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THE SUPREME COURT OF CANADA AND THE LAW OF INSURANCE 1975

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The year 1975 was very important one for the law of insurance in the Supreme Court of Canada, and the major decisions handed down by the court deserve to be examined in some detail. The major cases can be divided conveniently into three groups: the "illegal act" cases, the subrogation cases and the failure to co-operate case which might well be called "the case the court did not hear." It is proposed to examine these cases in turn and to suggest alternative methods of analysis from those employed in the court's decisions.

A. THE "ILLEGAL ACT" CASES

The background to the saga of *Canadian Indemnity Co.* v. *Walkem Machinery Ltd.*,[1] is quite well known. Washington Iron Works designed and manufactured a special type of crane which the Straits Towing Company used on its barge, the "Straits Logger," a self-unloading barge designed for transporting logs. Walkem was the agent and distributor of the crane in British Columbia. On September 16, 1966, one of the two cranes supplied by Washington and erected on the "Straits Logger" collapsed. The Straits Towing Company were successful in a claim against Walkem and Washington who were held to have been negligent in returning the vessel to the Straits Towing Company in an inadequate state of repair.[2]

After having been made to pay 25% of the damages to the Straits Company,[3] Walkem then sought to be indemnified by the Canadian Indemnity Company under a comprehensive Business Liability Policy. It was admitted by both parties that if Walkem's negligence amounted to an "accident," it was entitled to be indemnified.

The trial judge had described the plaintiff (Walkem's) negligence in the following language: "Walkem knew of the dangerous condition of the crane, but nevertheless pawned off on an unsuspecting customer an inadequately and negligently repaired piece of equipment."[4] This finding of fact was accepted

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[1] [1976] S.C.R. 309; 53 D.L.R. (3d) 1.

[2] See, *Rivtow Marine Ltd.* v. *Washington Iron Works and Walkem Machinery and Equipment Ltd.*, [1974] S.C.R. 1189; 40 D.L.R. (3d) 530.

[3] Damages were paid for the loss of production and they were calculated in accordance with the formula laid down in the *Rivtow* case (see, *id.*).

[4] *Straits Towing Ltd.* v. *Washington*, [1970] Ins. L. R. 982, 983.

by the Supreme Court which, nonetheless, held that Walkem was entitled to be indemnified because what had occurred was an "accident." This seems to be a startling application of the term "accident."

Although there is no universally agreed upon definition of accident, all the known legal definitions of the term emphasize that the occurrence must be *unexpected.*[5] It is extremely difficult to envisage how a distributor who sends out machinery which is, to his knowledge, dangerously defective can be said to have caused an unexpected loss. There may be good reasons for giving "accident" a wider meaning than usual, but the court did not advance any reasons.[6] Instead, Mr. Justice Pigeon, speaking for the majority, stated:

> . . . I wish to add that in construing the word "accident" in this policy, one should bear in mind that negligence is by far the most frequent source of exceptional liability which a businessman has to contend with. Therefore, a policy which would not cover liability due to negligence could not properly be called "comprehensive." But foreseeability is an essential element of such liability. If calculated risks and dangerous operations are excluded, what is left but some exceptional causes (sic) of liability?[7]

The court is, at this point, attacking a straw man. No one could argue that businessmen should not be able to insure against liability which results from their negligence. To do so would make liability insurance largely pointless. But it is extremely difficult to comprehend why a businessman who *knowingly* sells or provides dangerous and defective machinery or goods should be able to claim from an insurance fund on an equal footing with those businessmen who carry on their businesses in good faith. The moral difference between inevitable acts of negligence which occur in the running of any business, however well-managed, and the kind of calculated risk which Walkem took, seems to be fairly clear, and it is wrong for the law to ignore that difference. Furthermore, to deny indemnity to the miniscule number of entrepreneurs who suffer losses after having taken calculated risks would have a minimal effect on the operation of liability insurance.

The distinction between negligent and reckless acts which the Supreme Court, in effect, obliterated in the *Walkem* case is one which had previously

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[5] See, *e.g.*, the statement of Lord Lindley in *Fenton* v. *Thorley*, [1903] A.C. 443 at 453: "The word 'accident' is not a technical legal term with a clearly defined meaning. Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss." There are countless similar statements in the cases and treatises, but there is no point in reproducing them.

[6] One good reason for giving "accident" a broader meaning than usual is the fact that personal injury rather than economic loss has been suffered. It was on this basis that the English courts held, for example, that murder was an "accident" within the meaning of the *Workmen's Compensation Act*; see, *e.g.*, *Trim Joint District School Board of Management* v. *Kelly*, [1914] A.C. 667. It would also be legitimate to hold that harm caused as a result of a deliberate act was an "accident" if the insured person who deliberately caused the harm was insane.

[7] [1976] S.C.R. 309, 317; 53 D.L.R. (3d) 1, 7. Mr. Justice Ritchie concurred in the result reached by the court but expressed the view that "I do not, however, agree that the word 'accident' as used in a comprehensive business liability policy includes a 'calculated risk' which phrase appears to me to imply the very antithesis of an 'unlooked for mishap or occurrence'." [1976] S.C.R. 309, 318; 53 D.L.R. (3d) 1, 2. Since Walkem did take "a calculated risk," it is difficult to see why his Lordship did not dissent.

been recognised both by the Ontario Court of Appeal and by the Manitoba Court of Appeal. In the Ontario case, *Crisp* v. *Delta Tile and Terrazzo Co.*,[8] the defendant was carrying out grinding operations in the plaintiff's basement. Because the defendant took no preventative steps, the dust was allowed to escape and spread throughout the plaintiff's house. The Ontario Court of Appeal refused to hold that the loss the defendant had caused was an "accident." Aylesworth, J.A., giving the opinion of the court, said:

> There was . . . a deliberate courting of the risk with knowledge of the risk, there was an element of reckless conduct in the sense that they could not have cared whether or not the dust damage would ensue when they proceeded with the work in the way they did with the knowledge they had.[9]

The Supreme Court in *Walkem* did not mention the *Crisp* case, but it did discuss the decision of the Manitoba Court of Appeal in *Marshall Wells of Canada Ltd.* v. *Winnipeg Supply and Fuel*,[10] in which the Manitoba Court of Appeal approved the principle stated in the *Crisp* case. The manner in which the Supreme Court read the *Marshall Wells* case approaches the bizarre. Mr. Justice Pigeon quoted the following language from the dissenting opinion of Freedman, J.A.:

> With respect, I am of the view that what occurred here was an accident. One must avoid the danger of construing that term as if it were equivalent to "inevitable accident." That a mishap might have been avoided by the exercise of greater care and diligence does not automatically take it out of the range of accident. Expressed another way, "negligence" and "accident" as here used are not mutually exclusive terms. They may co-exist.[11]

This passage does not do justice to the views of Freedman, J.A. Freedman, J.A., accepted the principle stated in the *Crisp* case and dissented in the *Marshall Wells* case because "[n]o . . . deliberate or reckless conduct can be alleged against the defendant, Litz, in the present case. Nor did the learned trial judge make any such finding."[12] The disagreement between Freedman, J.A., and his colleagues shows that it may be difficult, on a given set of facts, to make a distinction between negligent and reckless behaviour, but all the judges were agreed that an attempt should be made to draw such a line. What is troubling about the *Walkem* decision is that it obliterates that line, without a single reason being given for so doing.[13]

The Supreme Court in *Walkem* also derived support for its definition

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[8] [1961] O.W.N. 278; [1961] Ins.L.R. 1-046, reversing [1961] O.W.N. 29; [1961] Ins. L. R. 1-029.

[9] [1961] O.W.N. 278, 279.

[10] (1964), 49 W.W.R. 664.

[11] Quoted at [1976] S.C.R. 309, 314-315; 54 D.L.R. (3d) 1, 5.

[12] (1964), 49 W.W.R. 664, 665.

[13] There can be no doubt that the line has been obliterated. Thus, Mr. Justice Pigeon stated in his opinion that "[i]n my view, the test . . . whether or not something was done by or for the insured 'with intent to bring about loss or damage' is the very same test which must be applied to decide whether the occurrence is an accident or whether it is a crime barring recovery." [1976] S.C.R. 309, 318; 53 D.L.R. (3d) 1, 7.

of "accident" from two English Workmen's Compensation cases.[14] It is difficult, however, to see the relevance of these cases to the question before the court. In the first place, in Workmen's Compensation cases, one is concerned with claims for physical injury, an interest that has traditionally received greater protection from the law than claims for economic loss.[15] Second, there is no evidence in either of the two cases cited by the court that the particular workman was negligent, much less reckless.

The Supreme Court, in the course of deciding *Walkem*, also delivered some *dicta* on the subject of criminal negligence which are as disturbing as the decision itself. The point arose in the following way. Canadian Indemnity argued that, in addition to being reckless, Walkem was not entitled to be indemnified since it (Walkem) was guilty of criminal negligence. The court held, correctly, that the point did not arise since Walkem had not been found guilty of criminal negligence, but it held that even if Walkem had been found guilty of criminal negligence, it would have been entitled to be indemnified. The court reached this amazing conclusion on the basis of the following statutory provision in the British Columbia *Insurance Act*:

> Unless the contract otherwise provides, a violation of any criminal or other law in force in the Province or elsewhere does not, *ipso facto*, render unenforceable a claim for indemnity under a contract of insurance except where the violation is committed by the insured, or by another person with the consent of the insured, with intent to bring about loss or damage....[16]

According to Mr. Justice Pigeon, speaking for the majority, the effect of this provision is that Walkem could be deprived of indemnity only it it could be shown that Walkem sent the crane intending that the crane should collapse and cause damage. According to the court, there was no further problem once counsel for Canadian Indemnity had answered "No" to the following question from the Bench: "Are you saying that the Company intended this to happen?"[17]

It is suggested that the statutory provision the court was purporting to construe does not compel this remarkable result. The statute states that, unless the crime has been committed with intent to bring about loss or damage, the fact that a criminal act has been committed does not *automatically* (or *"ipso facto"*) deprive the insured of an indemnity. Stated another way, the fact that a non-intentional criminal act has been committed does not automatically entitle the insured to an indemnity. In other words, what the court is required to do in a case where an insured has committed a non-intentional criminal act and is seeking an indemnity, is to balance the competing social interests for and against recovery. Some of the factors which would appear to be relevant in this weighing process are the character of the injury inflicted (*e.g.*, was the

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[14] *Fenton* v. *J. Thorley & Co. Ltd.*, [1903] A.C. 443 (workman ruptured himself by an act of over-exertion) and *Clover, Clayton & Co.* v. *Hughes*, [1910] A.C. 242 (a workman who was suffering from serious aneurism suddenly fell down dead from rupture of the aneurism while at work).

[15] See, for example, the decision in *Rivtow Marine* itself (*supra*, note 2).

[16] See, s. 100 of the *Insurance Act*, R.S.B.C. 1960, c. 197. This provision exists in all the other common law provinces. The historical background to the section is outlined in a note by G. W. Reed in (1953), 31 C.B.R. 319.

[17] [1976] S.C.R. 309, 317; 53 D.L.R. (3d) 1, 7.

harm suffered physical injury or economic loss) and the character of the criminal offence (*e.g.*, how serious was the criminal violation committed by the insured).[18] No one would deny that this balancing process is an extremely difficult one, and it may well be that reasonable men balancing the same factors might come to different results. However, at least in this context, the failure to take into account competing social interests will lead to very unfortunate results.

It is difficult to regard Walkem's claim to indemnity as being a particularly meritorious one. The act of sending out a crane which was known to be in a dangerous state must, by any standards, be regarded as a grossly immoral act. To argue that the criminal law and an increase in premiums constitute effective sanctions against this kind of behaviour may be unrealistic.

To deal with the criminal sanction first, even if there is a conviction for criminal negligence, it seems likely that the penalty imposed will be light, as will frequently be the case where only damage to property is caused.

Second, as regards the increase of premiums, there is serious reason to doubt that an enterprise such as Walkem would have had its premiums greatly increased. Large commercial concerns today frequently buy a large insurance package which may include, *inter alia*, liability insurance, fire insurance for the company's buildings, automobile insurance for the company's automobiles and group accident insurance for the company's employees. This practice of buying insurance in bulk means that the insurer is guaranteed a very sizeable premium. Consequently, the insurer will think twice before imposing massive increases in, for example, liability insurance, even for an enterprise with a bad accident record.[19] In doing so, the insurer runs the risk of losing a substantial amount of premium income.[20]

The only plausible argument that can be put forward for granting Walkem indemnity is that a failure to do so might defeat the Straits Towing Company's claim for loss of production against Walkem. It should be noted, however, that, in the first place, the Straits Towing Company would have been able to purchase business interruption insurance to cover this loss. Secondly, it is often possible to make up losses of production by such expedients as working overtime.[21]

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[18] See, McNeely, *Illegality as a Factor in Liability Insurance* (1941), 41 Columbia L.Rev. 26; Farbstein and Stillman, *Insurance for the Commission of Intentional Torts* (1969), 20 Hastings L.J. 1219.

[19] See, Atiyah, *Accident Prevention and Variable Premium Rates for Work Connected Accidents — II* (1975), 4 Industrial L.J. 89, 91-92.

[20] Another problem is that because "severity has always been measured in cost terms," an enterprise which has been guilty of reckless behaviour may still have its premiums affected only marginally, if the layout by the insurer is small; see, Atiyah (*id.* at 96).

[21] See, the statement of Lord Denning M.R. in *Spartan Steel & Alloys Ltd.* v. *Martin*, [1973] Q.B. 27. In dismissing a claim for loss of production following damage to a cable, his Lordship said: ". . . most people are content to take the risk on themselves. When the supply is cut off, they do not go running round to their solicitor. They do not try to find out whether it was anyone's fault. They just put up with it. They try to make up the economic loss by doing more work the next day." (at 38).

On a consideration of all of the above factors, it is suggested that Walkem should not have been able to claim an indemnity from its insurer.

Less than two months after its decision in the *Walkem* case,[22] the Supreme Court handed down its decision in *Co-operative Fire and Casualty Co.* v. *Saindon*.[23] The contrast between the two decisions is onthing less than startling.

The incident which gave rise to the *Saindon* case started with a dispute over the cutting of branches on the defendant's cherry tree. Angered by the removal of the cherry tree branches, the defendant threatened the plaintiff by raising a rotary lawn mower shoulder-high and directing it towards the plaintiff's face. The plaintiff tried to protect himself and, in doing so, the blades of the lawn mower struck both of the plaintiff's hands, severing the fingers from his left hand and injuring his right wrist.

Mr. Justice Pichette allowed the plaintiff's tort claim against the defendant and awarded him $39,942.40 by way of special and general damages. The learned judge, however, dismissed the third party claim against the liability insurer.[24]

Mr. Justice Pichette denied the claim against the liability insurer on two grounds. First, the learned judge stated that the incident fell outside the coverage of the defendant's liability insurance policy which did not apply to "bodily injury or personal damage caused intentionally by or at the direction of an insured." Second, Mr. Justice Pichette felt bound to deny the claim against the liability insurer because of the following provision in the New Brunswick *Insurance Act*:

> Unless the contract otherwise provides, a violation of any criminal or other law in force in the Province or elsewhere does not, *ipso facto*, render unenforceable a claim for indemnity under a contract of insurance except where the violation is committed by the insured, or by another person with the consent of the insured, with intent to bring about loss or damage. . . .[25]

The New Brunswick Court of Appeal reversed the trial judge in a crisp and lucid opinion. Mr. Justice Limerick, giving the opinion of the court, stated simply:

> As the injury to the plaintiff was not intentionally inflicted, but was the unforeseen result of a criminal act, the effect of section 2 above is to negate the "Public Policy Rule" and as the insurer in the contract excludes only personal injuries intentionally inflicted and does not exclude injuries otherwise arising out of the commission of a criminal act, the insurer is not relieved of its liability on the ground of public policy.[26]

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[22] [1975] Ins.L.R. 2290; 56 D.L.R. (3d) 556. There is a valuable discussion of this case by Professor Baer in Insurance Law (1976), 8 Ottawa L.R. 218, 224-228 to which I am much indebted.

[23] The Supreme Court handed down its decision in the *Walkem* case on January 28, 1975. The decision in the *Saindon case* was announced on March 26, 1975.

[24] *Sirois* v. *Saindon*, 7 N.B. (2d) 280, 285; [1974] Ins. L.R. 2000, 2002; 44 D.L.R. (3d) 469, 472.

[25] Section 2 of the New Brunswick *Insurance Act*, (N.B. Rev. Stat. c. I-12 (1973)).

[26] *Supra*, note 24.

This statement of principle is so unexceptionable and is so fully supported by authority,[27] that one is surprised that the Supreme Court even gave leave to appeal.

The Supreme Court not only gave leave to appeal but, in fact, reversed the decision of the New Brunswick Court of Appeal by a majority of 6-3.[28] Incredibly, the majority failed to cite its own decision in the *Walkem* case. According to the principle stated in that case, there is said to be an "accident" for insurance purposes unless the insured committed the act deliberately. Since the defendant did not deliberately intend to injure the plaintiff with the lawn-mower, the court should, to have been consistent with its decision in *Walkem*, have held that there was an "accident" within the meaning of the defendant's Comprehensive Personal Liability policy.

Indeed, *Saindon* is a much stronger case than *Walkem* for deciding that what had occurred was an "accident." The most that can be said of the defendant's behaviour in *Saindon* is that he should have foreseen that serious harm from his thoughtless act might result. The defendant in *Walkem* not only should have foreseen, but it *did in fact* foresee the risk of serious harm when it sent out a dangerously defective crane. If the law of insurance is going to be used in an attempt to influence human behaviour, and there is no doubt that the courts already use the law with this end in mind, it would seem to make far more sense to deny indemnity to someone who runs a calculated risk for profit rather than to someone who acts recklessly in the heat of the moment.

There is another factor that makes the claim for indemnity stronger in *Saindon* than it is in *Walkem*. In *Saindon*, the claim related to physical injury whereas in *Walkem* it related to economic loss. It has been argued above that the law has been more solicitous towards physical injury than towards economic loss and this point is illustrated very well in the various provincial Insurance Acts. Thus, in the automobile insurance liability provisions of the provincial Insurance Acts, it is provided that in an action by an accident victim against a motor vehicle insurer, the latter cannot set up as a defence "any contravention of the *Criminal Code* (Canada) or a statute of any province or territory of Canada or of any state or the District of Columbia of the United States of America by the owner or driver of the automobile . . . ."[29] The result in the *Saindon* case means that an accident victim is treated differently depending on whether he is injured by an automobile or by some other object, such as a lawn-mower. The highest court in the land should not make such distinctions unless it is compelled to do so by an un-

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[27] See, *e.g.*, Prince *George White Truck Sales Ltd.* v. *Canadian Indemnity Co.*, [1974] Ins.L.R. 1923; 40 D.L.R. (3d) 616; *Tiko Elec. Co.* v. *Canadian Surety Co.*, [1973] Ins.L.R. 1888; *Stevenson* v. *Continental Insurance Co.*, [1973] 6 W.W.R. 316, [1973] Ins.L.R. 1818.

[28] Mr. Justice Ritchie gave the opinion of the majority with which Justices Martland, Judson, Spence, Dickson and de Grandpré concurred. Chief Justice Laskin filed a dissenting opinion with which Justices Pigeon and Beetz concurred.

[29] See, section 225(4) (c) of the *Ontario Insurance Act*, R.S.O. 1970, c. 224. (An identical provision is to be found in the other provincial Insurance Acts.)

ambiguous statutory provision. There is nothing in any provincial Insurance Act that compels the drawing of any such bizarre lines.[30]

The only case the majority discussed in any detail was the decision of the English Court of Appeal in *Gray* v. *Barr*.[31] Mr. Justice Ritchie, speaking for the majority, thought that while *Gray* v. *Barr* was ". . . in no way binding on this Court, nevertheless [it] appears to me to be most apt and persuasive in the circumstances."[32] An examination of that case is, therefore, in order.

In the *Barr* case, the appellant, who was covered by an insurance policy with the respondent indemnifying him for all sums which "he shall become legally liable to pay as damages in respect of bodily injuries to any person caused by accident," had entered a farm-house with a loaded shot-gun and fired a shot into the ceiling with the intention of frightening the occupant. The occupant then grappled with him, and, as a result, the insured fell downstairs, breaking the stock of the gun as he fell and involuntarily firing the second barrel which killed the occupant. The insured's claim against his insurer was rejected by the Court of Appeal which held that the occupant's death had not occurred as a result of an "accident."

One of the problems with the decision in the *Barr* case is that it is extremely difficult to reconcile with three earlier English cases, one of them a decision of the Court of Appeal. In *Tinline* v. *White Cross Insurance*[33] and *James* v. *British General Insurance*,[34] the insureds were entitled to be indemnified against sums which they should become legally liable to pay to third parties as compensation for "accidental personal injury." In both cases, the insureds drove recklessly and killed accident victims. Both insureds were prosecuted and convicted of manslaughter. In both cases, the court held that the insured was entitled to be indemnified.

Further, in *Hardy* v. *Motor Insurers' Bureau*,[35] the Court of Appeal held that an accident victim was entitled to recover from a motor vehicle insurer, despite the fact that the driver of the vehicle was convicted on the charge of maliciously inflicting grievous bodily harm on the plaintiff.[36] In his concurring opinion, Diplock, L.J., addressed the policy questions in a vigorous manner:

> I can see no reason in public policy for drawing a distinction between one kind of wrongful act, of which a third party is the innocent victim, and another kind of

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[30] The only distinction the provincial Insurance Acts compel is between the *intentional* infliction of injuries by an automobile (where the insurer has no defence) to a claim by an accident victim and the *intentional* infliction of an injury by some other object, where the insurer has a defence under the "Illegal Act" provision of the various provincial Insurance Acts.

[31] [1971] 2 Q.B. 554. The majority also made a passing reference to a *dictum* by Mr. Justice Judson in *Ford Motor Co. of Canada Ltd.* v. *Prudential Assurance Co.* [1959] S.C.R. 539; 18 D.L.R. (2d) 273.

[32] [1975] Ins. L. R. 2290, 2292; 56 D.L.R. (3d) 556.

[33] [1921] 3 K.B. 327.

[34] [1927] 2 K.B. 311.

[35] [1964] 2 Q.B. 745.

[36] Although the Court of Appeal in *Hardy* (see, *id.*) said that it would be wrong to indemnify the insured, the court, in effect, indemnified the insured, by allowing an action against the insurer.

> wrongful act; between wrongful acts which are crimes on the part of the perpetrator and wrongful acts which are not crimes, or between wrongful acts which are crimes of carelessness and wrongful acts which are intentional crimes. It seems to me to be slightly unrealistic to suggest that a person who is not deterred by the risk of a possible sentence of life imprisonment from using a vehicle with intent to commit grievous bodily harm would be deterred by the fear that his civil liability to his victim would not be discharged by his insurers. I do not myself feel that by dismissing this appeal we shall add significantly to the statistics of crime.[37]

Since the validity of the motor manslaughter cases[38] was accepted by a majority of members of the Court of Appeal in *Barr*,[39] English law now seems to draw distinction, for purposes of insurance coverage, between accidents caused by motor vehicles and accidents caused by other objects. It is extremely doubtful if insurers, let alone laymen, could provide a satisfactory rationale for treating the two cases differently.

Because the *Barr* case represents a combination of bad law and bad policy, it has been vigorously criticized by commentators in English journals.[40] It is extremely unfortunate that the Supreme Court in *Saindon* did not meet the criticisms of the *Barr* decision but instead chose to follow the latter case uncritically.

Since the majority in *Saindon* did not articulate the policy (or policies) they were seeking to further, one is left to speculate as to what the policies may be. It is suggested that there are two possible policies the majority may have been trying to pursue and that neither policy is a desirable one.

The first policy the majority may have been endeavouring to further in *Saindon* is the deterrence of violent behaviour. There is a strong suggestion by two judges in the *Barr* case (which the majority embraced so warmly in *Saindon*) that some judges think that liability insurance should be used to penalise wrongdoers. In the *Barr* case, Salmon, L.J., said that "[c]rimes of violence, particularly when committed with loaded guns, are amongst the worst curses of this age."[41] In the same case, Phillimore, L.J., said that "[i]n an age of violence — an age when the use of firearms is all too frequent — it would be very odd if a man who had in his hands a loaded shotgun . . . and had killed another . . . could recover on an insurance policy."[42] It is difficult to see how an insured, who, in a case such as *Saindon* or *Barr*, is undeterred by the threat of criminal punishment, and is oblivious to the risk of serious personal injury, is likely to be deterred by an increase in his liability

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[37] [1964] 2 Q.B. 745, 769-770.

[38] See, *supra*, notes 33 and 34.

[39] The correctness of the motor-manslaughter cases was accepted by Lord Denning, M.R., [1971] 2 Q.B. 554, 568 ("it is settled beyond question that the insured is entitled to recover") and by Salmon, L.J., 554, 581 ("These road traffic cases may be *sui generis*"). Phillimore, L.J., left the question open.

[40] See, in particular, the excellent article by Shand, *Unblinkering the Unruly Horse — Public Policy in the Law of Contract* (1972), Cambridge L.J. 144 and see, the notes by Professor Jolowicz, (1970) Cambridge L.J. 194 and by Professor Fleming, (1971) 34 Modern L.Rev. 176. Both the latter comments criticise the decision at first instance.

[41] [1971] 2 Q.B. 554, 581.

[42] [1971] 2 Q.B. 554, 587.

insurance rates.[43] Second, the individual insured in cases like *Saindon* and *Barr* is more likely to have his policy cancelled, or his rates greatly increased, than is the commercial concern such as *Walkem*.[44] The short of the matter is that denying the insured indemnity in a case such as *Saindon* is most unlikely to deter anyone, and the only result of such decisions is to deprive innocent accident victims of indemnity, and, to compound injuries, to leave such accident victims with massive bills for legal expenses.

A second possible rationale for a *Saindon*-type outcome has been suggested by Professor Fleming. In his criticism of the *Barr* case, Professor Fleming stated that the existence of the British Criminal Injuries Compensation scheme "may thus conceivably justify the outcome in *Gray* v. *Barr*, but not its reasoning."[45]

It is suggested that the existence of a Criminal Injuries Compensation Scheme in New Brunswick should not be regarded as a sufficient justification for denying the insured an indemnity in a case such as *Saindon*. In the first place, there is nothing in any of the provincial Criminal Injuries Compensation statutes providing that someone who is the victim of criminal conduct *must* seek a remedy under the relevant provincial Criminal Injury Compensation statute.[46] It is wrong to penalise someone for exercising a choice which the law clearly gives him. Second, it is relevant to note that the maximum amount that can be paid under the New Brunswick *Criminal Injuries Compensation Act* is $10,000,[47] — an amount which might be inadequate to cover a victim's economic losses for a period of even a year.[48]

In terms of poor craftmanship and bad social policy, the *Saindon* case may well be the most unfortunate insurance decision the Supreme Court has handed down since 1934 when the court gave its opinion in the *Lindal* case[49] — a decision that has now, happily, been reversed by statute.[50]

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[43] Compare the statement of the New York Insurance Department in the field of road accidents. "Individual, last moment, driver mistakes — undeterred by fear of death, injury, imprisonment, fine or loss of licence — surely cannot be deterred by fear of civil liability against which one is insured." See, the Department's Report, *Automobile Insurance . . . for Whose Benefit?* (1970) at 12.

[44] For the reasons why this is likely to be so see text *supra*, notes 19 and 20.

[45] See, (1971) 34 Modern L. Rev. 176, 181 n. 27.

[46] A provision of this kind would mean that many cases of negligence would have to be referred to the relevant Criminal Injuries Compensation Board because in many of them it would appear that an injury has been caused in violation of the *Criminal Code*.

[47] See, section 17(3) of the New Brunswick *Compensation for Victims of Crime Act* (N.B. Stat. 1973 C-14).

[48] In this connection, it is instructive to note that the Ontario Law Reform Commission recommended that benefits of $12,000 a year be paid to road accident victims; see, Report on Motor Vehicle Accident Compensation (Toronto: Ministry of the Attorney-General, 1973).

[49] *Home Insurance Co. of New York et al* v. *Lindal & Beattie*, [1934] S.C.R. 33; [1934] 1 D.L.R. 497. In this case, the Supreme Court refused to indemnify an insured under an automobile liability policy because the insured had committed a criminal offence.

[50] See, *e.g.*, section 225(4) (c) of the Ontario *Insurance Act*, R.S.O. 1970, c. 224. There are identical provisions in other common law provincial Insurance Acts.

B. THE SUBROGATION CASES

In 1937, the Supreme Court of Canada decided the case of *United Motor Services* v. *Hutson*.[51] In that case, the landlords agreed to insure a building which they leased out to a tenant who used it as an automobile service garage. The tenant agreed to repair the building except for damage caused, *inter alia*, by fire. A fire occurred as a result of negligence on the part of the tenant's employees and the landlords recovered from the insurers in respect of the damage caused by the fire. The insurers (suing in the name of the landlords) then sought to be subrogated to the landlords' rights against the tenant. The Supreme Court, affirming the decision of the Ontario Court of Appeal, held that the insurers were entitled to claim subrogation rights against the tenant. The court might have decided that the right of subrogation was excluded for two reasons. First, because the landlords, in insuring against fire, were also insuring in respect of fires caused negligently by the tenant. Second, according to the exculpatory clause, when the tenant exculpated himself from fire, "fire" was to be read as including fires caused by the defendant's negligence. The court, in effect, rejected both these contentions. While the policy implications of the decision in *Hutson* are open to question, the decision itself is logically tenable.

Thirty-eight years after its decision in the *Hutson* case, the Supreme Court decided *Agnew-Surpass Shoe Stores Ltd.* v. *Cummer-Yonge Investments Ltd.*[52] On very similar facts to those in the *Hutson* case,[53] the Supreme Court, by a majority of 7-2, decided that the insurer was not entitled to enforce the landlord's subrogation rights against the tenant.

It is instructive to compare the relevant clauses in the two cases.

Hutson	*Cummer-Yonge*
Landlord's covenant to insure And the Lessor covenants to pay all taxes in connection with the demised premises and all premiums of insurance upon the buildings erected thereon.	The Lessor covenants to insure the shopping centre including the said Building, excepting foundations in each case against all risk of loss or damage caused by or resulting from fire, lightning or tempest or any additional peril defined in a standard fire insurance additional perils supplemental contract. All such insurance shall to the best of the ability of the Lessor be to the full insurable value of the property insured.
Exculpatory clause And that the said Lessee will repair, according to notice in writing, reasonable wear and tear and damage by fire, lightning and tempest, riot or public disorder or act on the part of any governmental authority, only excepted; provided nevertheless, that the Lessee shall not be required to make repairs to the roof, nor exterior or structural repairs.	The Lessee shall take good and proper care of the interior of the leased premises and appurtenances thereof (including all plate glass installed in or upon the leased premises) and any improvements now or hereafter erected therein and make all needed repairs and replacements thereto except for reasonable wear and tear, repairs to the four side walls, roof, skylights, foundation, floors and the bearing structure of the Building forming part thereof, damage to the building caused by water damage and damage to the Building caused by perils against which the Lessor is obligated to insure hereunder.

[51] [1975] Ins. L. R. 2309; 55 D.L.R. (3d) 676; see, Baer, (1976) 8 Ottawa L. Rev. 218, 242-243.

[52] [1937] S.C.R. 294; [1937] 1 D.L.R. 737.

[53] See, note 51, *supra*.

The majority[54] held that the first ground of distinction between *Hutson* and *Cummer-Yonge* was that it was only in the latter case that the landlord had covenanted to insure. It is difficult to see why such importance should be placed on the landlord's covenant to insure, particularly since it will sometimes be difficult to determine whether a landlord has, on the proper construction of the contract, obligated himself to insure.[55] It is suggested that no difference should be drawn between the case where the landlord takes out fire insurance without there being any legal obligation on him to do so and one where the landlord takes out fire insurance pursuant to a legally enforceable agreement. The existence of a legally enforceable covenant to insure between landlord and tenant does not show that either the insurer, the landlord or the tenant expected the right of subrogation to be excluded. If the insurer and the landlord intended the right of subrogation to be excluded, they could have so provided, in express terms, in their insurance contract.[56] Similarly, the existence of a covenant to insure on the part of the landlord, does not mean that the tenant will not take out liability insurance to cover himself against the consequences of his negligence.

The second difference the majority found between *Hutson* and *Cummer-Yonge* was in the exculpatory clause used in the two cases. However, as Mr. Justice de Grandpré pointed out in his dissenting opinion in *Cummer-Yonge*, it is impossible to see a significant difference between the two exculpatory clauses. In the *Hutson* case, the exculpatory clause covered the following exceptions: "fire, lightning and tempest, riot or public disorder or act on the part of any governmental authority."

Contrasting the relevant exculpatory clause in *Cummer-Yonge*, his Lordship made the following highly pertinent observations:

> Here, if we read into the lease the perils mentioned in the insurance policy, we have a list that is longer but not different in substance. Without being too technical, it is fair to say that these perils are: fire, lightning, explosion, impact, riot, smoke, sprinkler's leakage, windstorm and hail. It does not matter to my mind that the exceptions, instead of being listed by name, are listed by reference to a document which is standard in scope and well-known to the business world. On the authority of *Hutson*, if the excepted risks had been listed specifically, the tenant would not be successful in its contention that a negligent fire is part and parcel of the exclusion. In my view, the fact that the exceptions are listed by reference does not make any difference in the result.[57]

It is suggested that a principled and rational basis for the result reached

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[54] On the subrogation issue there was a seven man majority made up of Chief Justice Laskin, Justices Judson, Ritchie, Spence, Pigeon, Dickson and Beetz. A differently constituted majority of six justices held that the tenant was under an obligation to pay rent during the period when the building could not be used because of fire. I do not propose to deal with the latter issue in my comment.

[55] Thus, it could be strongly argued that the landlord's undertaking to pay insurance premiums in *Hutson* also imposed an obligation on him (the landlord) to procure adequate insurance for the building.

[56] See, *e.g.*, the decision of the New Brunswick Court of Appeal in *J. Clark & Son* v. *Finnamore* (1972), 32 D.L.R. (3d) 236.

[57] [1975] Ins. L. R. 2309, 2321; 55 D.L.R. (3d) 676, 698-99. (Mr. Justice Martland expressed his agreement with Mr. Justice de Grandpré's dissent.)

in *Cummer-Yonge* would have been to hold that when a landlord insures against fire, this coverage extends to fires negligently caused by the tenant, so as to give the latter the protection of the landlord's coverage. Alternatively (and additionally), the court might have held that when there is an exception clause in the lease excepting "fire" losses, these include fires negligently caused by the tenant. As the law stands at present, a court will, first, have to determine whether the landlord covenanted to insure, which may be a difficult question to resolve and is one that seems functionally irrelevant. Second, the court will have to decide whether the perils which have been excluded, have been excluded *à la Hutson* or *à la Cummer-Yonge*. As Mr. Justice de Grandpré points out in his dissent, to interpret two very similarly drafted exculpatory clauses in radically different ways is to elevate form over substance.

If it be argued that a broad holding, as the one argued for here, would substantially narrow the scope of subrogation, it is suggested that there are powerful reasons for doing precisely this. In the first place, as Professor Paterson has pointed out: "Even as to tortfeasors, it is arguable that since the insurer is paid to take the risk of negligent losses, it should not shift the loss to another."[58] Second, if the interruption of the tenant's business and the liability for the rent payable during the period when it is impossible to carry on business are not sufficient deterrents[59] against the tenant operating negligently,[60] it is difficult to believe that subrogation liabilities will prove to be much of a deterrent, particularly when the tenant may have insured against these liabilities.

A little more than two months after its decision in *Cummer-Yonge*, the Supreme Court handed down its decision in *Ross Southward Tire Ltd.* v. *Pyrotech Products*[61], which again dealt with the problem of subrogation in the context of a landlord-tenant relationship. The facts are simpler than those in *Cummer-Yonge*. The landlord had insured its property but, under the terms of the lease, the tenant was obliged to pay the insurance premiums. After a fire had occurred because of the tenant's negligence, the insurer indemnified the landlord and sought to enforce subrogation rights against the tenant. The Supreme Court held, by a majority of 3-2,[62] reversing the Ontario Court of Appeal, that the payment of insurance rates by the tenant placed the risk

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[58] *Essentials of Insurance Law* (2nd ed., 1957), 152. The process of shifting losses from one insurer to another in this manner is also very expensive; see Kimball and Davis, *The Extension of Insurance Subrogation* (1962), 60 Mich. L. Rev. 841.

[59] See, Brewer, *An Inductive Approach to the Liabality of the Tenant for Negligence* (1951), 31 Boston U. L. Rev. 47 at 59:

> "Tenants as a class are interested in protection from unpredictable, or more important, uninsurable responsibilities. Their desire for this protection cannot be disposed of by a social need for the deterrent effect of civil judgments. If we can draw any lesson at all from the field of automobile insurance, where the allocation of responsibility by civil process has been attempted on a vast scale, this lesson is that civil judgments are unsatisfactory both from the standpoint of preventing future negligent conduct and compensating its victims."

[60] There are, of course, similar sanctions operating in the case of residential tenants.

[61] [1975] Ins. L. R. 2373; 57 D.L.R. (3d) 248.

[62] Chief Justice Laskin delivered the majority opinion with which Justices Judson and Spence concurred; Justices Beetz and de Grandpré dissented.

of loss on the landlord, and the landlord's insurer had no basis for asserting a subrogated claim. It is difficult to see why such importance should be placed on who pays the premiums. The tenant himself did not seem to think that the operation of subrogation had been excluded, because he (the tenant) had transferred a legal liability (fire) rider which had originally been taken out when he had occupied different premises. As Chief Justice Laskin pointed out in his opinion for the majority: "The existence of the policy means only that litigation which in form is between a landlord and its tenant is in substance a contest between two insurance companies."[63]

The arbitrary results that flow from making the right to subrogation depend on who pays the premium may be easily illustrated. Assume that the landlord and the tenant both agree to pay half the premium (or otherwise agree to share the cost). Does this mean that the insurer's right to subrogation is cut by half (or reduced by the appropriate amount)? Again, let us imagine a case where the obligation to pay premiums is originally placed on the landlord, who, after a while is unable or unwilling to pay the premiums, and the tenant assumes the task of paying the premiums. Does the insurer's right of subrogation cease to exist once the tenant starts paying insurance premiums?

The truth of the matter is that the question of who pays premiums will very often be decided on the basis of administrative convenience, and to make the right of subrogation depend on factors of this kind, means that arbitrary lines will be drawn between situations which insurers and laymen alike would treat as identical.

In its celebrated decision in the *Keefer* case decided in 1901,[64] the Supreme Court held that a vendor could insure to protect his own interest as well as that of the purchaser. What the court should have done in both *Cummer-Yonge* and in *Pyrotech Products* is to have adopted a principle of similar generality.[65] By failing to do this, the court has left the lower courts to make findings of fact which may be difficult to make.[66] The lower courts will then have to make sharp distinctions on the basis of facts, the relevance of which seems to be open to very serious doubt. Since the problem of subrogation occurs frequently in the landlord-tenant context, the failure of the court to give clearer guidance to lower courts is a matter for concern.

C. THE INSURED'S FAILURE TO CO-OPERATE

In *Canadian Equipment Sales and Service Ltd.* v. *Continental Insurance Co.*,[67] the insurer agreed to pay all *sums which the insured* should

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[63] [1975] Ins. L. R. 2373, 2375; 57 D.L.R. (3d) 248, 253.

[64] *Keefer* v. *Phoenix Insurance* (1902), 31 S.C.R. 144.

[65] One unfortunate feature of the *Keefer* decision (see, *id.*) is that by purporting to state the "intention of the parties," a lot of argument has been left to determine exactly what the parties intended in each case. The proposed new rule that is being argued for here should not be based on the presumed "intention" of the parties.

[66] For example, did the landlord covenant, in express terms, to take out adequate insurance in line with the formula in *Cummer-Yonge*?

[67] [1957] Ins. L. R. 2331; 59 D.L.R. (3d) 333.

become liable to pay "because of injury to or destruction of property . . . including loss of use . . . ." A subcontractor of the insured, in the course of work on a pipe belonging to a third party, allowed a piece of material to fall into the pipe. Substantial expenses were then incurred in an unsuccessful attempt to find the material, there being a reasonable fear that, if not found, the material might block the pipe and cause extensive damage. The insured was held liable for these expenses.

In a claim by the insured against the insurer to recover these expenses, the Ontario Court of Appeal held, reversing the trial judge, that the insured was entitled to be indemnified. The court held that, as soon as the material fell into the pipe, the third party had a damaged pipe and the expenses incurred by the insured were a natural consequence of that damage.

Thus far, the question is only one of construction of a particular insurance policy. The important point for our purposes concerns the failure of the insured to give relevant information to the insurer as soon "as practicable" as required by the policy. The accident had occurred on June 9 and the insured did not give the insurer notice until September 1. The trial judge held that the insured had breached the policy condition requiring notice "as soon as practicable." The trial judge also refused to give the insured relief under section 103 of *The Insurance Act* which provides:

> Where there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to be done or omitted by the insured with respect to the loss and a consequent forfeiture or avoidance of the insurance in whole or in part and the Court considers it inequitable that the insurance should be forfeited or avoided on that ground, the Court may relieve against the forfeiture or avoidance on such terms as it considers just.[68]

The trial judge felt that he could give relief only where the breach of the duty to co-operate was of "a minor nature" and where there was "no possibility of prejudice" to the insurer.

The Court of Appeal refused to read section 103 so restrictively, and it decided that the insured was entitled to an indemnity. The court held that in cases of failure to co-operate, the insurer has to show "some actual proven prejudice or potential prejudice which coulld not be quantified after the event."[69] Further, the Court of Appeal seems to suggest that in addition to having to show prejudice, the insurer must also show that the insured acted in bad faith.[70]

There was sufficient uncertainty in the Ontario Court of Appeal's formulation of the law for the Supreme Court to have granted leave to appeal, but the court refused leave to appeal on October 8, 1975.

There are two major uncertainties in the Court of Appeal's statement of the law. In the first place, are the two requirements of prejudice to the insurer and the insured's bad faith independent of one another? In other

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[68] R.S.O. 1970, c. 224.

[69] [1975] Ins. L. R. 2331, 2336; 59 D.L.R. (3d) 333, 343.

[70] *Id.*

words, does the insurer have to prove *both* these requirements or does it have to prove only one to defeat the insured's claim for indemnity? Second, what is the meaning of "potential prejudice which [cannot] be quantified after the event?" If all the latter statement means is that insurers need only show that they *might* have been prejudiced, then this will be a fairly easy hurdle for them to surmount.

There is a second major problem. There is an important decision of the Supreme Court of Canada which states that in a failure to co-operate case, the insurer may refuse to indemnify the insured, even though the insurer cannot show prejudice and even though it (the insurer) cannot show that the insured acted in bad faith. In *Marcoux* v. *Halifax Insurance*,[71] the insured's truck overturned and struck a pedestrian walking on the sidewalk in Montreal. The pedestrian stated he was not injured and refused to be taken to a doctor or hospital. The insured did not notify his insurer, although a clause of his policy stated that notice was to be given promptly whenever an accident involving bodily injury happened. Two months later, the pedestrian claimed damages for injuries to the extent of $2,204.50. The insured notified his insurer who eventually refused to indemnify the insured. The Supreme Court of Canada held that the insured was not entitled to an indemnity. Not only did the court fail to find any prejudice to the insurer, but it also failed to find that the insured had acted in bad faith. The only comment on the insured's behaviour was made by Mr. Justice Rand who held that the insured had acted negligently. His Lordship stated: "On the facts, then, as they have been presented, I feel bound to conclude that there was sufficient evidence to indicate to a reasonable and prudent person that bodily injury had most probably been suffered."[72]

It might be argued that *Marcoux* is distinguishable since it was an appeal from Quebec which does not have a section in the Civil Code providing for relief against forfeiture similar to section 103 of the Ontario *Insurance Act*. It is submitted that this argument is not very convincing since Quebec does have an analogue to section 103 of the Ontario Act. Article 2478 of the Quebec Civil Cole provides, in part, that "[i]f it be impossible for the insured to give notice or make the preliminary proof within the delay specified in the policy, he is entitled to a reasonable extension of time."

To complicate matters further, *Marcoux* has been followed by the Court of Appeal of one common law province which has a provision in its Insurance Act providing for relief against forfeiture on the same basis as Section 103 of the Ontario *Insurance Act*. Thus, a majority of the British Columbia Court of Appeal followed the *Marcoux* decision in *Glenburn Dairy* v. *Canadian General Insurance*.[73] In that case, notice of a claim was given to insurers ten months after the occurrence of an accident. The majority of the court of Appeal held that notice had not been given "as soon as practicable" as required by the insurance policy. The court held, following *Marcoux*, that this

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[71] [1948] S.C.R. 278; [1948] 4 D.L.R. 143.

[72] [1948] S.C.R. 278, 286; [1948] 4 D.L.R. 143, 150.

[73] (1953), 9 W.W.R. 501.

fact defeated the insured's claim to an indemnity. There was no evidence either that the insurer had been prejudiced by the giving of late notice or that the insured acted in bad faith. The Court of Appeal did not find it necessary to discuss the relief from forfeiture provision in the *British Columbia Insurance Act.*

With the law in this state of confusion, it was incumbent on the court to shed some light on a very murky and important area of the law. At least, the court should have clarified the status of the *Marcoux* decision.

It is suggested that a rule which does justice to the interests of the insurer, the insured and the accident victim, is one that requires the insurer to plead and prove that the insured's failure to co-operate has caused the insurer real prejudice — that is, the insurer must prove that the outcome of the case would probably have been different if the insured had co-operated with the insurer.[74] This rule has been criticised on the ground that it has forced the insurer, in effect, to relitigate the original trial and establish that the result would have been different if the insurer had had prompt notice.[75] It is difficult to accept this criticism since the proposed rule only requires the insurer to prove that it did suffer loss.

CONCLUSION

The common thread of the cases analysed is the failure of the court to state principles of some generality for the guidance of lower courts and practitioners. It is true, as Holmes said, that general principles do not decide concrete cases, but our starting point must always be a general principle. Sometimes a general principle will have to give way to another general principle. When this happens, the court is under an obligation to state why it has preferred one principle to another.

The Supreme Court seems to be deciding each case on its facts, without disclosing what facts it regards as crucial and why.[76] The temptation to decide each case on its merits is great but it must be resisted. Very serious harm is done to the key value of predictability. If the highest court in the land is prepared to decide each case on the basis of undisclosed "equities," then lower courts will also be forced to play the game of "catch as catch can." Once this happens, the whole process of litigation runs the risk of being turned into an immoral and expensive farce.

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[74] This is the rule adopted by the Supreme Court of California in *Billington* v. *Interinsurance Exchange* (1969), 71 Cal. (2d) 728; 456 P. (2d) 982.

[75] Bolton, *Notice and Related Cooperation Provisions of Insurance: A Compendium of California Legal Principles* (1973), Insurance Counsel Journal 39.

[76] My colleague, Profesor Taman, has noted, in another area of the court's work, the predisposition on the part of the court "to circumvent difficult issues of principle by recourse to some sense of the equity of the individual case"; see, his article, *The Adversary Process on Trial: Full Answer and Defence and The Right to Counsel* (1975), 13 O.H.L.J. 251, 277.