

Chief Justice Dickson and the Evolving Law of Torts

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I. INTRODUCTION

THE RIGHT HON. BRIAN DICKSON served on the Supreme Court of Canada for more than seventeen years, for six of those years as Chief Justice of Canada. It would be idle to suppose that the law of torts was foremost on his agenda, or that of the Court, more than episodically during that momentous period. What is truly astonishing is the sheer volume of tort litigation which the Court did elect to hear. Close to a hundred tort cases, many of them involving elaborate and progressive judgments, have fallen from the Court since Mr. Justice Dickson joined it back in 1973. He himself wrote, before assuming the burdens of the Chief Justiceship, several tort judgments which serve as landmarks in tort jurisprudence and are likely to do so for many years. If the Court's rate of production in the tort field, and that of its Chief Justice, have shown a marked diminution since the advent of the *Charter*, that is hardly to be wondered at. What has surprised many of us is the regularity with which the "Dickson Court" has shouldered its responsibilities in the tort area; and its continuing willingness to confront the largest and most difficult areas of modern Canadian tort law.

Presently, I shall select and examine just a few of Mr. Justice Dickson's more remarkable and important tort judgments. For the time being, I am going to try just to give some idea of the sheer range and eclecticism of the tort law activity in which Dickson J. has himself been involved.

There have been significant contributions to the law of trespass. First, there was the case of *Dahlberg v. Naydiuk*,¹ in which the Manitoba Court of Appeal, through Dickson J.A., reaffirmed the ancient procedural peculiarities of trespass to the person. Later, in the Supreme Court of Canada, *Eccles v. Bourque*² clarified the extent to

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¹ (1970) 10 D.L.R. (3d) 319 (Man. C.A.).

² [1975] 2 S.C.R. 739, 50 D.L.R. (3d) 753, 3 N.R. 259.

which a man's house "is . . . his castle and fortress,"³ and the extent to which, on the contrary, a police officer may forcibly enter without a warrant in pursuit of a fugitive. And, dear to the heart of Manitoba students, there was *Harrison v. Carswell*,⁴ in which (in the context of the *Petty Trespasses Act*⁵), Dickson J. gave the majority judgment, declining to engraft upon ancient principles of trespass an exception favouring picketers, as suggested by a strong dissentient minority. Though subsequently reversed by statute,⁶ Dickson J.'s judgment may be seen not so much as a strong and inflexible re-affirmation of the sanctity of property rights, as a refusal to usurp the legislative function by reducing the possessory rights of landholders to a mere relative privilege, recessive to competing interests. It was for the Legislature, said Mr. Justice Dickson, not the Court, to change so long-established and fundamental a legal rule. It was an assertion we were to hear from him again, at a later date and in the far more poignant context of personal injury litigation.

Other sound and workmanlike judgments, notable more for their clarity than any particular novelty, were written by Mr. Justice Dickson in all sorts of areas: joint tortfeasors,⁷ apportionment,⁸ and the doctrines of "last clear chance"⁹ and remoteness of damage¹⁰ in negligence. In the latter context, Mr. Justice Dickson showed on the Supreme Court bench the same determination to liberalize the then new "Wagon Mound" test of remoteness that he had earlier shown on the Manitoba Court of Appeal in the famous "runaway snowmobile" case.¹¹ Then too there were judgments dealing with the capacity of children in the realm of contributory negligence,¹² and one eloquent and powerful dissenting judgment which sought in the interests of free

³ *Semayne's Case* (1604), 5 Co. Rep. 91a, 77 E.R. 194.

⁴ [1976] 2 S.C.R. 200, [1975] 6 W.W.R. 673, 62 D.L.R. (3d) 68.

⁵ R.S.M. 1970, c. P50; am. S.M. 1976, c. 71, s. 2.

⁶ *Petty Trespasses Act*, R.S.M. 1987, c. P50 s. 4.

⁷ *Stetar v. Poirier* (1975), 3 N.R. 311 (S.C.C.).

⁸ *Asody v. Taylor*, [1975] 2 S.C.R. 414, 49 D.L.R. (3d) 724, 3 N.R. 381.

⁹ *Hartman v. Fisette* (1976), 66 D.L.R. (3d) 516, 8 N.R. 301 (S.C.C.).

¹⁰ *Millette v. Côté*, (1974) 51 D.L.R. (3d) 244, 3 N.R. 341 (S.C.C.).

¹¹ *Hoffer v. S.D. of Assiniboine South*, [1971] 4 W.W.R. 746, 21 D.L.R. (3d) 608 (Man. C.A.), aff'd. 40 D.L.R. (3d) 480.

¹² *Paskivski v. C.P.R.* (1975), 5 N.R. 1 (S.C.C.).

and open public debate to preserve and perhaps augment the crucial defence of fair comment in the realm of libel.¹³ All in all, the middle 1970s were a very productive period, so far as Mr. Justice Dickson's contributions to the law of torts were concerned; but the best was just around the corner.

Before we get to the major contributions, however, there is one small but curious cameo-piece which cannot pass unnoticed: his Lordship's strangely half-hearted concurrence in *R. v. Buchinsky*¹⁴ in 1983. That case concerned the scope in modern law of the ancient tort known as the *actio per quod servitium amisit*, an action by an employer who has been deprived by a defendant's negligence of the value of an employee's services. Did this action apply, as the English courts had held, only to the case of menial, "live-in" domestic servants? Or did it extend to give the Crown an action when a member of the armed forces was debilitated? The Manitoba Court of Appeal, in a remarkable judgment,¹⁵ followed the restrictive English line and said no. The Supreme Court, not surprisingly (for it had said so emphatically on three previous occasions)¹⁶ said yes, and upheld the Crown's right to sue. As far as the scope of the action was concerned, Dickson J. was inclined to concur with his brethren, but noted that he was by no means convinced that so antique and anomalous action had any remaining life in it at all.

Counsel in this case did not argue that the action *per quod servitium amisit* is no longer a valid cause of action. Whether it still should be recognized has been for some time the subject of debate in the cases and among academic commentators. The conceptual underpinnings of the action are the main reason its validity has been brought into question. The action is of ancient origin. At its inception, it was based on the precept that a master had a proprietary or quasi-proprietary interest in the services of his servant. In an indirect sense at least, it amounted to an assumption of a proprietary interest in the servant himself. The *per quod* action developed during an era in which the master/servant relationship was analyzed in status terms, whereas we have long since treated the employment relationship as a contractual one. The debate is not whether the original assumptions underlying the action can any longer be supported. That rationale is plainly offensive in today's society. The serious question is whether, despite its antiquated origins, the action can now find a different justification. Does it serve a useful purpose that would not otherwise be met? Is it consistent with general

¹³ *Cherneskey v. Armadale Publishers Ltd.*, [1979] 1 S.C.R. 1067, [1978] 6 W.W.R. 618, 7 C.C.L.T. 69.

¹⁴ (1983) 24 C.C.L.T. 266 (S.C.C.).

¹⁵ (1980) 13 C.C.L.T. 298, 4 Man. R. (2d) 141, 114 D.L.R. (3d) 721.

¹⁶ *R. v. Richardson & Adams*, [1948] S.C.R. 57, *Nykorak v. A.G. Canada*, [1962] S.C.R. 331, and *R. v. Murray*, [1967] S.C.R. 262.

principles of tort law concerning collateral benefits and recovery for economic loss? Do employers, simply because they are employers, merit a special cause of action? Should the action *per quod servitium amisit* be abandoned, maintained or expanded? In a future case it may be appropriate to address these issues.¹⁷

As a result of these eloquently expressed doubts, *Buchinsky* is frankly a rather unsatisfactory decision, leaving doubt as to whether all employers can invoke this tort, or just some, or as Dickson J. might possibly be persuaded, none! One wonders how, except by legislative fiat, these doubts will even be mooted or resolved, now that the majority of the Supreme Court of Canada appears to have accepted the *actio per quod* in full amplitude, "hook, line and sinker."¹⁸ Jurisprudentially, *Buchinsky* provokes inquiry as to the legitimacy in our common law of the maxim "*cessante ratione legis, cessat ipsa lex*," and suggests a bolder approach to the problem of desuetude in the law than is ordinarily taken by common law judges. What other Canadian judge could be imagined challenging the very existence of a six or seven hundred year old tort, persistently, frequently and recently applied in most if not all common law provinces, and indeed so often discussed in recent times in the Supreme Court itself?

Far happier has been Dickson J.'s involvement in two other important areas — occupiers' liability and negligent misrepresentation. So far as occupiers' liability is concerned — an area now mercifully revolutionized by statute in many Canadian jurisdictions — it fell to Mr. Justice Dickson, and the Court on which he served, to amend the formalistic rigours of the old common law on several occasions. He concurred with Chief Justice Laskin in the benevolent decision in *Mitchell v. C.N.R.*,¹⁹ expanding the standard of responsibility owed to a child licensee. To his everlasting credit, he dissented, again in august company (Laskin C.J.C. and Spence J.), from the unsatisfactory ruling in the later and superficially very similar case of *Wade v. C.N.R.*²⁰ And finally, he delivered the Court's judgment in the important case of *Veinot v. Kerr-Addison Mines*.²¹ There, the Supreme Court of Canada at last abandoned the chill inhumanity of

¹⁷ *Supra*, note 14 at 274.

¹⁸ See Klar, "Developments in Tort Law: The 1982-83 Term" (1984) 6 S.C.L.R. 309 at 328-29.

¹⁹ [1975] 1 S.C.R. 592, 46 D.L.R. (3d) 363, 1 N.R. 344.

²⁰ [1978] 1 S.C.R. 1064, 3 C.C.L.T. 173, 80 D.L.R. (3d) 214, 17 N.R. 378.

²¹ [1975] 2 S.C.R. 311, 51 D.L.R. (3d) 533, 3 N.R. 94.

the old common law and held that even to trespassers a rudimentary duty of affirmative care — a duty of “common humanity” — was owed by the occupier. This, of course, was an espousal of a formula only recently adopted by the House of Lords. But this should not be interpreted as old-fashioned deference to the English judicial hierarchy. Mr. Justice Dickson and his court, like Chief Justice Laskin and his, have treated the developing English jurisprudence merely as an interesting and respectable, but eminently refusable, grab-bag of ideas, to be adopted (like *British Railways Board v. Herrington*²² on common humanity to trespassers) or rejected (like *Pirelli*²³ on limitation periods) as justice and Canadian conditions seem to dictate.

II. IMPORTANT TORT JUDGMENTS

LET ME NOW REFER to the three most memorable contributions which Mr. Justice Dickson has made to tort law:

- 1) His judgment in *Haig v. Bamford*,²⁴ which clarified the scope of a professional person's duties in giving advice or imparting information and addressed the crucial question of *to whom* such duties were owed.
- 2) The critically important decision of Dickson J. in *R. v. Saskatchewan Wheat Pool*,²⁵ which at long last swept away a heap of rubbishy and discreditable jurisprudence concerning civil liability for breach of penal and regulatory statutes; and last but not least . . .
- 3) Dickson J.'s leadership in crafting the Trilogy — that trio of cases on personal injury compensation (plus a fourth case on fatal accidents)²⁶ which revolutionized once and for all, on a single day in January 1978, the technique of quantifying damages for negligently inflicted injury and death. Dickson J. was at least a major architect

²² [1972] A.C. 877, [1972] 1 All E.R. 749 (H.L.); adopted in *Veinot*, *ibid.*

²³ *Pirelli Gen. Cable Works v. Oscar Faber & Ptners*, [1983] 1 All E.R. 65 (H.L.); rejected in *Kamloops v. Nielsen*, [1984] 2 S.C.R. 2, 10 D.L.R. (4th) 641, 54 N.R. 1.

²⁴ [1977] 1 S.C.R. 466, [1976] 3 W.W.R. 331, 9 N.R. 43, 72 D.L.R. (3d) 68.

²⁵ [1983] 1 S.C.R. 205, 23 C.C.L.T. 121, [1983] 3 W.W.R. 97, 45 N.R. 425, 143 D.L.R. (3d) 9.

²⁶ Personal injuries: *Andrews v. Grand & Toy (Alta.) Ltd.*, [1978] 2 S.C.R. 229; *Thornton v. Prince George Bd. of S. Trustees*, [1978] 2 S.C.R. 267; and *Arnold v. Teno*, [1978] 2 S.C.R. 287; fatal accident claims: *Keizer v. Hanna*, [1978] 2 S.C.R. 342.

of this scheme, delivering the judgment of the Court both in *Andrews* and *Thornton*, and the majority judgment in *Keizer v. Hanna*.

A. *Haig v. Bamford*

In this case, Dickson J. made it clear that so volatile and fast-spreading is misinformation, and so promiscuous the economic loss that it can engender, that the duty of care and skill owed by a professional (such as an accountant) in imparting such information, while not necessarily confined to the immediate addressee, or to other precisely identified probable recipients, cannot be regarded as extending to everyone into whose hands the information may conceivably come. Only where the complainant was a member of a *limited class*, known to the defendant as likely recipients of information, would a duty be owed to him. The case is important not only as the Commonwealth's leading case on the ambit of *Hedley Byrne* liability, but as the archetype of all those more recent economic loss cases, which find in the spectre of indeterminate liability the root of, and in its avoidance a sufficient cure for, all the doctrinal difficulties which vex this most difficult area of tort doctrine.²⁷

B. *Saskatchewan Wheat Pool*

As for this case, it represents one of those very few cases in tort law which amount to *codifications* — ultimate points of reference in their own right. Before 1983, those chapters in our textbooks (and those in England and America too) dealing with civil liability for conduct which infringed penal or regulatory statutes, were an ungodly mess, and the law both embarrassing in its hypocritical reverence for a non-existent "legislative intent," while at the same time being hopelessly labile and unpredictable. Mr. Justice Dickson, in a single judgment delivered for the Court, seems to have achieved at least one glorious feat — he obviated any future necessity for counsel or Courts to make reference, ever again, to the huge and nasty muddle that was the previous law. He laid down several critically important propositions:

²⁷ In recent months, however, it has become apparent that even within its own proper sphere of negligent misrepresentation, the *Haig v. Bamford* doctrine may no longer be the sole and sufficient check upon the ambit of the duty of care. New and mysterious reverence is being paid to the concept of "proximity," an elusive quality perceived not as a synonym or précis of the *Haig* requirements, but as something additional thereto: see, especially, *Edgeworth Construction Ltd. v. N.D. Lea & Associates*, [1991] 4 W.W.R. 251, 53 B.C.L.R. 180 (C.A.).

- (a) The Court is not in these cases required to indulge in the hunting of that empty mirage, the "intention of the legislature."
- (b) There is no nominate tort of "breach of statutory duty," involving virtually strict liability for infringement of statutory rules or standards.
- (c) Tort liability in such cases is entirely a creature of judge-made common law, part of the ordinary law of negligence.
- (d) The breach of statute is just one item of evidence which the judge *may, inter alia*, find to be suggestive of negligence, but which raises no presumptions.

There are those who will criticize this approach. They speculate on the possibility — acknowledged by Dickson J. with regard to "industrial legislation" — of exceptions to the general rules and wonder whether it was politic to estop future judges, by the all-encompassing scope of the *Saskatchewan Wheat Pool* judgment, from one easy avenue of introducing stricter liability in such areas as manufacturer's responsibility for defective products or liability for environmental contamination in breach of statutory regulations. As one who does not personally share these misgivings, I am simply grateful for the case as a masterly exercise in long-overdue housecleaning, and one which has enormously clarified the whole framework of legal debate in this traditionally awful area.

C. The Trilogy

That only leaves the Trilogy cases, of which, as I remarked before, Mr. Justice Dickson may claim to have been the chief architect, if not the sole progenitor. It is perhaps fortunate that the salient features of the new law of damages, introduced in these cases, are really too well known to need elaboration here. The Trilogy, and especially Dickson J.'s judgment in *Andrews*, can be seen first as a *cri de coeur* against the fundamental irrationality of confining our courts, in serious personal injury cases, to the making of lump-sum payments and once-and-for-all awards instead of structured awards of periodic payments.

Secondly, given the perception that only the legislators can effect so momentous a change,²⁸ the Trilogy represents a prodigious effort to make the existing system as rational and defensible as the circumstances allow, until the legislatures bestir themselves. Awards must be itemized and the judges "show their workings," so that their sums

²⁸ A perception very bluntly reasserted, of course, in the Supreme Court's recent pronouncement in *Watkins v. Olafson* (1990), 50 C.C.L.T. 101.

can be checked, their guesses evaluated, and their oversights supplied, on appeal. This detailed openness of calculation, coupled with the use of actuarial evidence, will check any tendency to awards which are excessive in the sense of being functionally indefensible. And the well-meant irrationality of non-pecuniary damages is curbed by the imposition of a "cap," together with a new stress on the need for functionality in the assessment of such components in any award. The cost of future care is to be assessed bearing in mind what is therapeutically the most appropriate environment for the victim, not what is the cheapest for the defendant. All in all, as a stop-gap regime which may have to last a very long time, the Trilogy represents a maximally rational, sophisticated and humane approach to an inherently intractable problem. It is rightly the envy of many other less happy jurisdictions, and for all the criticisms which might be advanced in point of detail the final verdict has to be "Well done."