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T. A. Cromwell

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Book Review: In the Matter of an Arbitration Between the Union of Doctrinal and Theoretical Legal Scholars and the Consultative Group on Research and Education in Law - The Law of Damages, by S. M. Waddams; Injunctions and Specific Performance, by R. J. Sharpe

IN THE MATTER OF AN ARBITRATION BETWEEN THE UNION OF DOCTRINAL AND THEORETICAL LEGAL SCHOLARS AND THE CONSULTATIVE GROUP ON RESEARCH AND EDUCATION IN LAW

The Law of Damages. By S.M. Waddams. Toronto: Canada Law Book Ltd. 1983.

Injunctions and Specific Performance. By R.J. Sharpe. Toronto: Canada Law Book Ltd., 1983.

Reviewed by T.A. Cromwell, Sole Arbitrator*

I. THE ISSUES

This is a grievance brought by the Union of Doctrinal and Theoretical Workers (hereafter "the union") in which the union grieves certain comments concerning legal research made by The Consultative Group on Research and Education in Law (hereafter "management"). More specifically, the union complains that management has failed to nurture and support valuable scholarly enterprises undertaken by members of the union. Indeed, it contends that it unfairly denigrated doctrinal and theoretical legal research and writing. The union asks that management withdraw certain of its comments and issue statements affirming its support for such valuable work recently completed and currently underway.

Management responds that the union is oversensitive and has misinterpreted its remarks. It seeks to encourage what it calls "fundamental research" without in any sense denigrating other types of work. Its emphasis on fundamental research simply reflects a desire to foster new initiatives in less traditional enterprises. It also claims that the union, perhaps in an effort to protect its own position, fails or refuses to acknowledge the benefits of fundamental research to the point of actually obstructing it. Thus, management says that the union not only misinterprets its remarks, but is doing so to create a diversion away from its

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* Associate Professor of Law, Dalhousie Law School.

central thrust.

II. THE EVIDENCE

The union advances its case in two branches. It first says that management's published remarks¹ show that it views "doctrinal" and "theoretical" research and writing as the poor cousins of the more exalted "fundamental" research. Next, the union tries to show that this view is wrong and unfair. In doing so, it has held up two recent examples of doctrinal and theoretical work to show their valuable contribution to Canadian legal literature — namely, S.M. Waddams' *The Law of Damages*² and R.J. Sharpe's *Injunctions and Specific Performance*.³ It relies on this evidence to put the lie to management's published remarks.

To follow the union's argument, one must review management's remarks and ask: What would a reasonable and fair minded person take from them? In other words, what is a fair interpretation of those remarks? Next, one must examine the two examples brought forward by the union to see if its remarks are justified.

There are clearly passages which are capable of bearing the interpretation the union has taken. Management has created a categorization of legal research as follows:

Conventional Texts and Articles:

Research designed to collect and organize legal data, to expound legal rules and to explicate or offer exegesis upon authoritative legal sources;

Legal Theory:

Research designed to yield a unifying theory or perspective by which legal rules may be understood and their application in particular cases evaluated and controlled; this type would include scholarly commentary on civil law, usually referred to as *doctrine*;

¹ Consultative Group on Research and Education in Law, *Law and Learning: Report to the Social Sciences and Humanities Research Council* (1983).

² *The Law of Damages* (1983).

³ *Injunctions and Specific Performance* (1983).

Law Reform Research:

Research designed to accomplish change in the law, whether to eliminate anomalies, to enhance effectiveness or to secure a change in direction;

Fundamental Research:

Research designed to secure a deeper understanding of law as a social phenomenon, including research on the historical, philosophical, linguistic, economic, social or political implications of law.⁴

While these are not actually ranked in order of preference, one does not have to strain to discern the message that Fundamental Research is the intellectual king. Conventional Research is said to lead to “predictable” answers⁵ and even Legal Theory “makes certain assumptions about the nature of knowledge, language, law or society and risks leaving such assumptions unstated and unexplored.”⁶ Fundamental Research belongs to “The World of Ideas” whereas other forms of research belong to the world of action where, incidentally, the legal hewers of wood and carriers of water — the practitioners — reside. Fundamental Research is said to be what all other kinds of scholarly activity should aspire to when they grow up. Other types of work “mature” into Fundamental Research.⁷ At times, the latter term is rendered in French as *recherche sublime* contrasted (and not to its disadvantage) with *recherches ponctuelles*.⁸ The fostering of Fundamental Research will require improvement of the scholarly education of legal researchers. This suggests that, while existing graduate training may suffice to rise above the poor drones who hew wood and carry water, something more is required to permit the pilgrim to reach The World of Ideas.

The union argues that other commentators have taken negative implications from management’s published remarks. This fact, it urges, strengthens the argument that the implications are those that would be taken by a reasonable observer. In particular, a published note by Professor Mark Weisberg is relied upon. It is unclear whether he is a member of the union, but his reading of management’s remarks clearly supports the union’s case. His introductory remarks set the tone:

⁴ *Consultative Group on Research & Education in Law*, *supra* note 1, at 65-66.
1 at 65-66.

⁵ *Id.* at 66.

⁶ *Id.* at 68.

⁷ *Id.* at 83-84.

⁸ *Id.*

The Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Research and Education in Law, dubbed the Arthurs Report by the Minister of Justice, is a critical document. Its principal author is a senior, well-known and well-respected legal scholar and teacher, a former law dean. For members of the community about whom it speaks and to whom it in part is addressed, the document is parental criticism. The question it poses is: how to take it? My answer is: with partial acceptance, partial resistance, considerable irritation, and, predominantly, with sadness.⁹

Weisberg calls management's classification of research "hierarchical"¹⁰ and "nonsense"¹¹ and maintains that the primacy given Fundamental Research is based on a false dichotomy between conventional ("law as gospel") and fundamental ("law as impact");¹² "[l]ost is any sense of the value of taking seriously the common law process."¹³ To him, management castigates and subordinates other types of research in a "typology of worth".¹⁴ Without doubt, if these views may fairly be attributed to management, the union has made out the first part of its case.

The union goes on to show that management's remarks, thus interpreted, are wrong and unfair. It uses the recently published works by Waddams and Sharpe as examples. Accordingly, it is necessary to examine these works in light of management's comments or, at least, in light of the interpretation that the union seeks to place upon those comments.

These books are joint and several projects. Severally, each tackles an area of remedial law and contributes the first Canadian text in that area. The projects are joint in that they are extensively cross-referenced to show the interplay in principle and practice between specific relief and monetary compensation. The works are both comprehensive and extensive, being 735 and 423 pages respectively. They also share the same goals: to give an accurate account of the present Canadian law relating to the remedy(ies) under consideration and, as Sharpe expresses it, "to contribute to the process of elaborating sound theoretical principles governing the award of these remedies."¹⁵ At the risk of neglecting the joint aspects of the enterprise, each book deserves to be considered on its own merits.

⁹ Weisberg, *On the Relationship of "Law and Learning" to Law and Learning* (1983), 29 McGill L.J. 155 at 156.

¹⁰ *Id.* at 158.

¹¹ *Id.* at 159.

¹² *Id.* at 160.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Supra* note 3, at v.

It is easy to describe the place in Canadian literature taken by Waddams' book on damages. It is the first comprehensive Canadian text on the subject. Its contribution would be significant even if it only managed to bring together in some sensible order the relevant Canadian case law; but it does much more. It is not simply a Canadian converter for *MacGregor*;¹⁶ nor is it an expanded, updated and Canadianized *Ogus*.¹⁷ It is a meticulous and critical examination of the law relating to the award of damages in Canada. More significantly, it erects a new analytical framework for considering that body of law.

The method of exposition to be adopted in discussing damages was an awesome question facing Waddams. Its difficulty arises both from the present state of flux and the unsatisfactory compartmentalization of the law. A temptation might have been to treat damages in tort and contract separately. However, the great boundary dispute between them seems to show, more and more, that the disputants are really tenants-in-common of the same parcel of land. Thus, exposition of damages law divided into sections dealing separately with contract and tort would be misleading and likely to become obsolete. Another possible treatment was division according to type of transaction, but this would only have furthered the existing overcompartmentalized approach to damages which results in analogous situations being decided differently, with no attempt to reconcile the apparent conflict. How to proceed with the discussion of damages in light of these difficulties was a major challenge.

Waddams responds by structuring his exposition according to the nature of the loss rather than the source of the legal obligation or the type of transaction. For him, "it is the interest protected that is the logical connecting factor."¹⁸ Thus, the chapters are headed "Loss of Property", "Loss of Service", "Loss of Reputation" and so forth. The result is that cases with different substantive and factual bases, sharing an analogous remedial problem, are treated in one place. Inconsistency of principle is often exposed in the process and, in addition, well articulated solutions from one context are shown to be applicable in others.¹⁹ The broad sweep across substantive law areas that occurs while the analogous remedial problems are being considered is not only an academic *tour de force*, but holds promise of undoing the overcompartmentalization and logical inconsistency that presently pervades the law

¹⁶ McGregor, *McGregor on Damages* (14th ed. 1980).

¹⁷ Ogus, *The Law of Damages* (1973).

¹⁸ *Supra* note 2, at v.

¹⁹ *Id.* at paras. 140, 504-35, 810 *passim*.

of damages.

There is no doubt, though, that according to management's classification system, the work is doctrinal and theoretical. "Authoritative legal sources"²⁰ are its primary raw material. It seeks to expound legal rules and offer unifying theories "by which legal rules may be understood."²¹ There is no "Conclusions" section in which the large and central questions about damage compensation are systematically reviewed and in which the many strands of the text are woven together. Aside from a few references to economic theory and some historical material, there is little in the book that could be called "fundamental" in management's sense of the word.

Even the theoretical aspects of the work have their limitations. There is a tendency to use ambiguous words such as "rational" and "value" as though they helped to explain something. They do not; at least, not without further definition. For example, terms such as "intrinsic value", "market value", "the value of property to an owner"²² are used without adequate definition or explanation. Words such as "actual loss" and "full value" only compound the difficulties.²³ Admittedly, the case law which forms the raw material for the book is full of such language. Even though Waddams exposes the variety of meanings that words such as value are capable of bearing, a more theoretical work would have spent more time defining and clarifying these basic terms.

A further limitation of the theoretical dimension of this book is that it fails to knit the great body of doctrinal detail into one large coherent structure. There are discussions of major theoretical issues such as why contract damages should protect expectancy²⁴ and how the law should deal with intangible losses.²⁵ Despite these and similar treatments of basic issues, the reader concludes the book with the feeling that it needs a last chapter, one beginning ideally with: "The law of damages is about. . . ." The central themes of compensation, encouragement of commercial activity and deterrence of unlawful conduct need to be examined and some general conclusions drawn. The book, in some respects, is like several large mounds of recently mined precious stones all of which have been carefully and painstakingly extracted,

²⁰ *Supra* note 1, at 65.

²¹ *Id.* at 66.

²² *Supra* note 2, at paras. 5-35.

²³ *Id.* at paras. 204-205.

²⁴ *Id.* at paras. 536-49.

²⁵ *Id.* at para. 448 *passim*.

cleaned and sorted, but still await cutting, polishing and fashioning into jewellery.

These last remarks constitute a counsel of perfection; some will say that they constitute unfair criticism. In the context of scholarship relating to damage compensation in Canada, Waddams has taken us, in one bold step, from the one-room schoolhouse to the modern university. Much remains to be done, but the foundations have been well laid.

Many of the remarks made in the discussion of Waddams' book apply equally with respect to Sharpe's. Although the enormity of the task facing him was somewhat less daunting, it has been accomplished with great thoroughness and skill. Injunctions and specific performance are, in the main, discussed separately, but Sharpe has been careful to remember overlapping and analogous issues, and to allow learning from one to enlighten consideration of the other. There is an excellent discussion of the general equitable principles relevant to both, particularly of the vexed (and vexing) question of what is meant by the inadequacy of damages requirement.

Two areas of the discussion of injunctions merit special praise. The first is the commendable attempt to bring order to the chaos of interlocutory injunctions. Sharpe's discussion of *American Cyanamid*²⁶ should be required reading for every lawyer seeking an interlocutory injunction as well as for every Chambers Judge with authority to grant one. The second especially valuable section deals with injunctions to enforce public rights and includes the difficult issues of the role of the Attorney General and the standing of the individual plaintiff. Once again, the discussion is sound and important.

The book exhibits varying degrees of theoretical intensity. For example, whereas the chapter dealing with general principles relating to injunctions is insufficiently searching, the discussion of general principles relating to specific performance tackles the important and basic theoretical questions with rigour and insight. Historical material enlightens much of the discussion throughout. Again, however, the reader senses a need for some kind of concluding essay bringing together the main strands of why courts do or should grant specific relief.

III. CONCLUSIONS

Has the union proved its case? If so, what remedy ought to be awarded? Is it fair to say that a reasonable person would think that

²⁶ *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 (H.L.); *supra* note 3, at para. 127 *passim*.

management has denigrated work such as that of Waddams and Sharpe? If so, is it deserved?

To turn to this last question first, the answer must be a resounding "No!". The only legitimate grounds for denigration would be that the works do not make a valuable contribution to the scholarly legal literature. Any person with even a passing acquaintance with the Canadian legal landscape knows that it is not overburdened with well-crafted texts which attempt a comprehensive statement of the relevant law. Only in the last ten years or so have such texts begun to appear with any frequency and, even yet, large areas of legal learning remain uncharted. Waddams and Sharpe have made significant contributions in this respect.

It is possible to applaud the appearance of such works without rejecting the need for Fundamental Research. Textbooks not only save time for the hewers of wood and help to improve the quality of advice, argument and decision, but they also form a sound basis for those wishing to undertake Fundamental Research. It is not possible "to secure a deeper understanding of law as a social phenomenon"²⁷ without first knowing what the law says in response to a particular social situation. What the law says is the province of the doctrinal and theoretical scholar. While the doctrine makes up the fibres of the law's seamless web, the theory exposes the pattern. Without both, Fundamental Research is impossible or is, at least, likely to founder. Anyone inclined to denigrate doctrinal and theoretical scholarship in law in Canada overlooks the shortage of high quality examples of works of that type, ignores its potential for salutary effect upon the administration of justice and denies the creation of an important raw material for any significant attempt to understand law as a social phenomenon.

An attempt to belittle such work can only lead to unscholarly fadishness. Surely the essence of scholarship is that it contributes to both knowledge and understanding of the subject studied. It is the result that is important, not the methodology or the ideological slant of the scholar. Scholarship must be judged on its own merits according to whether it makes such a contribution, not according to some *a priori* decision about methodology. Insistence on a preferred mode of approach is anti-scholarly, as is the erection of some hierarchy of worth based on the method of study.

Fundamental Research surely holds the promise of making an important and distinctive scholarly contribution, but it is a promise that

²⁷ *Supra* note 1, at 66.

remains largely unfulfilled. Moreover, it cannot meet all the needs of society. While we await the ultimate and deep answers that Fundamental Research promises, life goes on. Cases must be decided and clients advised. Surely attempts to assist the process within a narrow context of sound doctrine and theory does not deny the validity of the more fundamental endeavour. Nor does the need for the latter deny the need for the former.

A hierarchy of scholarly enterprises, if generally accepted, leads to fadishness. If the hierarchy is based on methodology, method becomes the objective. An avalanche of attempts to exploit the method will doubtless result. However, if method is the key, how much that is truly scholarly will result? Other disciplines have learned the answer to this question and to their great regret. How aptly could these words (which begin a critique of the scholarly condition of social history) be turned to describe the likely impact of methodological fadishness upon legal scholarship:

. . . social history is suffering a severe case of pollution. The subject has become a gathering place for the unscholarly, for historians bereft of ideas and subtlety. The writings thus produced are without theoretical content, a failing disguised by an obsession with method and technique. They represent collectively a loss of faith in history. In their reaction against the chronological imperatives of political or economic history, social historians have all but lost touch with the historical events altogether. There is a constant striving for "scientific" status, a requirement commonly met by the undignified and indiscriminate borrowing of terms and tools from other disciplines. One journal avowedly declares its commitment to "interdisciplinary history", as if the support of other subjects were required for history to remain a plausible undertaking. In these circumstances the study of the past becomes a playpit for the unattended urchins of other disciplines: computer scientists, parsonian sociologists and structural anthropologists wallow around under a benevolent editorial eye. Small wonder that social history elicits scorn and distaste from the traditional empiricists, who at least retain their faith in history, for all that they do not know what that is.²⁸

I conclude, therefore, that any denigration of work such as that of Waddams or Sharpe is unjustified in fact and wrong as a matter of principle. Yet, has management actually done so in its published remarks?

There is much language that would support such an interpretation. The most obvious examples have already been reviewed. However, management points to other passages that it claims show the intent was to encourage what is good in existing scholarly endeavours while encouraging new initiatives, particularly in Fundamental Research. It argues that the recommendations contained in the Report make it clear

²⁸ Judd, "A Clown in Regal Purple: Social History and the Historians," *History Workshop* (1979) at 66.

that all forms of legal scholarship have been undervalued and deserve encouragement.²⁹ Diversity is all that management intended to espouse. While Fundamental Research deserves special encouragement because it is so rare, there was no intention to discourage other kinds of work in the process of encouraging Fundamental Research. Moreover, the criticisms of law professors as researchers as undereducated, uncommitted and relatively unproductive scholars could patently have no application to persons such as Sharpe and Waddams.³⁰

Management also argues that the union's interpretation misconceives the whole tenor and purpose of the Report. It is not, it is argued, anything other than a very generalised critique of what is and a vision of what could be. Any criticism, express or implied, in the Report is based on a comparison with the ideal. The goal of the report is to lift the eyes of legal scholars toward that ideal in the hope that it will inspire them. Management points out that some commentators have sensed this intent. For example, Trakman commented:

Used as a bible and treated as words from on high, the intent of this Report is unlikely to be advanced. Employed as a research tool and as the expression of thought by some of the more refined legal minds in Canada, it is a sure device in the proud yet still infant growth of Canadian legal scholarship.³¹

This argument of management is simply that it is not denigration to be compared with the ideal and found wanting. The Report set about providing a vision of the heavenly city, not a map. It is not much concerned with speculating about who is likely to arrive there.

I do not doubt that, so interpreted, the Report ought not to be offensive to anyone. I accept that these purposes and intentions as described by management are what actually motivated it to make the remarks that it has. However, I must conclude on the basis of the evidence that the union is justified in its complaint. Much of the Report gives rise to the inference that legal scholars are not properly trained nor sufficiently committed to undertake truly scholarly work. True scholarship is represented by Fundamental Research. To be fundamental (and therefore truly scholarly) the work must be informed by the social sciences, philosophy, linguistics or political theory. It must reject code, case and statute as the basis and exclusive subject matter of analysis. Not only does this view suggest that support from other disciplines is needed to make law "a plausible undertaking", but it risks legal scholarship becoming "the playpit for the unattended urchins of other

²⁹ *Supra* note 1, at 157-60.

³⁰ *Id.* at 135-36.

³¹ Trakman, *Law and Learning* (1983), 21 Osgoode Hall L.J. 554 at 560.

disciplines. ³² Moreover, it suggests that all else is decidedly second-rate, scarcely worthy of place in a university. Other forms of scholarship are presented as the summer fancy of the too-soon-promoted, undereducated and uncommitted.

For these reasons, I accept the union's argument that management has, by implication, denigrated doctrinal and theoretical work and that, at least in the case of works of the quality of Sharpe and Waddams, it has done so unfairly. However, I also accept management's claim that such implication was unintended and results from an overenthusiasm for promoting the ideal and the unexplored. The appropriate remedy is for management to issue and publish clarifying statements in accordance with submissions that it made in these proceedings and I so order.

³² *Supra* note 28.

