extensive comment. And to a great extent, this article is a comment on that case. However, it is more than that. *Sask. Wheat Pool* aroused my interest in the judicial use of public policy in tort cases, whatever the source of that policy.

I will begin my paper with an examination of the judicial use of public policy apart from legislation, and then move to an examination of the judicial use of public policy arising from legislation. This will be followed by an extensive comment and critique of *Sask. Wheat Pool*. In my conclusion I will attempt to reconcile these somewhat disparate matters.

## I. Public Policy Apart From Legislation

One hundred and sixty years ago, Mr Justice Burroughs wisely observed that public policy "is a very unruly horse, and when once you get astride it you never know where it will carry you".<sup>3</sup> Modern judges might do well to heed the warning implicit in this famous metaphor.<sup>4</sup> There is today a judicial tendency to invoke public policy as a justification for innovation in law-making. Nowhere is this tendency more evident than in the law of torts. No one has exploited this tendency more systematically in tort cases

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questions of "principle", that is, consideration of the competing rights of individuals or groups. This can be contrasted with questions of "policy" involving competing views of the collective good of the community as a whole . . . .

The latter function, one presumes, is reserved for legislators and administrators. Dworkin, *ibid.* at 294, makes the following distinction between "principle" and "policy":

Arguments of principle attempt to justify a political decision that benefits some person or group by showing that the person or group has a right to the benefit. Arguments of policy attempt to justify a decision by showing that, in spite of the fact that those who are benefitted do not have a right to the benefit, providing the benefit will advance a collective goal of the political community.

<sup>2</sup>(1983), [1983] 1 S.C.R. 205, 143 D.L.R. (3d) 9 [hereinafter cited to S.C.R. as *Sask. Wheat Pool*].

<sup>3</sup>*Richardson v. Mellish* (1842), 2 Bing 220 at 252, 130 E.R. 294 at 303. He continued: "It may lead you from the sound law. It is never argued but when other points fail."

<sup>4</sup>Winfield, writing in 1928, thought it rather shopworn: P.H. Winfield, "Public Policy in the English Common Law" (1928) 42 Harv. L. Rev. 76 at 91.

than the great, and controversial, Lord Denning.<sup>5</sup> His critics might argue that particularly in his later years on the bench Lord Denning became Cardozo's quintessential "knight errant, roaming at will in pursuit of his own ideal of beauty or of goodness".<sup>6</sup> It was usually on his "unruly horse" of public policy that he pursued what some might call his quixotic mission.

I presume that judicial innovation is generally to be applauded and encouraged. However, the problem with public policy as a determinant in decision-making is the difficulty of ascertaining what it is or should be in particular cases. Public policy will not normally be a matter of judicial notice.<sup>7</sup> Nor is it easy to see how public policy could be established by

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<sup>5</sup>For example, in *Dorset Yacht Co. v. Home Office* (1969), [1969] 2 W.L.R. 1008, 2 All E.R. 564 at 567 (C.A.), he said: "[I]t is, I think, at bottom a matter of public policy which we, as judges, must resolve. This talk of 'duty' or 'no duty' is simply a way of limiting the range of liability for negligence." In *Dutton v. Bognor Regis Urban District Council* (1972), [1972] 1 Q.B. 373, [1972] 1 All E.R. 462 at 475 (C.A.), he said:

In previous times, when faced with a new problem, the judges have not openly asked themselves the question: What is the best policy for the law to adopt? But the question has always been there in the background. It has been concealed behind such questions as: Was the defendant under any duty to the plaintiff? Was the relationship between them sufficiently proximate? Was the injury direct or indirect? Was it foreseeable, or not? Was it too remote? And so forth. Nowadays, we direct ourselves to considerations of policy.

In *Spartan Steel Ltd v. Martin Ltd* (1972), [1973] Q.B. 27, 3 All E.R. 557 at 562 (C.A.), he said:

The more I think about these cases the more difficult I find it to put each into its proper pigeon-hole. Sometimes I say: "There was no duty." In others I say: "The damage was too remote." So much so that I think the time has come to discard those tests which have proved so elusive. It seems to me better to consider the particular relationship in hand, and see whether or not, as a matter of policy, economic loss should be recoverable.

<sup>6</sup>B.N. Cardozo, *The Nature of the Judicial Process* (1921) at 141. In context, Cardozo said: "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles."

<sup>7</sup>To satisfy the requirements of judicial notice a matter must be "so notorious as not to be the subject of dispute among reasonable men" or be "capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy". J. Sopinka & W.R. Lederman, *The Law of Evidence in Civil Cases* (1974) at 357. But see *Demarco v. Ungaro* (1979), 21 O.R. (2d) 673, 95 D.L.R. (3d) 385 (Ont. H.C.) where Krever J. said at 692-3:

I have come to the conclusion that the public interest . . . in Ontario does not require that our courts recognize an immunity of a lawyer from action for negligence at the suit of his or her former client by reason of the conduct of a civil case in Court. It has not been, is not now, and should not be, public policy in Ontario to confer exclusively on lawyers engaged in Court work an immunity possessed by no other professional person. Public policy and the public interest do not exist in a vacuum. They must be examined against the background of a host of sociological facts of the society concerned . . . . Many of the sociological facts that are related to public policy may be judicially noticed.

evidence. Without arguing that policy issues are not justiciable,<sup>8</sup> is it unfair to suggest that public policy is what a judge says it is in a particular case, no more and no less?<sup>9</sup> And if this is true, is it an acceptable basis for deciding cases, even granted the wisdom, experience and good faith of our judges? The answer is probably a qualified yes.<sup>10</sup>

A more fundamental question, perhaps, is what does “public policy” mean? Dworkin’s distinction between “principle” and “policy” is, of course, well known.<sup>11</sup> Winfield describes public policy as “a principle of judicial legislation or interpretation founded on the current needs of the community”.<sup>12</sup> It might be less generally described as the sum total of those considerations which lead a judge to decide a particular case in a way in which a strict application of legal principle would not necessarily dictate. It can be argued that public policy is variable, not only from time to time and place to place, but from legal subject to legal subject as well.<sup>13</sup>

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<sup>8</sup>As Lord Scarman seems to argue in *McLoughlin v. O’Brian* (1982), [1982] 2 W.L.R. 982, [1982] 2 All E.R. 298 (H.L.) [hereinafter cited to All E.R.].

<sup>9</sup>“When I see a word,” Humpty Dumpty said “... it means just what I choose it to mean — neither more nor less.” L. Carroll, *Alice’s Adventures in Wonderland & Through the Looking Glass* (London: Bodley Head, 1974) at 197.

<sup>10</sup>[T]here is a great temptation when one reaches a particular position of authority or power to confuse ‘the public interest’ with one’s own interest. ... Lord Denning’s decisions are scattershot in terms of values he seems to espouse.” I. Kennedy, “‘In the Public Interest’ — Says Who?” (1984) 33 King’s Counsel 9 at 10-1.

<sup>11</sup>In *Caltex Oil Pty Ltd v. The Dredge “Willemstad”* (1976), 136 C.L.R. 529 at 565-7, 11 A.L.R. 226, Stephen J. said the following about Lord Denning’s approach to policy in the *Spartan Steel* case, *supra*, note 5:

The importance of some of the policy considerations Lord Denning refers to and of the part they must play in any formulation of the law in this area, especially in ensuring that the field for recovery of economic loss is not unduly enlarged, is undoubted. Nevertheless the wide range of matters thus thrown open to judicial consideration by his Lordship’s approach, some varying from case to case, must lead to great uncertainty in the law if the sole criterion for recovery of economic loss is to be “a matter of policy” determined by the individual judge . . . . Policy considerations must no doubt play a very significant part in any judicial definition of liability and entitlement in new areas of the law: . . . [However] to apply generalized policy considerations directly, in each case, instead of formulating principles from policy and applying those principles, derived from policy to the case in hand, is, in my view, to invite uncertainty and judicial diversity.

<sup>12</sup>See Winfield, *supra*, note 4 at 90.

<sup>13</sup>*Supra*, note 1.

<sup>14</sup>*Supra*, note 4 at 92.

<sup>15</sup>*Ibid.* at 93-4. As to public policy varying from place to place, in *Demarco v. Ungaro*, *supra*, note 7, Krever J. held that public policy in Ontario with respect to a client suing his lawyer for the conduct of a court case was different from the corresponding policy in England.

A recent case in the House of Lords, *McLoughlin v. O'Brian*,<sup>14</sup> is instructive on the issue of public policy and its place in judicial law-making. The plaintiff sued the defendants for negligently inflicted nervous shock. The plaintiff's husband and three children were injured in a car accident caused by the defendants' negligence. A daughter was killed and the husband and the other two children were seriously injured. At the time of the accident the plaintiff was in her home two miles away. She was told of the accident by a motorist who had been at the scene. She went to the hospital where she learned of her daughter's death and saw the injured members of her family. The trial judge<sup>15</sup> dismissed the plaintiff's claim for nervous shock on the basis that it was not reasonably foreseeable. The plaintiff's appeal to the Court of Appeal was dismissed,<sup>16</sup> despite a finding that, in the circumstances, the shock to her was reasonably foreseeable. However, her further appeal to the House of Lords was successful, the Law Lords holding that the test of liability for nervous shock is reasonable foreseeability, and that the plaintiff's shock was reasonably foreseeable.

Although *McLoughlin v. O'Brian* goes further in allowing recovery for negligently inflicted nervous shock than any previous English or Canadian case, it is consistent with the trend in this area of tort law. In the almost one hundred years since the Privy Council summarily rejected a claim by a woman who suffered shock as a result of fear of being run down by the defendant's negligently operated train,<sup>17</sup> there has been a steady, if somewhat erratic, extension of liability for negligently inflicted nervous shock.<sup>18</sup>

<sup>14</sup>*Supra*, note 8. For comments on the case see H. Teff, "Liability for Negligently Inflicted Nervous Shock" (1983) 99 L.Q. Rev. 100; D. Hutchinson & A.C. Morgan, "Shock Therapy: Policy, Principles and Tort" (1982) 45 Mod. L. Rev. 693.

<sup>15</sup>Boreham, J. (11 December 1978) [unreported].

<sup>16</sup>(1980), [1981] 1 All E.R. 809, [1981] Q.B. 599 [hereinafter cited to All E.R.].

<sup>17</sup>*Victorian Railway Commissioners v. Coultas* (1887), [1888] 13 App. Cas. 222, 4 T.L.R. 286 [hereinafter cited to App. Cas. as *Coultas*].

<sup>18</sup>The key English cases, in chronological order, are the following: *Dulieu v. White & Sons* (1901), [1901] 2 K.B. 669, [1900-03] All E.R. 353 *per* Kennedy and Phillimore JJ., refusing to follow the *Coultas* case, *ibid.*, but limiting recovery to cases where the plaintiff's shock was caused by fear for his or her own safety; *Hambrook v. Stokes Brothers* (1924), [1925] 1 K.B. 141, [1924] All E.R. 110 (C.A.), allowing a mother, who apparently was not herself in danger, to recover for the shock she suffered as a result of fear for her children's safety; *Hay or Bourhill v. Young* (1942), [1943] A.C. 92 (H.L.), denying recovery to a stranger, not herself in danger, who suffered shock as a result of hearing an accident and seeing the aftermath; *King v. Phillips* (1953), [1953] 1 Q.B. 429, [1953] 1 All E.R. 617 (C.A.), denying recovery to a mother who suffered shock on seeing, from the safety of her home, her child being run over in the street; *Boardman v. Sanderson* (1961), [1964] 1 W.L.R. 1317 (C.A.) allowing a father, who was not himself in danger, to recover for the shock he suffered when he heard his son scream, ran to his aid and found him injured under a car; *Chadwick v. British Transport Commission* (1967), [1967] 2 All E.R. 945, [1967] 1 W.L.R. 912, *per* Waller J., allowing a stranger, who was not himself in danger, to recover for the shock he suffered when he went to the aid of the passengers in a train disaster.

In the Court of Appeal in *McLoughlin v. O'Brian*, Stephenson and Griffiths L.JJ.<sup>19</sup> agreed that shock to the plaintiff was reasonably foreseeable. Lord Justice Stephenson went on to hold that a *prima facie* duty of care was owed to her, that the defendant had been in breach of that duty, but that for policy reasons the plaintiff could not recover.<sup>20</sup> On the other hand, Griffiths L.J., despite finding that the plaintiff's nervous shock was reasonably foreseeable, held that for policy reasons the defendants owed her no duty of care. The result is the same: policy is decisive. The policy relied upon in both judgements was mainly what has become known as the "flood-gates" argument,<sup>21</sup> the argument that if the plaintiff's claim is allowed the door will be open to innumerable similar, and perhaps less meritorious, claims.<sup>22</sup> Adopting Lord Pierce's opinion in *Hedley Byrne & Co. v.*

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<sup>19</sup>Cumming-Bruce L.J. agreeing with both judgments.

<sup>20</sup>Stephenson L.J. followed the two-stage approach to the duty issue advocated by Lord Wilberforce in *Anns v. Merton London Borough Council* (1977), [1978] A.C. 728, [1977] 2 All E.R. 492 (H.L.). Lord Wilberforce said at 751-2:

[T]he question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplations of the former, carelessness on his part may be likely to cause damage to the latter — in which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise . . . .

The second is, of course, dealing with policy.

<sup>21</sup>Neither judge so characterized it, but the House of Lords did. In the *Coultas* case, *supra*, note 17 at 225-6, the Privy Council in rejecting a claim for negligently inflicted nervous shock invoked the "floodgates" policy in these terms:

According to the evidence of the female plaintiff her fright was caused by seeing the train approaching, and thinking they were going to be killed. Damages arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot under such circumstances, their Lordships think, be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gate-keeper. If it were held that they can, it appears to their Lordships that it would be extending the liability for negligence much beyond what that liability has hitherto been held to be. Not only in such a case as the present, but in every case where an accident caused by negligence had given a person a serious nervous shock, there might be a claim for damages on account of mental injury. The difficulty which now often exists in case of alleged physical injuries of determining whether they were caused by the negligent act would be greatly increased, and a wide field opened for imaginary claims.

<sup>22</sup>Stephenson L.J. said this, *supra*, note 16 at 820-1:

Counsel for the plaintiff has argued with some force that the policy grounds for excluding such a claim as the plaintiff's are not very strong. They are a multiplication of claims to burden the courts, and the economic consequences of such claims if successful, mainly in increasing accident insurance premiums; the difficulty of defining the class or classes of persons who can bring such claims, and the difficulty

*Heller*<sup>23</sup> that the question “depends ultimately on the courts’ assessment of the demands of society for protection from the carelessness of others”, Stephenson L.J.’s assessment of the demands of society in the case before him was that “considerations of policy ought to take this sort of injury to this class of person out of the scope of the duty by limiting that scope to those on or near the highway at or near the time of the accident caused by the defendant’s carelessness”.<sup>24</sup> He then added, with revealing frankness: “Ask me why, and I find some difficulty in stating a convincing reason. It is largely a matter of what may be called pretentiously ‘judicial instinct’ that the duty of the negligent driver . . . must stop somewhere . . .”<sup>25</sup> In Griffiths L.J.’s opinion, “in any state of society it is ultimately a question of policy to decide the limits of liability”.<sup>26</sup> If recovery is to be allowed for those like the plaintiff who suffer shock although far from the scene of the accident, it should be done by legislation where there would “be an opportunity for public debate to count the costs”.<sup>27</sup>

The House of Lords unanimously rejected the policy grounds relied upon by the Court of Appeal and decided in favour of the plaintiff. However, the five Law Lords had different views on the part to be played by public policy in this branch of tort law. To Lord Wilberforce, the judgements in the Court of Appeal rested “on a common principle, namely that, at the margin, the boundaries of a man’s responsibility for acts of negligence have to be fixed as a matter of policy”.<sup>28</sup> Lord Wilberforce agreed with this view. However, he disagreed with the opinion that the policy invoked by the Court of Appeal, in the main based on the “floodgates” argument, justified a denial of liability to a person like the plaintiff.<sup>29</sup> Lord Edmund-Davies also rejected the “floodgates” argument. Nevertheless, he recognized that policy was a relevant consideration for a judge, while noting that “public policy is not immutable” and that “any invocation of public policy calls for the closest scrutiny, and the defendant might well fail to discharge the burden of making

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of deciding whether the plaintiffs suffer from psychiatric illness resulting from shock as distinct from the effects of grief, whether the plaintiff’s complaints of illness are genuine and whether the illness in fact results from the accident and injuries caused by the defendants’ negligence or breach of duty.

<sup>23</sup>(1963), [1964] A.C. 465 at 536, [1963] All E.R. 575 (H.L.).

<sup>24</sup>*Supra*, note 16 at 820.

<sup>25</sup>*Ibid.*

<sup>26</sup>*Ibid.* at 827.

<sup>27</sup>*Ibid.* at 828.

<sup>28</sup>*Supra*, note 8 at 303.

<sup>29</sup>However, he did recognize the need for some limitation on liability, saying, *ibid.* at 304: “[T]here remains . . . just because ‘shock’ in its nature is capable of affecting so wide a range of people, a real need for the law to place some limitation on the extent of admissible claims. It is necessary to consider three elements inherent in any claim: the class of persons whose claim should be recognized; the proximity of such persons to the accident; and the means by which the shock is caused.”



it good".<sup>30</sup> In a very short judgement, Lord Russell of Killowen said this about public policy and its relevance to the case: "I would not shrink from regarding in an appropriate case policy as something which may feature in a judicial decision. But in this case what policy should inhibit a decision in favour of liability to the plaintiff?"<sup>31</sup> His answer was that there is no such policy.

In a relatively short judgement, Lord Scarman took a different view of public policy. Although sharing the anxieties of the Court of Appeal about extending liability too far, he was "persuaded that in this branch of the law it is not for the courts but for the legislature to set limits, if any be needed, to the law's development".<sup>32</sup> In his view, the case before him raised

directly a question as to the balance in our law between the functions of judge and legislature . . . . The distinguishing feature of the common law is . . . [the] judicial development and formulation of principle. Policy considerations will have to be weighed; but the objective of the judges is the formulation of principle. And, if principle inexorably requires a decision which entails a degree of policy risk, the court's function is to adjudicate according to principle, leaving policy curtailment to the judgment of Parliament. Here lies the true role of the two law-making institutions in our constitution. By concentrating on principle the judges can keep the common law alive, flexible and consistent, and can keep the legal system clear of policy problems which neither they, nor the forensic process which it is their duty to operate, are equipped to resolve. If principle leads to results which are thought to be socially unacceptable, Parliament can legislate to draw a line or map out a new path . . . . Why then should not the courts draw the line, as the Court of Appeal manfully tried to do in this case? Simply, because the policy issue of where to draw the line is not justiciable. The problem is one of social, economic, and financial policy. The considerations relevant to a decision are not such as to be capable of being handled within the limits of the forensic process.<sup>33</sup>

The final and longest judgement in the House of Lords was given by Lord Bridge of Harwich. For him, the question was "whether the law, as a matter of policy, draws a line which exempts from liability a defendant whose negligent act or omission was actually and foreseeably the cause of the plaintiff's psychiatric illness and, if so, where that line is to be drawn".<sup>34</sup> He added that "a policy which is to be relied on to narrow the scope of the negligent tortfeasor's duty must be justified by cogent and readily intelligible considerations, and must be capable of defining the appropriate limits of liability by reference to factors which are not purely arbitrary".<sup>35</sup> In Lord

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<sup>30</sup>*Ibid.* at 307.

<sup>31</sup>*Ibid.* at 310.

<sup>32</sup>*Ibid.*

<sup>33</sup>*Ibid.* at 310-1. Lord Scarman is apparently accepting Dworkin's distinction, *supra*, note 1, between "principle" and "policy".

<sup>34</sup>*Ibid.* at 313.

<sup>35</sup>*Ibid.* at 319.

Bridge's view there was no such policy available to defeat the plaintiff's claim in *McLoughlin v. O'Brian*.

The differences in judicial opinion in *McLoughlin v. O'Brian* on public policy, not only between the Court of Appeal and the House of Lords as to whether any relevant policy should limit liability in that case, but also between the Law Lords themselves as to whether public policy was even relevant to the case, besides revealing differing views of the judicial function, lends credence to Mr Justice Burrough's restive-horse metaphor.

## II. Public Policy and Legislation

Is a judge on firmer ground if, rather than relying on his own unaided perception of public policy, he relies on legislation as his policy source, even if the particular statute is not directly relevant to the case before him? I would argue that he is, at least if he correctly interprets the policy underlying the statute, because the policy represents the considered judgement of the legislature. Making such use of statutes is not something that modern courts are particularly familiar or comfortable with.<sup>36</sup> However, there is a legitimate historical basis for it. What it really involves is an invocation of the ancient doctrine of the "equity of the statute".<sup>37</sup> At least in modern garb, as espoused

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<sup>36</sup>See R.F. Williams, "Statutes as Sources of Law Beyond Their Terms in Common-Law Cases" (1982) 50 Geo. Wash. L. Rev. 554. See also J. Willis, Case Comment (1950) 28 Can. Bar Rev. 1140 at 1141:

To a layman who knows nothing about the lawyer's division of the "seamless web" of the law into two departments of "common law" and "statute law", interpreting the common law in the light of a statute seems the most natural thing in the world; to him a change in community policy embodied in "statute law" must inevitably have repercussions over the whole field of the law including "common law". Any lawyer can tell him that interpreting the common law in the light of a statute is unusual.

See also H.F. Stone, "The Common Law in the United States" (1936) 50 Harv. L. Rev. 4 at 12-3:

Notwithstanding their genius for the generation of new law from that already established, the common-law courts have given little recognition to statutes as starting points for judicial law-making comparable to judicial decisions. They have long recognized the supremacy of statutes over judge-made law, but it has been the supremacy of a command to be obeyed according to its letter, to be treated as otherwise of little consequence. The fact that the command involves recognition of a policy by the supreme lawmaking body has seldom been regarded by courts as significant, either as a social datum or as a point of departure for the process of judicial reasoning by which the common law has been expanded.

<sup>37</sup>See generally W.H. Lloyd, "The Equity of a Statute" (1909) 58 U. Pa. L. Rev. 76. Lloyd suggests at 79-81 that

[i]t is to Coke and Plowden that we are chiefly indebted for an explanation of what

by Dean Landis in his seminal article, "Statutes and the Sources of Law",<sup>38</sup> the doctrine envisages "an integrated universe of legal authority where statutes are equal partners with common law decisions".<sup>39</sup> The doctrine considers statutes as "expressions of public policy that properly influence decisional law in areas the legislature has not directly addressed".<sup>40</sup> A recent example of the doctrine of the "equity of the statute" operating in this modern context is the Ontario Court of Appeal's judgement in the *Bhadauria* case.<sup>41</sup> The Court of Appeal created a new intentional tort of discrimination based on its view of the policy underlying *The Ontario Human Rights Code*.<sup>42</sup> Although the Supreme Court of Canada overruled the Court of Appeal,<sup>43</sup> it

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was understood by the equity of a statute in the period when the doctrine received its greatest elaboration . . . . Says Coke: "Equitie is a construction made by the Judges that cases out of the letter of a statute yet being within the same mischief or cause of the making of the same, shall be within the same remedy that the statute provideth; and the reason thereof is, for that the law-makers could not possibly set down all cases in express terms." This however, presents but one side of the subject, which is explained more fully by Plowden in his note to *Eyston v. Studd*. . . . [Says Plowden:] "For oftentimes things which are within the words of statutes are out of the purview of them, which purview extends no further than the intent of the makers of the act" . . . . Plowden . . . goes on to elaborate his text; sometimes the sense is more contracted than the letter of the law and sometimes more extensive, and equity operates in two ways, be diminishing or enlarging the letter at discretion [footnotes omitted].

<sup>38</sup>(1965) 2 Harv. J. Legis. 7 at 9.

The doctrine of the equity of the statute was a double-edged device. As Plowden so sagely observed, merely knowing the letter of the statute does not mean that you know its sense, "for sometimes the Sense is more confined and contracted than the Letter, and sometimes it is more large and extensive". Under its authority exceptions dictated by sound policy were written by judges into loose statutory generalizations, and, on the other hand, situations were brought within the reach of the statute that admittedly lay without its express terms. No apology other than the need for a decent administration of justice was indulged in by judges who invoked its aid. Definite principles, therefore, as to the circumstances which would justify extending statutes to cover cases beyond the scope of their language seem never to have been evolved. Rather there was simply the urge to do equity and so *mould* the law to conform more closely to its recognized aims [footnotes omitted].

<sup>39</sup>See R. Weisberg, "The Calabresian Judicial Artist: Statutes and the New Legal Process" (1983) 35 Stan. L. Rev. 213 at 237.

<sup>40</sup>S. Estreicher, "Judicial Nullification: Guido Calabresi's Uncommon Common Law for a Statutory Age" (1982) 57 N.Y.U.L. Rev. 1126 at 1141.

<sup>41</sup>*Bhadauria v. Board of Governors of Seneca College* (1979), 27 O.R. (2d) 142, 105 D.L.R. (3d) 707 [hereinafter cited to O.R. as *Bhadauria*].

<sup>42</sup>R.S.O. 1970, c. 318, as am. S.O. 1972, c. 119; S.O. 1974, c. 73, cons. R.S.O. 1980, c. 340 [hereinafter the *Code*]. The *Code* was repealed and replaced by the *Human Rights Code, 1981* S.O. 1981, c. 53, proclaimed in force 15 June 1982.

<sup>43</sup>*Sub nom. Board of Governors of Seneca College v. Bhadauria* (1981), [1981] 2 S.C.R. 181, 124 D.L.R. (3d) 193 [hereinafter cited to S.C.R. as *Bhadauria*].

did not disavow the Court of Appeal's invocation of the "equity of the statute" doctrine.

In *Bhadauria*, the plaintiff claimed that she was refused employment by Seneca College because of her East Indian origin. Instead of following the usual course of filing a complaint with the Human Rights Commission under the *Code*,<sup>44</sup> the plaintiff brought an action against the defendant for damages for discrimination and for breach of section 4 of the *Code*.<sup>45</sup> The defendant applied to have the plaintiff's statement of claim struck out as disclosing no reasonable cause of action. Mr Justice Callaghan granted the application and dismissed the plaintiff's action. The plaintiff's appeal to the Court of Appeal was allowed, the Court holding, in a judgement delivered by Wilson J.A., that if the plaintiff could establish the facts alleged in her statement of claim she would have an action against the defendant for the common law tort of discrimination. As a result, it was "unnecessary, in view of the finding that a cause of action exists at common law, to determine whether or not the *Code* gives rise to a civil cause of action".<sup>46</sup> Of course, this latter determination could involve the hoary pursuit of non-existent legislative intention, because the *Code* says nothing expressly about civil liability arising from a breach of its provisions.<sup>47</sup>

The Court of Appeal was aware that in basing the plaintiff's action on a tort of discrimination it was creating something new.<sup>48</sup> Madam Justice

<sup>44</sup>Part III of the *Code*.

<sup>45</sup>The relevant parts of s. 4 provide: "4(1) No person shall, (a) refuse to refer or recruit any person for employment; (b) dismiss or refuse to employ or to continue to employ any person . . . because of race, creed, colour, age, sex, marital status, nationality, ancestry, or place of origin of such person or employee." The defendant's counsel conceded that the conduct alleged against the defendant in the plaintiff's statement of claim fell within s. 4 (1)(a) and (b). *Bhadauria*, *supra*, note 41 at 144.

<sup>46</sup>*Ibid.* at 150. Nor did the Court of Appeal decide this question in the contemporary case of *Macdonald v. 283076 Ontario Inc.* (1979), 23 O.R. (2d) 185, 95 D.L.R. (3d) 723. However, the Supreme Court of Canada decided the question in *Bhadauria*, *supra*, note 43: the *Code* does not give a civil cause of action for its breach.

<sup>47</sup>However, under s. 19 of the *Code* boards of inquiry are empowered to make compensation orders.

<sup>48</sup>"While no authority cited to us has recognized a tort of discrimination, none has repudiated such a tort. The matter is accordingly *res integra* before us." See *supra*, note 41 at 149. Immediately after saying this, Wilson J.A. quoted the following passage from W.L. Prosser, *Handbook of the Law of Torts*, 4th ed. (1971) at 3-4: "The law of torts is anything but static, and the limits of its development are never set. When it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not of itself operate as a bar to the remedy." It is not surprising that Wilson J.A. did not attempt to define the parameters of this new tort. In particular, she did not mention what part the *Code* would play in establishing the tort in a particular case. Would it be necessary for the plaintiff to establish a breach of the *Code*, and, what is more, an intentional breach? (The Ontario Court of Appeal recently held that an intention to discriminate on a prohibited

Wilson referred to a number of cases predating human rights legislation, cases involving denial of services or accomodation on the basis of colour or race.<sup>49</sup> As Laskin C.J. points out in his judgement for the Supreme Court of Canada in the *Bhadauria* case,<sup>50</sup> when the plaintiffs succeeded in those cases it was on the basis of the law of innkeeper's liability, not on the basis of a tort of discrimination. Wilson J.A. recognized that those cases were not directly relevant to the facts before her.<sup>51</sup>

The most significant case for Wilson J.A. was the Ontario case of *Re Drummond Wren*,<sup>52</sup> decided in 1945 just after Ontario enacted its first human rights statute, *The Racial Discrimination Act, 1944*.<sup>53</sup> *Re Drummond Wren* involved an application before Mackay J. to strike out a restrictive covenant in a deed of land. The covenant prevented the land from being sold to "Jews or persons of objectionable nationality". What is significant about *Re Drummond Wren* for present purposes is that, although the restrictive covenant may not have violated the *Racial Discrimination Act*,<sup>54</sup> Mackay J. was prepared to strike it down as being contrary to the public policy expressed in the *Act*.<sup>55</sup> To me, this is a clear invocation of the doctrine of the "equity of the statute".<sup>56</sup> It was on the basis of the public policy expressed in the preamble to the *Ontario Human Rights Code* that the Court

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ground was an essential element of a contravention of s. 4(1)(g) of the *Code*. See *Ontario Human Rights Commission v. Simpsons-Sears Ltd* (1982), 38 O.R. (2d) 423, 138 D.L.R. (3d) 133. (This case is on appeal to the Supreme Court of Canada.) Would the forms of discrimination set out in the *Code* be exhaustive? What defences, if any, would be available to a defendant?

<sup>49</sup>In the order in which she considered them in her judgement: *Christie v. York Corp.* (1940), [1940] S.C.R. 139, [1940] 1 D.L.R. 81; *Rogers v. Clarence Hotel Co. Ltd* (1940), [1940] 3 D.L.R. 583, [1940] 2 W.W.R. 545 (B.C.C.A.); *Constantine v. Imperial Hotels Ltd* (1944), [1944] 1 K.B. 693, [1944] 2 All E.R. 171; *Loew's Montreal Theatres Ltd v. Reynolds* (1919), 30 B.R. 459; *Franklin v. Evans* (1924), 55 O.L.R. 349.

<sup>50</sup>*Supra*, note 43 at 190.

<sup>51</sup>*Supra*, note 41 at 147.

<sup>52</sup>(1945), [1945] O.R. 778, [1945] 4 D.L.R. 674 *per* Mackay J. [hereinafter cited to O.R.].

<sup>53</sup>S.O. 1944, c. 51.

<sup>54</sup>Mr Justice Mackay did not decide this point, although he seemed to favour the view that the covenant did violate the Act. See *supra*, note 52 at 787.

<sup>55</sup>"My opinion as to the public policy applicable to this case in no way depends on the terms of The Racial Discrimination Act, save to the extent that such Act constitutes a legislative recognition of the policy which I have applied . . ." *Ibid*.

<sup>56</sup>See what Madam Justice Wilson said about *Re Drummond Wren* in *Bhadauria*, *supra*, note 41 at 149: "Mr Justice Mackay, in other words, distinguished between invalidation of the restrictive covenant as a violation of the *Racial Discrimination Act, 1944* (as to which he thought there was merit but made no finding) and invalidation of the restrictive covenant as being contrary to public policy expressed in the *Racial Discrimination Act, 1944*."

of Appeal in *Bhadauria* created a new tort of discrimination.<sup>57</sup> The Court used the policy underlying the *Code* to justify its creation of a new civil remedy for a person injured by conduct prohibited by the *Code*, not because the legislature intended this result, but because the Court in its wisdom thought it appropriate.

The Supreme Court of Canada's reversal of the Court of Appeal should be seen, not as a rejection of the doctrine of the "equity of the statute",<sup>58</sup> but as a disagreement over the wisdom of invoking it in the circumstances of the *Bhadauria* case to create a new tort of discrimination. Rather than advancing the public policy underlying the *Code*, the course taken by the Court of Appeal would, in the opinion of the Supreme Court, subvert that policy.<sup>59</sup> Such a conclusion, whether or not one agrees with it, is, I think, in accordance with, if not an application of, the "equity of the statute" doctrine.

### III. Saskatchewan Wheat Pool

It is arguable that the recent judgement of the Supreme Court of Canada in *Sask. Wheat Pool* involves a less radical, although probably more significant, invocation of the "equity of the statute" doctrine than that invoked by the Court of Appeal in the *Bhadauria* case. At the beginning of his judgement for the Court in *Sask. Wheat Pool*, Dickson J., as he then was, said:

This case raises the difficult issue of the relation of a breach of a statutory duty to a civil cause of action. Where "A" has breached a statutory duty causing injury to "B", does "B" have a civil cause of action against "A"? If so, is "A's" liability absolute, in the sense that it exists independently of fault, or is "A" free from liability if the failure to perform the duty is through no fault of his?<sup>60</sup>

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<sup>57</sup>*Ibid.* at 150, where Madam Justice Wilson stated:

I regard the preamble to the Code as evidencing what is now, and probably has been for some considerable time, the public policy of this Province respecting fundamental human rights. If we accept that "every person is free and equal in dignity and rights without regard to race, creed, colour, sex, marital status, nationality, ancestry or place of origin", as we do, then it is appropriate that these rights receive the full protection of the common law. The plaintiff has a right not to be discriminated against because of her ethnic origin and alleges that she has been injured in the exercise or enjoyment of it. If she can establish that, then the common law must . . . afford her a remedy.

<sup>58</sup>See what Chief Justice Laskin said about *Re Drummond Wren* in *Bhadauria*, *supra*, note 43 at 192: "I do not myself quarrel with the approach taken in *Re Drummond Wren* . . ."

<sup>59</sup>See *ibid.* at 193-4.

<sup>60</sup>*Supra*, note 2 at 206.

In answering these questions, Dickson J. makes an important contribution to the tangled jurisprudence on legislation and civil liability.<sup>61</sup> Undoubtedly, the primary contribution is his rejection of the specious judicial pursuit of non-existent legislative intention. I will return to this issue when I deal with his judgement, after first considering the facts of the case, and the judgements at trial and on appeal to the Federal Court of Canada.

### A. *The Facts*

The facts of *Sask. Wheat Pool* are unusual. In tort law, the problem of legislation and civil liability normally arises in the context of safety legislation, legislation enacted to protect persons or tangible property, usually the former, from physical injury by providing specific precautions to be taken by those engaging in certain risk-creating activities.<sup>62</sup> The legislation in issue in *Sask. Wheat Pool* is section 86(c) of the *Canada Grain Act*,<sup>63</sup> which provides that "[n]o operator of a licensed elevator shall . . . discharge from the elevator any grain . . . that is infested or contaminated". It seems difficult to view this provision as safety legislation, at least of the usual kind. Instead of mandating specific precautions to prevent contamination, it provides a straight prohibition against discharging contaminated grain from elevators. It seems equally difficult to view the damage likely to occur as a result of a breach as physical injury to tangible property.<sup>64</sup> It seems more like a form of economic loss.

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<sup>61</sup>The periodical literature on the subject is voluminous. A sampling of Canadian, English and American writers follows: E.R. Alexander, "Legislation and the Standard of Care in Negligence" (1964) 42 Can. Bar Rev. 243; R.A. Buckley, "Liability in Tort for Breach of Statutory Duty" (1984) 100 L.Q. Rev. 204; G.L. Fricke, "The Juridical Nature of the Action Upon the Statute" (1960) 76 L.Q. Rev. 240; G.H.L. Fridman, "Civil Liability for Criminal Conduct" (1984) 15 Ottawa L. Rev. 34; A.M. Linden, "Tort Liability for Criminal Nonfeasance" (1966) 44 Can. Bar Rev. 25; C. Morris, "The Role of Criminal Statutes in Negligence Actions" (1949) 40 Colum. L. Rev. 21; J. Pritchard & R. Bradner, "Tort Liability for Breach of Statute: A Natural Rights Perspective" (1983) 2 Law & Phil. 89; E.R. Thayer, "Public Wrong and Private Actions" (1914) Harv. L. Rev. 317; G.L. Williams, "The Effect of Penal Legislation in the Law of Tort" (1960) Mod. L. Rev. 233.

<sup>62</sup>Typical would be the highway traffic legislation involved in *Sterling Trusts Corp. v. Postma* (1964), [1965] S.C.R. 324, 48 D.L.R. (2d) 423 requiring operating rear lights on motor vehicles at night.

<sup>63</sup>S.C. 1970-71-72, c. 7.

<sup>64</sup>In any event, prior to its discharge from the grain elevator the grain seems to belong to the elevator operator. See *infra*, note 67. It might be argued that the likely damage resulting from a breach is physical injury to persons from consuming the contaminated grain. There was no suggestion in the case that this was the kind of damage the statute was intended to prevent.

The plaintiff in *Sask. Wheat Pool* was the federal Crown, acting on behalf of its agent, the Canadian Wheat Board.<sup>65</sup> The defendant was, among other things, the operator of a licensed terminal grain elevator at Thunder Bay, Ontario.<sup>66</sup> The Board held a number of grain receipts issued by the defendant.<sup>67</sup> On September 19, 1975, the Board arranged for a cargo of, *inter alia*, No. 3 Canada Utility Wheat to be shipped on a grain ship, the "Frankcliffe Hall". The Board surrendered the appropriate receipts to the defendant and the defendant loaded several of the ship's holds with No. 3 Canada Utility Wheat. Unbeknownst to either the Board or the defendant, some of the wheat was infested with rusty grain beetle larvae. The infestation was not discovered until after the ship left Thunder Bay on September 22, 1975. Pursuant to its statutory powers, the Canadian Grain Commission ordered the Board to fumigate the contaminated grain. This was done at a cost of \$98,261.55. The plaintiff, as principal, sought to recover this amount from the defendant.

## B. In the Federal Court of Canada

### 1. At Trial

The trial was before Mr Justice Collier of the Trial Division of the Federal Court.<sup>68</sup> As he said, after reciting the facts, "[t]he plaintiff's claim is founded, not on negligence, but simply on breach of statutory duty".<sup>69</sup>

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<sup>65</sup>Hereinafter referred to as the Board. Dickson J. describes it as follows:

The Board is an agent of the Crown and is authorized under the *Canadian Wheat Board Act*, R.S.C. 1970, c. C-12 to buy, sell and market wheat, oats and barley, grown in Western Canada, for marketing in interprovincial and export trade. In designated areas (including Saskatchewan) it is obliged to purchase all wheat produced and offered for sale and delivery. Such grain is placed in storage at a primary elevator; it is not required to be stored separately from other grain. At the request of the Board, wheat of the same grade and in the same quantity as that originally purchased is shipped by the Pool [the defendant] and other elevator companies from the primary elevators to the terminal elevators of the Pool and other licensed terminal elevator operators.

*Supra*, note 2 at 207.

<sup>66</sup>The defendant was a grain dealer, the operator of licensed primary country grain elevators in Saskatchewan, as well as the operator of eight licensed terminal grain elevators at Thunder Bay. *Ibid.*

<sup>67</sup>"The terminal elevator receipt is a negotiable instrument and passes from hand to hand by endorsement and delivery. It reads in part: 'Received in store in our terminal named above, subject to the order of the above named consignee, Canadian grain of grade and quantity as shown hereon. Like grade and quantity will be delivered to the holder hereof upon surrender of this receipt, properly endorsed and on payment of all lawful charges due to the above named terminal company.'" *Ibid.* at 208.

<sup>68</sup>(1979), [1980] 1 F.C. 407, 104 D.L.R. (3d) 392 (F.C.T.D.) [hereinafter cited to F.C.].

<sup>69</sup>*Ibid.* at 409. It was assumed in all courts that the defendant was not negligent with respect to its breach of s. 86(c) of the *Canada Grain Act*, S.C. 1970-71-72, c. 7.



For Collier J., the main issue in the case was the ostensibly straightforward one of whether section 86(c) of the *Canada Grain Act* gives a civil cause of action to a person injured by its breach. The difficulty with approaching the case in this way is that neither section 86(c) nor any other section of the *Act* expressly says anything about civil liability resulting from a breach of that section. The *Act* expressly provides criminal penalties,<sup>70</sup> but is silent with respect to civil consequences.<sup>71</sup> It is in this sort of situation that the courts, particularly the English courts, have embarked on a search for the “will-o’-the-wisp of a non-existent legislative intention”.<sup>72</sup> This is the labyrinth which Collier J. chose to enter.

The defendant raised the following defences:

- (a) The *Canada Grain Act* does not create any rights enforceable by civil action by individuals who say they have been aggrieved by breach of some specified duty or duties.
- (b) The duty set out in paragraph 86(c) is not absolute, but qualified; if reasonable care was taken, as it is alleged here, then there was no breach by the defendant.
- (c) The damages are unreasonable or excessive or both.<sup>73</sup>

Mr Justice Collier dealt with these defences in the order stated. Of the first defence, Collier J. said:

In determining whether a breach of paragraph 86(c) confers a civil right of action on individuals one must look at the whole of the *Canada Grain Act*. This statute provides for prosecution of, and penalties against those who violate or fail to comply with, its provisions. . . . But that does not end the matter, nor necessarily lead to the conclusion civil remedies by persons injured are excluded.<sup>74</sup>

In looking at the *Canada Grain Act* as a whole, and concluding that section 86(c) conferred a civil right of action for its breach, Collier J. relied in particular on Part III of the *Act*. Among other matters, Part III requires elevator operators as a condition of licensing to post security with the Canadian Grain Commission to ensure that they meet all their obligations under the *Act*, including the delivery of grain.<sup>75</sup> Section 38(1) empowers the Commission to demand additional security from an elevator operator during the

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<sup>70</sup>*Canada Grain Act*, S.C. 1970-71-72, c. 7, s. 89 (2).

<sup>71</sup>Except for a limited form of civil relief given by s. 38(2) of the *Canada Grain Act*, S.C. 1970-71-72, c. 7. Section 38(2) is set out *infra*, note 77.

<sup>72</sup>F.V. Harper & F. James, Jr, *The Law of Torts*, vol. 2 (1956) at 995 n. 5.

<sup>73</sup>*Supra*, note 68 at 410.

<sup>74</sup>*Ibid.* at 411.

<sup>75</sup>*Canada Grain Act*, S.C. 1970-71-72, c. 7, s. 36(1)(c).

term of a licence.<sup>76</sup> Section 38(2) appears expressly to give a civil remedy to a person in the position of the plaintiff in *Sask. Wheat Pool*, by way of claim against the posted security.<sup>77</sup> There is nothing in Mr Justice Collier's judgement to indicate why the plaintiff did not invoke section 38(2). Was the security posted by the defendant too small to be worth pursuing? Was the plaintiff afraid that the defendant would successfully argue that a faultless breach of section 86(c) of the *Act* is not a "failure to comply with this Act" under section 38(2)?<sup>78</sup> Whatever the reason for the plaintiff's failure to invoke section 38(2), its express provision of a limited civil remedy suggests to me that Parliament did not intend the more extensive civil remedy which Collier J. found to exist. Mr Justice Collier made the following puzzling comment about section 38(2):

It seems to me the logical way in which a person, who has suffered loss or damage by reason of the failure of a licensee to carry out duties imposed on him by the Act, may realize on the posted security, is to first establish civil liability against that licensee. That goes to the question whether a civil right of action was contemplated or conferred.<sup>79</sup>

The circularity of this reasoning is, I think, readily apparent. On its face, section 38(2) provides a self-contained, although limited, civil remedy. All the plaintiff in *Sask. Wheat Pool* should have to do to successfully claim under section 38(2) against the defendant's security is to establish that the defendant failed to comply with the *Act* and that the plaintiff suffered a loss as a result. Why should the plaintiff be required to establish civil liability quite apart from section 38(2) before invoking that section, as Collier J. seems to be suggesting? And rather than supporting a legislative intention to confer a separate and distinct cause of action for the breach of section 86(c), section 38(2) seems to me to have exactly the opposite effect.

Mr Justice Collier did not say much more in rejecting the first defence. He referred to a case in the Federal Court of Appeal, *Canadian Pacific*

<sup>76</sup>Section 38(1) of the *Canada Grain Act*, S.C. 1970-71-72, c. 7 provides that: Where . . . the Commission has reason to believe . . . that any security given by the licensee . . . is not sufficient to ensure that all obligations to holders of documents for the . . . delivery of grain issued by the licensee will be met, the Commission may . . . require the licensee to give . . . such additional security . . . as . . . is sufficient to ensure that those obligations will be met.

<sup>77</sup>Section 38(2) of the *Canada Grain Act*, S.C. 1970-71-72, c. 7 provides that: "Any security given by a licensee as a condition of a license may be realized or enforced by . . . (b) any person who has suffered loss or damage by reason of the refusal or failure of the licensee to (i) comply with this Act . . . ."

<sup>78</sup>See the discussion of the defendant's second defence, *infra*, notes 86-90 and accompanying text.

<sup>79</sup>*Supra*, note 68 at 412. The last sentence seems to be referring to "a civil right of action" contemplated or conferred by s. 86(c) of the *Canada Grain Act*, S.C. 1970-71-72, c. 7.

*Airlines Ltd v. The Queen*,<sup>80</sup> quoting with approval the following passage from the judgement of Mr Justice LeDain (as he then was) in that case:

Whether a breach of statutory duty gives rise to a civil right of action in persons injured by it has been said to be a question of statutory construction that depends on "a consideration of the whole Act and the circumstances, including the pre-existing law, in which it was enacted": *Cutler v. Wandsworth Stadium Ltd* [1949] A.C. 398 at page 407. There would appear to be two questions involved: (a) Was the duty imposed, at least in part, for the benefit or protection of the particular class of persons of which the plaintiff forms part? (b) If this be the case, is a right of action excluded by the existence of other sanction or remedy for a breach of the duty, or on general grounds of policy? It would appear to be, in the final analysis, a question of policy, particularly where the liability of the Crown is involved. A distinction is to be drawn between legislation very clearly directed to the benefit or protection of a particular class of persons, such as that which imposes safety standards for the benefit of workmen, of which the case of *Groves v. Wimborne* [[1898] 2 Q.B. 402] . . . is an example, and legislation which imposes a general duty to provide a public service or facility. The opinion has been expressed that in the latter case the Courts will be more reluctant to recognize a private right of action.<sup>81</sup>

This is a statement, albeit a sophisticated statement, of the traditional approach to legislation and civil liability. Recently, the Federal Court of Appeal, following the Supreme Court of Canada's decision in *Sask. Wheat Pool*, overruled the *Canadian Pacific Airlines* case.<sup>82</sup>

Mr Justice Collier concluded his analysis and rejection of the first defence by holding that the objectives of the *Canada Grain Act* are substantially the same as those of the Canadian Grain Commission as specified in section 11 of the *Act*. Section 11 provides that "the Commission shall, in the interests of the grain producers, establish and maintain standards of quality for Canadian grain and regulate grain handling in Canada, to ensure a dependable commodity for domestic and export markets".<sup>83</sup> He then said: "Considering the statute as a whole, I conclude para. 86(c) points to a litigable duty on the defendant, enforceable by persons injured or aggrieved by a breach of that duty."<sup>84</sup> I presume that his reference to the objectives of the *Canada Grain Act* is related to his immediately preceding quotation

<sup>80</sup>(1978), [1979] 1 F.C. 39, 87 D.L.R. (3d) 511 (F.C.A.D.).

<sup>81</sup>*Supra*, note 68 at 412-3.

<sup>82</sup>*Baird v. The Queen* (1983), 148 D.L.R. (3d) 1, 48 N.R. 276. In giving the main judgement in the case, LeDain J. said at 9: "[T]he question whether there is to be civil liability for breach of statutory duty is to be determined, in so far as it necessarily remains a question of policy, not by conjectures as to legislative intention but by the application, in a public law context, of the common law principles governing liability for negligence. The liability is not to be regarded as created by the statute, where there is no express provision for it."

<sup>83</sup>Emphasis added.

<sup>84</sup>*Supra*, note 68 at 413.

from LeDain J. in the *Canadian Pacific Airlines* case. In that passage, LeDain J. pointed out that in determining whether the legislature intended to give a civil remedy for breach of statute, it is important to determine whether a particular class of persons, of which the plaintiff is a member, is meant to be protected by the statute. Again, Mr Justice Collier's judgement is puzzling in terms of his own analysis. It does not seem that the plaintiff in *Sask. Wheat Pool*, whether viewed as the Crown or as the Canada Wheat Board, comes within the particular class which Collier J. found the *Canada Grain Act* was intended to protect, *i.e.* the grain producers.<sup>85</sup>

In my opinion, Mr. Justice Collier's disposition of the first defence is unsatisfactory. It is a classic example of the sterility of viewing the problem of legislation and civil liability as one of statutory construction when the legislature is silent with respect to civil liability. *A fortiori* is this the case where the legislature provides not only criminal penalties for a breach but a limited civil remedy as well, as Parliament does in section 38(2) of the *Canada Grain Act*. This is not to say that a breach of section 86(c) of the *Act* should be irrelevant to civil liability, but only that its relevance should not be based on non-existent legislative intention.

The second defence put forward by the defendant, it will be recalled, was that the duty imposed by section 86(c) is not absolute, and a defendant who takes reasonable care to comply with the statute is not liable to the plaintiff. The defendant seems to be arguing that a faultless breach is not a breach at all and, therefore, the blameless defendant is not liable either criminally or civilly, even if Parliament intended to give a civil cause of action for a breach of section 86(c). Mr Justice Collier rejected the second defence, but again his reasoning seems confused.

It is no surprise that he approached the second defence as an issue of statutory construction.<sup>86</sup> If Parliament intended to impose civil liability for breach of section 86(c) of the *Canada Grain Act*, despite not saying so expressly, then it is not illogical to suppose that the nature of that civil

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<sup>85</sup>The anomaly is pointed out by the Federal Court of Appeal. See *infra*, note 99.

<sup>86</sup>This is consistent with the traditional approach to legislation and civil liability, as are the questions of who is protected by the legislation and against what. An example of "who" is *Knapp v. Railway Executive* (1949), [1949] 2 All E.R. 508 (C.A.), where the engineer of a train who was injured as a result of a defendant's failure, in breach of statute, to close the gates at a level crossing was denied recovery on the basis that the legislature intended to protect only the road-using public. An example of "what" is *Gorris v. Scott* (1874), L.R. 9 Ex. 125, where the plaintiffs' sheep were washed overboard during a storm while being carried on defendant's ship. Although the defendant was in breach of a statute requiring ships to have pens for livestock, the plaintiffs were denied recovery on the basis that the legislature intended to protect animals against disease and not against being washed overboard.

liability, whether strict or based on negligence, is also a question of Parliament's intention. Mr Justice Collier quoted a passage from Halsbury<sup>87</sup> as accurately stating the law. The passage includes the following sentence: "In general, however, the answer to the question of whether a duty imposed by a particular statute is absolute in the sense previously mentioned, or is such that it would be a defence to an action founded on breach of it to show that the defendant has been unable by the exercise of reasonable care to avoid the breach, is a matter of the construction of the particular statute."<sup>88</sup> No matter that this compounds the futile search for non-existent legislative intention. If Parliament has no intention with respect to civil liability it may seem ludicrous for a court to search for Parliament's intention with respect to the nature of that non-existent civil liability.

In support of the second defence, the defendant argued that if it had been prosecuted under section 89(2) of the *Canada Grain Act* for a breach of section 86(c), the prosecutor would have had to prove *mens rea*. Taking reasonable care to prevent a breach negatives *mens rea*. Therefore, taking reasonable care should also be a defence to a civil action for a breach of section 86(c). In rejecting this argument Collier J. said:

In my view, while taking of reasonable care might possibly be a defence to a criminal charge under para. 86(c), it does not follow it would be a defence to a civil breach of the paragraph. To put it another way, the possibility of a good answer to a criminal charge does not reduce the civil onus of an absolute duty to one of a qualified duty.<sup>89</sup>

If this is a question of statutory construction, *i.e.* legislative intention, as Collier J. assumes,<sup>90</sup> it seems a little strange that Parliament should have one intention with respect to the defence of reasonable care as far as criminal liability is concerned and another intention as far as civil liability is concerned. This is particularly so since Parliament has not expressly said anything about defences, either with respect to its express imposition of criminal liability or its unexpressed imposition of civil liability.<sup>91</sup> Mr Justice Collier appears to be carrying the search for the elusive non-existent legislative intention to absurd lengths.

The defendant's third defence was that the damages claimed by the plaintiff were unreasonable, or excessive, or both. Mr Justice Collier gave this defence short shrift. The plaintiff claimed damages of \$98,261.55 which

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<sup>87</sup>*Halsbury's Laws of England*, vol. 36, 3d ed. (1961) at 456.

<sup>88</sup>*Supra*, note 68 at 414-5.

<sup>89</sup>*Ibid.* at 417.

<sup>90</sup>*Ibid.*

<sup>91</sup>See W.V.H. Rogers, "Rusty Beetles in Elevators" (1984) 43 *Camb. L.J.* 23 at 25: "[I]f an English court concluded that section 86 contained an implied 'due diligence' defence [to a criminal charge] it is thought that would also conclude the issue of civil liability."

included \$22,824.05 as the cost of unloading and fumigating the infested wheat<sup>92</sup> and \$75,437.55 as the cost to the owner of "Frankcliffe Hall" for the delay caused by the unloading and fumigating.<sup>93</sup> In rejecting the defendant's contention that the damages were excessive because the Board acted unreasonably, Collier J. said: "But this was the first encounter, according to the evidence, with infestation on vessels. Previous experience had only been on rail cars. In this novel situation, the Board's personnel, in my view, acted reasonably in the circumstances."<sup>94</sup>

## 2. On Appeal

The defendant's appeal to the Federal Court of Appeal<sup>95</sup> was allowed, Mr Justice Heald writing the judgement of the Court. The defendant attacked the trial judgement on two grounds: first, that Collier J. was wrong in concluding that the *Canada Grain Act* gave the plaintiff a civil action for damages for the defendant's breach of section 86(c); second, that the plaintiff had not sustained any damages, or in the alternative had not proven them, or in the further alternative the damages claimed were excessive. The appeal was allowed on the first ground. As a result, the Court of Appeal did not have to deal with the second ground.<sup>96</sup>

On the first ground, the Court of Appeal's disagreement with Collier J. was not over his general approach to the problem. They agreed that the problem was one of statutory construction. Did Parliament intend, when it enacted the *Canada Grain Act*, to give a person like the plaintiff a civil action for damages for breach of section 86(c)?<sup>97</sup> The Court of Appeal disagreed with Collier J.'s conclusion that Parliament had this intention. They felt that the *Canada Grain Act* was intended to benefit the Canadian public

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<sup>92</sup>Is this to be considered purely economic damage or partly economic damage and partly damage to property?

<sup>93</sup>Clearly this is purely economic damage. It is not mentioned in the case, but presumably the Board was contractually bound to pay this amount to the owner of the "Frankcliffe Hall".

<sup>94</sup>*Supra*, note 68 at 419.

<sup>95</sup>(1980), [1981] 2 F.C. 212, 117 D.L.R. (3d) 70 (F.C.A.D.) *per* Heald and Urie JJ., and Kelly D.J. [hereinafter cited to F.C.].

<sup>96</sup>However, Heald J. did say this about the second ground at the end of his judgement: "[T]here was ample evidence before the learned Trial Judge from which he could conclude that the respondent had suffered damages in the amount awarded by him. Were it necessary to consider the matter of damages, I would not disturb the award of the learned Trial Judge in this regard." *Ibid.* at 220.

<sup>97</sup>Heald J. quoted, *ibid.* at 216-7, and implicitly accepted the passage from *Canadian Pacific Airline Ltd v. The Queen*, *supra*, note 80, set out in the text, *supra*, and relied on by Collier J., *supra*, note 81.

as a whole, not a particular class of it.<sup>98</sup> As a result, no individual could bring a civil action for damages for a breach of section 86(c).

### C. *In the Supreme Court of Canada*

The plaintiff's appeal to the Supreme Court of Canada was dismissed in a unanimous judgement delivered by Mr Justice Dickson. The judgement is important primarily because of its rejection of the futile judicial search for non-existent legislative intention.

After stating the facts of the case, Dickson J. said: "The Board makes no claim in negligence. It relies entirely on what it alleges to be a statutory breach."<sup>99</sup> He then briefly discussed the disposition of the case in the lower courts, before turning to the crux of the case in part three of his judgement, under the heading "Statutory Breach Giving Rise to a Civil Cause of Action." In this part of his judgement, in just over ten pages, Dickson J. provides a penetrating analysis of the common law of legislation and civil liability. He divides it into four sections: (a) General; (b) The English position; (c) The American position; and (d) The Canadian position. I shall examine each of these sections in turn.

#### 1. General

Mr Justice Dickson begins his examination of legislation and civil liability by saying:

The uncertainty and confusion in relation between breach of statute and a civil cause of action for damages arising from the breach is of long standing. The commentators have little but harsh words for the unhappy state of affairs, but arriving at a solution, from the disarray of cases, is extraordinarily difficult. It is doubtful that any general principle or rationale can be found in the authorities to resolve all of the issues or even those which are transcendent.

There does seem to be general agreement that the breach of a statutory provision which causes damage to an individual should in some way be pertinent to recovery of compensation for the damage. Two very different forces, however, have been acting in opposite directions. In the United States the civil consequences of breach of statute have been subsumed in the law of negligence. On the other hand, we have witnessed in England the painful emergence of a new nominate tort of statutory breach.<sup>100</sup>

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<sup>98</sup>Heald J. pointed out that even if the *Canada Grain Act* intends to benefit the members of a particular class, *i.e.* grain producers, the Board is not a member of that class. *Supra*, note 95 at 218-9.

<sup>99</sup>*Supra*, note 2 at 209.

<sup>100</sup>*Ibid.* at 211.

## 2. The English Position

Mr. Justice Dickson's characterization of the English position as involving the "painful emergence of a new nominate tort of statutory breach" is apt, based as that position is on the futile pursuit of non-existent legislative intention. Mr Justice Dickson, relying on Professor Fricke,<sup>101</sup> points out that the English position

leads to many difficulties. In the first place it is not clear what the *prima facie* rule or presumption should be. Some of the cases suggest that *prima facie* an action is given by the statement of a statutory duty, and that it exists unless it can be said to be taken away by any provisions to be found in the Act. Other authorities suggest the *prima facie* rule is that the specific statement of a certain manner of enforcement excludes any other means of enforcement. Sometimes the courts jump one way, sometimes the other. Fricke concludes . . . that as a matter of pure statutory construction the law went wrong with the decision in 1854 in *Couch v. Steel*: "If one is concerned with the intrinsic question of interpreting the legislative will as reflected within the four corners of a document which made express provision of a fine, but makes no mention of a civil remedy, one is compelled to the conclusion that a civil remedy was not intended."<sup>102</sup>

He adds that

[t]he pretence of seeking what has been called a "will o' the wisp", a non-existent intention of Parliament to create a civil cause of action, has been harshly criticized. It is capricious and arbitrary, "judicial legislation" at its very worst . . . . It is a "bare faced fiction" at odds with accepted canons of statutory interpretation: "the legislature's silence on the question of civil liability rather points to the conclusion that it either did not have it in mind or deliberately omitted to provide for it." (Fleming, *The Law of Torts*, 5th ed. (1977), at p. 123).<sup>103</sup>

In conclusion on the English position, Dickson J. says:

[S]everal justifications are given for the tort of statutory breach. It provides fixed standards of negligence and replaces the judgment of amateurs (the jury) with that of professionals in highly technical areas. In effect, it provides for absolute liability in fields where this has been found desirable such as industrial safety. Laudable as these effects are, the state of the law remains extremely unsatisfactory.<sup>104</sup>

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<sup>101</sup>*Supra*, note 61. One of the intriguing aspects of Dickson J.'s judgement, at least from an academic's perspective, is his reference to academic writers — some of whom are still alive! I counted references, many of them extensive, to eleven English, American and Canadian tort writers.

<sup>102</sup>*Supra*, note 2 at 214.

<sup>103</sup>*Ibid.* at 215-6.

<sup>104</sup>*Ibid.* at 217-8.



### 3. The American Position

At the beginning of this section of his judgement, Dickson J. says:

Professor Fleming prefers the American approach which has assimilated civil responsibility for statutory breach into the general law of negligence:

Intellectually more acceptable, because less arcane, is the prevailing American theory which frankly disclaims that the civil action is in any true sense a creature of the statute, for the simple enough reason that the statute just does not contemplate, much less provide, a civil remedy. Any recovery of damages for injury due to its violation must, therefore, rest on common law principles. But though the penal statute does not create civil liability the court may think it proper to *adopt* the legislative formulation of a specific standard in place of the unformulated standard of reasonable conduct, in much the same manner as when it rules peremptorily [*sic*] that certain acts or omissions constitute negligence as a matter of law.<sup>105</sup>

Mr Justice Dickson goes on to point out that the majority view in the United States is that an unexcused breach of the statute is negligence *per se*,<sup>106</sup> while the minority view is that breach of a statute is merely evidence of negligence.<sup>107</sup>

<sup>105</sup>*Ibid.* at 218.

<sup>106</sup>Mr Justice Dickson, *ibid.* at 219-20, quotes W.L. Prosser, *Handbook of the Law of Torts*, 4th ed. (1971) at 200 on the majority view, as follows:

Once the statute is determined to be applicable — which is to say, once it is interpreted as designed to protect the class of persons in which the plaintiff is included, against the risk of the type of harm which had in fact occurred as a result of its violation — the great majority of the courts hold that an unexcused violation is conclusive on the issue of negligence, and that the court must so direct the jury. The standard of conduct is taken over by the court from that fixed by the legislature, and “jurors have no dispensing power by which to relax it”, except in so far as the court may recognize the possibility of a valid excuse for disobedience of the law. This usually is expressed by saying that the unexcused violation is negligence “*per se*”, or in itself. The effect of such a rule is to stamp the defendant’s conduct as negligence, with all of the effects of common law negligence, but with no greater effect.

The sixty-four thousand dollar question, of course, is what qualifies as an “excuse” under the negligence *per se* doctrine? The *Restatement of the Law, Second: Torts*, vol. 2, 2d (1965) [hereinafter *Restatement*] which has adopted the negligence *per se* doctrine, provides for the following excuses at 288A(2):

- (a) the violation is reasonable because of the actor’s incapacity;
- (b) he neither knows nor should know of the occasion for compliance;
- (c) he is unable after reasonable diligence or care to comply;
- (d) he is confronted by an emergency not due to his own misconduct;
- (e) compliance would involve a risk of harm to the actors or to others.

<sup>107</sup>*Sask. Wheat Pool, ibid.* at 221: “The so-called ‘minority view’ in the United States considers breach of a statute to be merely evidence of negligence. . . . Statutory breach may be considered totally irrelevant, merely relevant or *prima facie* evidence of negligence having the effect of reversing the onus of proof.” It seems difficult to clearly distinguish negligence *per se* subject to excuses and *prima facie* evidence of negligence shifting the onus of proof. See Prosser, *ibid.* at 201.

#### 4. The Canadian Position

At the beginning of the next section of his judgement, Dickson J. says:

Professor Linden has said that the "Canadian courts appear to oscillate between the English and American positions without even recognizing this fact": (Comments: *Sterling Trusts Corporation v. Postma*, (1967) 45 Can. Bar Rev. 121 (1967), at p. 126). The most widely used approach, however, has been that stated in *Sterling Trusts Corporation v. Postma*, *supra*: The breach of a statutory provision is "*prima facie* evidence of negligence".<sup>108</sup>

In apparently approving of this approach, Dickson J. says:

The use of breach of statute as evidence of negligence as opposed to recognition of a nominate tort of statutory breach is, as Professor Fleming has put it, more intellectually acceptable. It avoids, to a certain extent, the fictitious hunt for legislative intent to create a civil cause of action which has been so criticized in England. It also avoids the inflexible application of the legislature's criminal standard of conduct to a civil case.<sup>109</sup>

He then continues with this important, and in some respects curious and perhaps unfortunate, passage:

Glanville Williams is of the opinion, with which I am in agreement, that where there is no duty of care at common law, breach of non-industrial penal legislation should not affect civil liability unless the statute provides for it. As I have indicated above, industrial legislation historically has enjoyed special consideration. Recognition of the doctrine of absolute liability under some industrial statutes does not justify extension of such doctrine to other fields, particularly when one considers the jejune reasoning supporting the juristic invention.<sup>110</sup>

Mr Justice Dickson seems to be saying that for historical reasons the traditional English search for non-existent legislative intention is acceptable in Canada with respect to industrial penal legislation, but that with respect to other kinds of penal legislation the "evidence of negligence" approach is

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<sup>108</sup>*Sask. Wheat Pool*, *ibid.* at 222. Mr. Justice Dickson continues, *ibid.*: "There is some difficulty in the terminology used. '*Prima facie* evidence of negligence' in the *Sterling Trusts* case is used seemingly interchangeably with the expression '*prima facie* liable'. In a later case in the Ontario Court of Appeal, *Queensway Tank Lines Ltd v. Moise* . . . Mackay J.A. assumes *prima facie* evidence of negligence to be a presumption of negligence with concomitant shift in the onus of proof to the defendant."

<sup>109</sup>*Ibid.* at 223. I say "apparently" approving of the "*prima facie* evidence of negligence" approach because in summary at the end of his judgement Dickson J. appears to adopt the "evidence of negligence" approach under which, unlike the *prima facie* evidence of negligence approach, *supra*, note 108, the burden of proof would not shift to the defendant. For Dickson J.'s summary see *infra*, note 120.

The last sentence of the quotation in the text is somewhat puzzling. It is presumably a reference to the American negligence *per se* doctrine, which, as Dickson J. pointed out earlier in his judgement, *supra*, note 2 at 218-22, is not applied inflexibly.

<sup>110</sup>*Ibid.* at 223.

the proper one. I have some difficulty in seeing why the English approach should be retained in Canada even in this one limited area. If, as Dickson J. seems to be saying, the reason for its retention is to preserve absolute liability for breach of industrial penal legislation, there seems to be no reason why this should not be done directly by the courts, rather than indirectly through a search for imaginary legislative intention.<sup>111</sup> With respect to non-industrial penal legislation, why should the absence of a duty of care at common law make a breach of statute irrelevant to civil liability unless the statute expressly provides for it, as Dickson J. seems to be saying? If a breach of statute is relevant to the negligence or breach of duty issue, because it is "evidence of negligence", which of course assumes the existence of a common law duty of care, why should it not also be relevant to the duty issue? In other words, where no duty of care exists at common law, why should a court in its wisdom not create a duty based on the policy underlying a statute? I will discuss this in more detail later in my critique of *Sask. Wheat Pool*.

After remarking that "regarding statutory breach as part of the law of negligence is also more consonant with other developments which have taken place in the law",<sup>112</sup> Dickson J. concludes his section on the Canadian position on legislation and civil liability with some general observations. In his view "statutes are increasingly speaking plainly to civil responsibility: consumer protection acts, rental acts, business corporations acts, securities acts. Individual compensation has become an active concern of the legislator."<sup>113</sup> Thus, it seems that the courts are not justified in creating a civil responsibility based on supposed legislative intention where the statute does not speak plainly. "In addition, the role of tort liability in compensation and allocation of loss is of less and less importance."<sup>114</sup> And tort law "has undergone a major transformation in this century with nominate torts being eclipsed by negligence, the closest the common law has come to a general theory of civil responsibility. The concept of duty of care, embodied in the neighbour principle, has expanded into areas hitherto untouched by tort law."<sup>115</sup> Mr. Justice Dickson seems to think that modern negligence law is based on personal fault, and that it is this moral blameworthiness that

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<sup>111</sup>The existence of workers' compensation legislation in this country seems to make the question of tort liability arising from breach of industrial penal legislation irrelevant. See Rogers, *supra*, note 91 at 25.

<sup>112</sup>*Supra*, note 2 at 223.

<sup>113</sup>*Ibid.* at 223-4.

<sup>114</sup>*Ibid.* at 224.

<sup>115</sup>*Ibid.*

justifies shifting losses.<sup>116</sup> He feels that it is not defensible to impose liability for breach of statute without fault, which, in his view, is what the traditional English search for non-existent legislative intention does. However, this seems to ignore the fact that the kind of civil liability imposed by a statute, whether strict or based on negligence, is also considered by the English courts to be a question of legislative intention.<sup>117</sup> Sometimes the English approach results in strict liability, while at other times it results in liability based on negligence.

The final part of Mr Justice Dickson's judgement is headed "This Case". He begins this part by saying:

Assuming that Parliament is competent constitutionally to provide that anyone injured by a breach of the *Canada Grain Act* shall have a remedy by civil action, the fact is that Parliament has not done so. Parliament has said that an offender shall suffer certain specified penalties for his statutory breach. We must refrain from conjecture as to Parliament's unexpressed intent. The most we can do in determining whether the breach shall have any other legal consequences is to examine what is expressed. In professing to construe the Act in order to conclude whether Parliament intended a private right of action, we are likely to engage in a process which Glanville Williams aptly described as "looking for what is not there" . . . .The *Canada Grain Act* does not contain any express provision for damages for the holder of a terminal elevator receipt who receives infested grain out of an elevator.<sup>118</sup>

He then goes on to point out that the plaintiff's case was based on breach of statutory duty as an independent tort action, and not on negligence, and fails for that reason. But even if the action had been framed in negligence, and the breach of section 86(c) of the *Canada Grain Act* had been relied on as evidence of negligence, the plaintiff's action would have failed because the defendant "successfully demonstrated that the loss was not the result of any negligence on its part".<sup>119</sup>

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<sup>116</sup>"One of the main reasons for shifting a loss to a defendant is that he has been at fault, . . . that he has done some act which should be discouraged. There is then good reason for taking money from the defendant as well as a reason for giving it to the plaintiff who has suffered from the fault of the defendant." *Ibid.* This emphasis on personal fault and deterrence seems curiously old fashioned and out of step with modern tort law. See J.G. Fleming, *The Law of Torts*, 6th ed. (1983) at 6-13.

<sup>117</sup>See, e.g., *John Summers & Sons v. Frost* (1955), [1955] A.C. 740, [1955] 1 All E.R. 810 (H.L.).

<sup>118</sup>*Supra*, note 2 at 226. The last sentence ignores s. 38(2) of the *Act* which does provide a limited civil remedy: see *supra*, note 77 and accompanying text.

<sup>119</sup>*Ibid.* at 227. I am making a rather free interpretation of this part of Dickson J.'s judgement.

In concluding, Dickson J. summarized his judgement in point form.<sup>120</sup>

#### IV. A Critique of *Saskatchewan Wheat Pool*

As Dean Wright perceptively observed in 1967, “[t]he common law treatment of legislation has never been happy. The manner in which statutes are used — and sometimes abused — in determining the incidence of civil liability is no exception.”<sup>121</sup> Although Mr. Justice Dickson’s judgement in *Sask. Wheat Pool* is, in my opinion, in some respects flawed, it cannot be said to add to this unhappiness or abuse. By freeing Canadian courts from their unfortunate pursuit of non-existent legislative intention, his judgement should contribute to a rationalization, not only of the law relating to legislation and civil liability, but also of the common law treatment of legislation generally.<sup>122</sup>

Where the legislature expressly speaks to civil liability, its voice should be heeded by the courts.<sup>123</sup> This should be the case whether the statute expressly creates civil liability or expressly denies it. Two consecutive sections of the Ontario *Public Transportation and Highway Improvement Act*<sup>124</sup> are illustrative. Section 32 makes it an offence subject to fine for the owner of, *inter alia*, a horse to permit the animal to run at large on the highway. The section goes on to provide that “this section does not create civil liability on the part of the owner of the animal for damage caused to the property of others as a result of the animal running at large”.<sup>125</sup> Section 33 imposes

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<sup>120</sup>*Ibid.* at 227-8.

In sum I conclude that: 1. Civil consequences of breach of statute should be subsumed in the law of negligence. 2. The notion of a nominate tort of statutory breach giving a right to recovery merely on proof of breach and damages should be rejected, as should the view that unexcused breach constitutes negligence *per se* giving rise to absolute liability. 3. Proof of statutory breach, causative of damages, may be evidence of negligence. 4. The statutory formulation of the duty may afford a specific, and useful, standard of reasonable conduct. 5. In the case at bar negligence is neither pleaded nor proven. The action must fail.

<sup>121</sup>C. Wright, *Cases on the Law of Torts*, 4th ed. (1967) at 284.

<sup>122</sup>In *Bhadauria*, *supra*, note 43 at 188, Laskin C.J. said: “There is, in my view, a narrow line between founding a civil cause of action directly upon a breach of statute and as arising from the statute itself and founding a civil cause of action at common law by reference to policies reflected in the statute and standards fixed by the statute.” There may be a “narrow line” between the two approaches in the sense that they may lead to the same result in a particular case, but in terms of underlying theory they are diametrically opposed.

<sup>123</sup>But see G. Calabresi, *A Common Law for the Age of Statutes* (1982).

<sup>124</sup>R.S.O. 1980, c. 421.

<sup>125</sup>The section, as worded, does not prevent the common law of torts from imposing liability on the owner. See *Fleming v. Atkinson* (1959), [1959] S.C.R. 513, 18 D.L.R. (2d) 81. Compare

an obligation on the Department of Highways to repair certain highways and then goes on to provide that "in case of default by the Ministry to keep the King's Highway in repair, the Crown is liable for all damage sustained by any person by reason of the default".<sup>126</sup>

The difficult cases are those like *Sask. Wheat Pool*, where the legislature says nothing about civil liability. What effect, if any, are the courts going to give to the statute in a civil action? Since *Sask. Wheat Pool*, the answer to this question should depend, not on non-existent legislative intention, but on something analogous to the ancient doctrine of the "equity of the statute".<sup>127</sup> It can be argued that the doctrine influenced Mr. Justice Dickson's judgement in *Sask. Wheat Pool*. But the doctrine of the "equity of the statute" encompasses much more than just using statutory standards in

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the wording of s. 32 with the wording of s. 157(14) of Nova Scotia's compulsory seatbelt legislation, *An Act to Amend Chapter 191 of the Revised Statutes, 1967, the Motor Vehicle Act*, S.N. 1974, c. 42, s. 10 adding ss 157(12)-(14), never proclaimed in force. "The use or non-use of restraint equipment by operators or passengers shall not be evidence of negligence in any civil action."

<sup>126</sup>There is an obvious difference between ss 32 and 33. If civil liability were not expressly created by s. 33 there would be no effective statutory sanction for the performance of the Department's duty to repair. On the other hand, s. 32 fines the owner of a straying animal, and there is no need for the additional statutory sanction of civil liability.

<sup>127</sup>Of course, it can be argued, with some justification, that the search for non-existent legislative intention is in itself an application of the "equity of statute" doctrine. See Landis, *supra*, note 38 at 12. The trouble with this fictional search, however, is that the courts are apt to accept the fiction for reality, are apt to believe it really is the legislature that controls the effect of statute on civil liability when the statute is silent. See *Cutler v. Wandsworth Stadium Ltd* (1949), [1949] A.C. 398, [1949] 2 All E.R. 544 where Lord du Parc said the following at 410:

To a person unversed in the science, or art, of legislation it may well seem strange that Parliament has not by now made it a rule to state explicitly what its intention is in a matter which is often of no little importance, instead of leaving it to the courts to discover, by a careful examination and analysis of what is expressly said, what that intention may be supposed probably to be. There are, no doubt, reasons which inhibit the legislature from revealing its intention in plain words. I do not know, and must not speculate, what those reasons may be. I trust, however, that it will not be thought impertinent, in any sense of that word, to suggest respectfully that those who are responsible for framing legislation might consider whether the traditional practice, which obscures, if it does not conceal, the intention which Parliament has, or must be presumed to have, might not safely be abandoned.

Of course, there is a "[j]udicial — indeed, universally human — temptation to pass responsibility on to others by saying one is *describing* their will when one is, in truth, *prescribing* what is to be . . ." [emphasis in original]. L.H. Tribe, "Toward a Syntax of the Unsaid: Conserving the Sounds of Congressional and Constitutional Silence" (1982) 57 Ind. L.J. 515 at 523. However, this temptation should be resisted in the context of legislation and civil liability because "linguistic inaccuracy has its costs. Too much of it destroys the credibility of communication in general. And too much use of it by the courts destroys their credibility especially since the major effective control on courts stems precisely from their duty to explain what they are doing." Calebresi, *supra*, note 123 at 175-6 [footnote omitted].

civil negligence actions. In its modern form it involves a judicial attitude towards legislation which recognizes the importance of legislative policy to common law decision-making. My main criticism of Dickson J.'s judgement in the *Sask. Wheat Pool* case is that he is prepared to make only a limited use of statutes in civil actions. Apparently, a breach of a statute will be no more than evidence of negligence.<sup>128</sup> One might have hoped for a more imaginative approach.

A tort action for negligence involves a number of elements, including duty, breach of duty and proximate cause.<sup>129</sup> On the breach of duty or "negligence" issue, why should a court limit itself to using a breach of statute as evidence of negligence, as evidence of the required standard of care? Is there not an argument for a more flexible approach, an approach that would make the impact of a breach of statute on the "negligence" issue depend on the nature of the particular statute, and the court's assessment of the policy underlying it? Sometimes the breach might be merely evidence of negligence, entitling the court, whether judge alone or judge and jury, to disregard the statute in deciding the negligence issue;<sup>130</sup> sometimes the breach might be *prima facie* proof of negligence, shifting the burden to the defendant to prove he was not negligent, and entitling the plaintiff to a verdict if the defendant did not satisfy the burden;<sup>131</sup> sometimes the breach might be negligence *per se*, allowing no, or at best limited, excuses, and in effect imposing strict liability;<sup>132</sup> sometimes the breach might be irrelevant to the "negligence" issue.<sup>133</sup> If this kind of flexibility is thought to give too much

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<sup>128</sup>See *supra*, note 120.

<sup>129</sup>See Fleming, *supra*, note 116 at 99-100.

<sup>130</sup>As evidence of negligence the breach would allow the plaintiff to avoid a non-suit.

<sup>131</sup>This was the effect given by Mackay J.A. to a breach in *Queensway Tank Ltd v. Moise* (1969), [1970] 1 O.R. 535, 9 D.L.R. (3d) 30; and see *supra*, note 108.

<sup>132</sup>This is the majority view in the United States, Prosser, *supra*, note 106, although the excuses allowed by the *Restatement*, *supra*, note 106, seem quite extensive.

<sup>133</sup>As Dickson J. seemed to assume might sometimes be the case in his concluding summary. See *supra*, note 120. There may be a number of reasons for holding a breach to be irrelevant. See E.R. Alexander, "The Fate of *Sterling Trusts Corp. v. Postma*" (1968) 2 Ottawa L. Rev. 441 at 442-3. One reason might be obsolescence:

[S]uppose that, even though a statute was enacted to promote safety, because of its antiquity the standard that it prescribes is now unreasonable. For example, a violation of an old motor vehicle statute prescribing "speed limits of six miles an hour" should be irrelevant in a negligence action against the driver of an offending vehicle.

*Ibid.* at 443 [footnote omitted]. Calabresi, *supra*, note 123, would go further and allow courts to nullify obsolete statutes or at least remand them to the legislature for reconsideration. This is Calabresi's answer to what he refers to as the "statutorification" of American law. He says, *ibid.* at 2: "There is an alternative way of dealing with the problem of legal obsolescence: granting to courts the authority to determine whether a statute is obsolete, whether in one way or another it should be consciously reviewed. At times this doctrine would approach granting to courts the authority to treat statutes as if they were no more and no less than part of the

discretion to the courts, and a uniform effect of breach of statute is thought to be desirable,<sup>134</sup> why should that effect not be *prima facie* proof of negligence, rather than merely evidence of negligence? Earlier cases seemed to favour the *prima facie* proof effect.<sup>135</sup> It is clearly more deferential to the legislative judgement. In addition, it advances the predominant "compensation" purpose of modern negligence law<sup>136</sup> by putting the burden on the statute violator to prove he was not at fault, a burden he may have difficulty satisfying.<sup>137</sup>

And why should a breach of statute only be relevant to the "negligence" issue? Why should it not, at least sometimes, be relevant to the duty issue? An example is "hit and run" legislation, which makes it an offence for a person involved in a motor vehicle accident to leave the scene without helping the injured, even if the offender was not at fault with respect to the accident.<sup>138</sup> It is arguable that the common law of torts does not impose liability on the faultless motorist for any additional injuries suffered by his victims as a result of his failure to stop and render aid.<sup>139</sup> The common law has been slow to recognize duties of affirmative action in the absence of a special relationship between the parties.<sup>140</sup> It seems clear that the main purpose of, and the public policy underlying, "hit and run" legislation is a concern for the victims of motor vehicle accidents and a desire to minimize

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common law. At other times it would be used to enable courts to encourage, or even to induce, legislative reconsideration of the statute [footnote omitted].

<sup>134</sup>Subject to those breaches considered to be irrelevant.

<sup>135</sup>*Supra*, note 131.

<sup>136</sup>See Fleming, *supra*, note 116 at 6-13.

<sup>137</sup>As a manufacturer has difficulty when *res ipsa loquitur* is used to shift the burden of proof. *Zeppa v. Coca-Cola Ltd* (1955), [1955] O.R. 855, [1955] 5 D.L.R. 187 (C.A.).

<sup>138</sup>Section 174(1)(b) of the *Highway Traffic Act*, R.S.O. 1980, c. 198, provides that: "Where an accident occurs on a highway every person in charge of a vehicle . . . that is directly or indirectly involved in the accident shall . . . render all possible assistance . . ." Section 174(2) provides for a fine and/or imprisonment for a contravention of s. 174(1). A similar provision in the *Criminal Code*, R.S.C. 1970, c. C-34, ss 233(2) and (3) seems to require that the offender be at fault with respect to the accident.

<sup>139</sup>At least the Canadian common law of torts. But see *Oke v. Weide Transport Ltd* (1963), 41 D.L.R. (2d) 53 (Man. C.A.) *per* Freedman J.A. dissenting.

The American "instrumentality" basis for recognizing duties of affirmative action would impose liability on the faultless motorist for his victim's additional injuries. *L.S. Ayres & Co. v. Hicks*, 40 N.E. 2d 334 (Ind. S.C. 1942).

<sup>140</sup>As there was in *Horsley v. MacLaren* (1971), [1972] S.C.R. 441, 22 D.L.R. (3d) 545. (The "Ogopogo") — owner-operator of cabin cruiser and guest passengers. Or where the defendant has a special relationship with the public generally, for example, a police officer on traffic patrol who discovers a dangerous situation. *O'Rourke v. Schacht* (1974), [1976] 1 S.C.R. 53, 55 D.L.R. (3d) 96.



their injuries. Why should a court not advance this policy by imposing a duty of affirmative action on motorists to help their victims? Unlike in *Bhadauria*,<sup>141</sup> there is nothing in the “hit and run” legislation to suggest that the court’s creation of a duty of affirmative action, where none existed at common law, would subvert the policy underlying the legislation. On the contrary, the creation of such a duty would seem to advance the policy.

And why should the effect of a breach of statute on civil liability be limited to negligence actions?<sup>142</sup> Mr Justice Dickson’s judgement in the *Sask. Wheat Pool* case seems to preclude the approach taken by the Ontario Court of Appeal in the *Bhadauria* case,<sup>143</sup> an approach that the Supreme Court of Canada appeared to confirm.<sup>144</sup> The Court of Appeal created a new intentional tort of discrimination based on its perception of the policy underlying the *Human Rights Code*.<sup>145</sup> The plaintiff could establish the tort by proving the defendant’s breach of the discrimination provisions of the *Code*.<sup>146</sup>

And, going even further, why should the effect of a statute on civil liability depend upon a breach of the statute? In an appropriate case, why should the court not make use of the policy underlying a statute as an aid in deciding analagous cases, even though the statute has not been breached?<sup>147</sup> The judgement of Laskin J., as he then was, in “*Ogopogo*”<sup>148</sup> is illustrative. One of the problems in “*Ogopogo*” was whether the owner-operator of a cabin cruiser had a duty to go to the rescue of a passenger who had fallen overboard. Earlier authority<sup>149</sup> had held that there was no such duty. In holding that the owner-operator did owe a duty of affirmative action to the passenger, Laskin J. relied, in part, on section 526(1) of the *Canada Shipping*

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<sup>141</sup>*Supra*, notes 41 (C.A.) and 43 (S.C.C.).

<sup>142</sup>As Dickson J. seems to limit it in his concluding summary in *Sask. Wheat Pool*. See *supra*, note 120.

<sup>143</sup>*Supra*, note 41.

<sup>144</sup>*Supra*, note 43.

<sup>145</sup>R.S.O. 1970, c. 318.

<sup>146</sup>*Ibid.*, s. 4.

<sup>147</sup>As Mackay J. arguably did in *Re Drummond Wren*, *supra*, note 52; in agreement was *Thatcher v. C.P.R.* (1947), [1947] O.W.N. 965 (C.A.); *contra*, *Chipchase v. British Titan Products Co. Ltd* (1956), [1956] 1 Q.B. 545, [1956] 1 All E.R. 613 (C.A.).

<sup>148</sup>*Horsley v. MacLaren*, *supra*, note 140. Mr. Justice Laskin was dissenting in the case, but not on the issue of whether the owner-operator had a duty to rescue a passenger.

<sup>149</sup>*Vanvalkenburg v. Northern Navigation Co.* (1913), 30 O.L.R. 142, 19 D.L.R. 649, (S.C.A.D.).

*Act*,<sup>150</sup> which probably did not apply to the facts before him. Mr Justice Laskin said this about section 526(1):

I do not rest the duty to which I would hold MacLaren in this case on s. 526(1) of the *Canada Shipping Act*, even assuming that its terms are broad enough to embrace the facts herein . . . . I do not find it necessary in this case to consider whether s. 526(1), taken alone, entails civil consequences for failure to perform a statutory duty; or, even, whether it fixes a standard of conduct upon which the common law may operate to found liability. There is an independent basis for a common law duty of care in the relationship of carrier to passenger, but the legislative declaration of policy in s. 526(1) is a fortifying element in the recognition of that duty, being in harmony with it in a comparable situation.<sup>151</sup>

To me this is the kind of sophisticated analysis of the impact of legislative policy on tort liability that can trace its lineage to the ancient "equity of the statute" doctrine.

My criticisms of Mr Justice Dickson's judgement in *Sask. Wheat Pool* are really a plea for a more creative judicial use of statutes. This use would view statutes as "equal partners with common law decisions".<sup>152</sup> It would be in harmony with the "equity of the statute" doctrine.

## Conclusion

As the late Chief Justice Laskin said in a lecture given shortly after his appointment to the Supreme Court of Canada, "the call from academic writers is for more candour by the judges about how and why they do what they do. The assertion is that judges have a public obligation in this respect in a democracy, akin to that of a legislature which works in the open."<sup>153</sup> Certainly Dickson J. cannot be accused of lack of candour in his judgement in *Sask. Wheat Pool*. He clearly articulates the policy reason underlying his rejection of the old approach to legislation and civil liability and the substitute he is offering. What one would like from our judges, I think, is a comparable degree of candour in their use of public policy whatever its source. It is no more acceptable for judges to conceal policy decisions behind

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<sup>150</sup>R.S.C. 1952, c. 29, s. 526(1), as am. R.S.C. 1970, c. S-9, s. 516(1):

The master or person in charge of a vessel shall, so far as he can do so without serious danger to his own vessel, her crew and passengers, if any, render assistance to every person, even if that person be a subject of a foreign state at war with Her Majesty, who is found at sea and in danger of being lost, and if he fails to do so he is liable to a fine not exceeding one thousand dollars.

<sup>151</sup>*Horsley v. MacLaren*, *supra*, note 140 at 462-3.

<sup>152</sup>Weisberg, *supra*, note 39.

<sup>153</sup>B. Laskin, "The Institutional Character of the Judge" (1972) 7 *Israel L. R.* 329 at 344.

fictitious pursuits of legislative intention than it is to conceal them behind control devices like "duty of care".<sup>154</sup>

Of course, it is not enough for a judge to simply say that he is deciding the case on the basis of public policy. We want him to articulate the source of that policy and the reasons underlying it. More and more judges seem to be doing this.<sup>155</sup> This, I presume, means that counsel should be able to participate in the process of formulating policy. One criticism of Lord Denning is that he did not always give reasons for his policy choices and, when he did, those reasons were often not compelling.<sup>156</sup> Nor, usually, was there any indication that counsel contributed to his choices.

How should a judge go about discovering public policy in a particular case? There may be a difference between legislation as a source of policy and other sources. Sometimes, it may be relatively easy for a judge to discover the policy underlying a statute. For example, it seems clear that the policy underlying a "hit and run" statute, a statute requiring a motorist involved in an accident to render aid to the injured, is a desire to minimize the inexorable toll exacted by the automobile.<sup>157</sup> It may not always be so easy to discover the policy basis of a statute.<sup>158</sup> Sometimes the preamble, if there is one, may reveal the underlying policy, although, as the Supreme Court of Canada's judgement in *Bhadauria*<sup>159</sup> shows, relying exclusively on the preamble to discover a statute's policy may be dangerous.

When a judge moves away from legislation as a source of public policy to other sources, the problem of discovering policy becomes more problematic. While we may be prepared to countenance judicial activism, judicial tyranny is not acceptable. Public policy *simpliciter*, as Burroughs J. observed,<sup>160</sup> can be an unruly steed. There is no reason to think that a judge is in any better position than any other enlightened member of society when

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<sup>154</sup>"That 'duty' raises a policy issue has only gained belated overt admission from judges steeped in the British positivist tradition." Fleming, *supra*, note 116 at 131 n. 14.

<sup>155</sup>"In recent years, the judges have been more willing to go into detail about policy arguments which justify their decisions, and their explicit justifications are more helpful to a consideration of the political function which they perform." *Supra*, note 1 at 37.

<sup>156</sup>See *supra*, note 9.

<sup>157</sup>See *supra*, note 138 and accompanying text.

<sup>158</sup>Would the underlying purpose of a statute be important in discovering its policy base? If so, might the courts resort to extrinsic evidence to discover this "purpose", as they do in constitutional cases? See, e.g., *Re Anti-Inflation Act* (1976), [1976] 2 S.C.R. 373, 68 D.L.R. (3d) 452. Extrinsic evidence, such as a report on which a statute is based, "may be used in order to expose and examine the mischief, evil or condition to which the Legislature was directing its attention". *Morguard Properties Ltd v. City of Winnipeg* (1983), 3 D.L.R. (4th) 1 at 5, 50 N.R. 264 (S.C.C.) per Estey J. for the Court. This seems close to a search for policy.

<sup>159</sup>*Supra*, note 43.

<sup>160</sup>*Supra*, note 3 and accompanying text.

it comes to discovering policy.<sup>161</sup> Of course, there are certain institutional restraints on common law policy making.<sup>162</sup> Perhaps the most we can hope is that our judges will be careful in their search for and use of public policy. In the end it may be that we will have to put our trust in their wisdom, experience and good faith.

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<sup>161</sup>See Winfield, *supra*, note 4 at 90.

<sup>162</sup>See J.W. Hurst, *Dealing With Statutes* (1981) at 26:

However, common law policy making was inherently limited. It depended on the initiative and means of individual litigants, and on the issues presented by records made in specific suits. Accidents of the timing and scope of matters litigated might not bring to court matters of general concern when those matters needed attention or in circumstances fairly representative of the underlying problem. Judges had no independent means of investigating facts relevant to the policy choices involved, and they held a quite limited armory of means for dealing with affairs — chiefly judgments for money damages or decrees of injunction.

Professor Hurst is talking in particular about nineteenth century courts and judges but his observations seem to apply to modern courts and judges as well.