

1970

Annual Survey of Canadian Law: Part 1, Civil Procedure

Garry D. Watson

Osgoode Hall Law School of York University, gwatson@osgoode.yorku.ca

John M. Barber

Source Publication:

Ottawa Law Review. Volume 4, Number 1 (1970), p. 132-175.

Follow this and additional works at: https://digitalcommons.osgoode.yorku.ca/scholarly_works



This work is licensed under a [Creative Commons Attribution-NonCommercial-No Derivative Works 4.0 License](#).

Recommended Citation

Watson, Garry D., and John M. Barber. "Annual Survey of Canadian Law: Part 1, Civil Procedure." *Ottawa Law Review* 4.1 (1970): 132-175.

This Article is brought to you for free and open access by the Faculty Scholarship at Osgoode Digital Commons. It has been accepted for inclusion in Articles & Book Chapters by an authorized administrator of Osgoode Digital Commons.

ANNUAL SURVEY OF CANADIAN LAW

PART 1

CIVIL PROCEDURE

Garry D. Watson*

John M. Barber**

I. INTRODUCTION

In view of the breadth of the subject, we have not attempted to cover all of the recent cases or developments in the field of civil procedure. Rather, we have selected a number of specific topics and attempted to develop them in as full and as critical a manner as a survey of this nature will permit. We have tried to select areas on the basis of their general importance or current interest; however, we have omitted from discussion areas with perhaps as great a claim to coverage as some we have included.¹

Our main reason for selecting specific areas and attempting to discuss them critically and in somewhat more depth than would normally be the case in a survey article is the dearth of critical literature in the field in Canada. Civil procedure must surely be one of the most neglected fields of legal scholarship in this country.² Perhaps the recent tendency to an increase in

*LL.B., 1962, University of Melbourne; LL.M., 1966, Yale University. Associate Professor of Law, Osgoode Hall Law School.

**B.S.A., 1959, University of Toronto; LL.B., 1962, Osgoode Hall; LL.M., 1966, Yale University. Associate Professor of Law, Osgoode Hall Law School.

¹ For instance there have been a number of interesting cases involving Statutes of Limitations, e.g., *Dill v. Alves*, [1968] 1 Ont. 58; *Chretien v. Herrman*, [1969] 2 Ont. 339; *Dietrich Collins Equip. Ltd. v. Ed Huss Logging Co.*, 5 D.L.R.3d 87 (B.C. Sup. Ct. 1969)—all covering problems of amendment after the expiration of the limitation period. *Simpson v. Saskatchewan Gov't Ins. Office*, 65 D.L.R.2d 324 (Sask. 1967), and *Cook v. Szott*, 68 D.L.R.2d 723 (Alta. 1968)—two interesting decisions on renewal *post diem* of writs and statements of claim. *Schwebel v. Telekes*, [1967] 1 Ont. 541, and *Long v. Western Propeller Co.*, 67 D.L.R.2d 345 (Man. 1968)—dealing with the question of when a cause of action arises for the purposes of the limitation period. See also *Heppel v. Stewart*, [1968] Sup. Ct. 707, 69 D.L.R.2d 88, holding that the limitation period in the Highway Traffic Act, ONT. REV. STAT. c. 172, § 147(1) (1960), applies to an action against the repairman whose faulty work on brakes resulted in the motor vehicle causing damages. This holding left the plaintiff in an unfortunate position as she was not apprised of the faulty repair until the delivery of the statement of defence two days after the expiration of the limitation period.

² However, recently, we have seen what is for Canada almost a flood of writings relating to civil procedure, e.g., Haines, *Criminal and Civil Jury Charges*, 46 CAN. B. REV. 48 (1968); Haines, *The Future of the Civil Jury*, in *STUDIES IN CANADIAN TORT LAW* 10 (A. Linden ed. 1968); HOLMESTED & GALE, *ONTARIO JUDICATURE ACT & RULES OF PRACTICE* (W. Hemmerick ed. 1968); WILLISTON & ROLLS, *THE LAW OF CIVIL PROCEDURE* (1970).

the number of full-time academics teaching the subject may in the future change this.

II. SERVICE OF PROCESS IN DIVORCE ACTIONS

One of the basic tenets in any scheme of procedure based on the principles of due process is that all parties directly affected by the legal proceeding should be given notice of it, and given an opportunity to present their case. In most matters, personal service can be effected with little difficulty, and in the cases where the party who must be served evades service, an order for substituted service can be obtained by presenting evidence of evasion. The problem is much more acute, however, when the party who must be served has disappeared and cannot be traced. In such a situation, we must either compromise the defendant's right to notice or take away the plaintiff's right of action under the substantive law. This issue has been raised graphically by four recent cases dealing with service of process in divorce proceedings under the Divorce Act, 1968.³ In all of these cases a wife was petitioning for a divorce following desertion by her husband and his subsequent disappearance. Although not all of the cases specify the section of the Divorce Act under which the wife was proceeding, it seems likely that all were petitioning on the ground of their husbands' disappearance for over three years.⁴

Since the wording of section 4(1)(c) of the Divorce Act explicitly makes the disappearance of the spouse and the petitioner's inability to find him a ground for divorce, it is somewhat difficult to understand how the question of personally serving such an absent spouse could arise. Inability to find the absent spouse being a prerequisite to a divorce under this section would seem to imply that personal service is unnecessary, since it is by definition impossible. The problem arose in September, 1968. Mr. Justice Stewart of the Ontario High Court ruled, in *McAdams v. McAdams*,⁵ that a woman who had been deserted by her husband in 1948 and had been unable to locate him since 1949 could not have him served substitutionally. Justice Stewart held that to obtain an order for substituted service the applicant must show that there was some reasonable prospect that the material being served would come to the attention of the person being served. Since,

³ Can. Stat. 1967-68 c. 24.

⁴ *Id.* § 4(1)(c) which reads:

In addition to the grounds specified in section 3, and subject to section 5, a petition for divorce may be presented to a court by a husband or wife where the husband and wife are living separate and apart, on the ground that there has been a permanent breakdown of their marriage by reason of one or more of the following circumstances as specified in the petition, namely:

...
(c) the petitioner, for a period of not less than three years immediately preceding the presentation of the petition, has had no knowledge of or information as to the whereabouts of the respondent and, throughout that period, has been unable to locate the respondent.

⁵ [1968] 2 Ont. 784, 70 D.L.R.2d 582 (High Ct.).

on the facts of the case,⁶ there was no method of substituted service which offered any reasonable prospect of giving notice, the judge held that he could not make the order. He took the position that he was unable to dispense with the service because rule 792 of the Matrimonial Rules provided specifically for dispensing with service only in the case of a respondent *other than the respondent spouse*.⁷ He held that by making a specific rule for dispensing with service and exempting the respondent spouse from its provisions the rules committee had said in effect that there was no power to dispense with service upon a respondent spouse though he may have vanished many years ago. Having found that he could neither dispense with service nor order substituted service, the judge adjourned the application *sine die* pending the availability of further information as to the whereabouts of the absent spouse. Because of the circumstances of the case,⁸ it is clear that the effect of this ruling was to dismiss the petitioner's divorce petition.

In October, 1968, the ruling in *McAdams* was disapproved by another Ontario High Court judge in *Sutt v. Sutt*.⁹ In this case, Justice Parker took the position that a petitioner should not be prevented from obtaining relief because she could not locate her husband in order to serve him with process. He found that the legislature, by permitting a divorce on the basis of the disappearance of the spouse for three years, contemplated the granting of relief in situations of this kind and that this intention of the legislature was sufficient to provide for an exception to the general rule that substitutional service should not be ordered unless there is some reasonable prospect of the service coming to the attention of the person to be served. In fact he was prepared to make an order even if there was no possibility that the respondent would be notified. In view of the conflict between his view and that expressed by Stewart in *McAdams*, Justice Parker referred the case to the Court of Appeal pursuant to section 32 of the Judicature Act¹⁰ to resolve the conflict and make the appropriate order. The Court of Appeal¹¹ held that an order for substituted service should be made.

In making the order, the Court of Appeal took the position that a procedural rule should not be interpreted to frustrate the purpose of the substantive law, which in this case gave the petitioner a right to a divorce. The court was sympathetic to the wife's position, and generally unsympathetic to the claim of the respondent spouse with regards to notice of the pro-

⁶ *Id.* at 784, 70 D.L.R.2d at 582. Not only had the wife not heard from him since 1949, no member of his family—all of whom the wife had contacted—knew of his whereabouts.

⁷ Ont. Reg. 156/68, § 17, rule 792 which reads: "A judge may dispense with service of the notice of petition and other documents on a respondent, other than the respondent spouse, who cannot be found if no claim is made against him, or if made, is abandoned."

⁸ *Supra* note 6.

⁹ [1968] 2 Ont. 786, 70 D.L.R.2d 584 (High Ct.).

¹⁰ ONT. REV. STAT. c. 19, § 32(1) (1960) which provides that "[i]f a judge deems a decision previously given to be wrong and of sufficient importance to be considered in a higher court, he may refer the case before him to the Court of Appeal."

¹¹ 2 D.L.R.3d 33 (Ont. 1968).

ceedings in cases where he had deserted and disappeared. However, the majority were not prepared to support the suggestion of the judge of first instance that substitutional service should be ordered even in situations where there was no possibility that notice of the petition would come to the attention of the respondent. Rather, the Court of Appeal held that the mode of service ordered must "render it reasonably *possible* rather than reasonably *probable* that service so effected would bring knowledge of the proceedings to the respondent spouse."¹² Unfortunately, the court gave no satisfactory indication of when, if ever, substituted service would be denied under this standard. They, therefore, left the matter open so that in subsequent cases courts may feel obliged to deny an order for substituted service on the ground that the chances of notice coming to the attention of the respondent are so remote as to make it less than "reasonably possible" that he would be notified.

In a concurring judgment, Mr. Justice Jessup held that there were no circumstances in which the court can ultimately decline to make an order for substitutional service of a petition founded on section 4(1)(c) of the Divorce Act and that the mode of service selected should be the one offering the best possibility of notice of the proceedings to the respondent. This solution would have ensured that no petitioner would be denied a divorce simply because his spouse had disappeared. However, the majority decision has left the matter in doubt.

While the decision of the Court of Appeal resolved the particular problem of the petitioner in *Sutt v. Sutt*, the solution is still far from satisfactory. One can only speculate on how the majority opinion of the court will be applied in situations such as the one dealt with by the British Columbia court in *Myers v. Myers*.¹³ There the respondent had deserted the petitioner after only three months of marriage and at the same time he deserted the army. A number of factors made it impossible to select any method of service which would bring the proceedings to the attention of the respondent. Twenty-eight years had passed since the desertion. An army deserter, as much as anyone, seems likely to stay away from areas where he might be known, and thus, he is no more likely to be in one city or town in North America than any other. The British Columbia court resolved the problem by ordering substituted service by posting a sealed copy of the petition in the main post office in the city where the couple had been married. In Ontario, it seems likely that such an order, or any order for substituted service in such a case, would be difficult to obtain because of the requirement laid down by the Court of Appeal that the mode of service employed must make it reasonably possible that the respondent will be notified. In this situation, no mode of service, except perhaps advertising on national radio or television, would make it reasonably possible for the respondent to be notified. Thus, if the reasoning of the Ontario court were to be applied, it is quite possible that a petitioner such as Mrs. Myers would be denied a divorce.

¹² *Id.* at 41 (emphasis added).

¹³ 65 W.W.R. (n.s.) 575, 70 D.L.R.2d 586 (B.C. Sup. Ct. 1968).

Although the *Myers* decision resolved the problem of that particular wife, it must be clear to all who were involved in the case that the procedure adopted was a meaningless formality.¹⁴ Such procedures not only delay the proceedings while the petitioner awaits an answer which will never come, but they are the sort of procedure which makes the legal process a subject of derision. Surely, this case will make clear to the procedural rule-makers of the country¹⁵ the need to give serious consideration to promulgating a rule, similar to that existing in the United Kingdom,¹⁶ which will specifically permit the court to dispense with service in cases similar to *Myers*. Such a rule will avoid annoying delays, the wasting of money on futile advertising and at the same time have the advantage of a realistic and honest way of dealing with the situation where the respondent has disappeared.

The onerous burden of the expense of substituted service received attention in the British Columbia case of *Watts v. Watts*.¹⁷ In arriving at his

¹⁴In *Watts v. Watts*, 66 W.W.R. (n.s.) 233, 70 D.L.R.2d 621 (B.C. Sup. Ct. 1968), Mr. Justice Aikins described the ordering of substituted service in such circumstances as the making of "what really is no more than a *pro forma* order with no real expectation that it will be effective." *Id.* at 234, 70 D.L.R.2d at 622.

¹⁵Under the Divorce Act of 1968, a general rule-making power is given to the superior courts of each province and to the Exchequer Court, *see* Can. Stat. 1967-68 c. 24, § 19(1) and § 2(e) and (f). Notwithstanding this grant, § 19(2) provides that the "Governor in Council may make such regulations as he considers proper to assure uniformity in the rules of court made under this Act" and that when made such regulations prevail over rules made by the courts under § 19(1). The provision of a power in the courts to dispense with service in appropriate cases could thus be achieved, it would seem, by the Governor in Council exercising this power.

¹⁶U.K. MATRIMONIAL CAUSES R. 14(10) (1968) states: "Where it appears necessary or expedient to do so—(a) a judge may by order dispense with service of a copy of a petition on a respondent spouse, . . ."

A similar power to dispense with service was contained in the U.K. MATRIMONIAL CAUSES R. 9(5) (1957). The cases under this earlier provision are collected in 2 THE SUP. CT. P. § 1648 (1967).

The need for a rule of this nature becomes even more apparent when one observes that the basis of the Ontario Court of Appeal's "liberal" approach to substituted service (the normal rule is that there must be a reasonable probability of the substituted service coming to the attention of the defendant or respondent, *see* *Sutt v. Sutt*, [1968] 2 Ont. 786, at 787, 70 D.L.R.2d 584, at 585) in *Sutt* seemed to turn on the fact that the ground relied on by the petitioner was § 4(1)(c) of the Divorce Act—ignorance of knowledge or information of the whereabouts of the respondent for the last three years. *See* 2 D.L.R.3d 33, at 40 (Ont. 1968) (per Schroeder) and at 42 (per Jessup). It is far from clear that the court was directing that the normal rule could be relaxed in *all* divorce cases. Yet the types of problems encountered in the cases discussed in the text are not peculiar to the situation where the petition is founded on § 4(1)(c) of the Divorce Act. For example, how would an Ontario court deal with the situation of a petitioner who deserted her spouse six years ago (*see* § 4(1)(e)) but has not known of his whereabouts for the last two years, or that of a petitioner whose husband committed adultery (*see* § 3(a)) six months ago and has since disappeared? To enable such petitioners to avail themselves of the substantive provisions of the Divorce Act of 1968, power should be granted to the courts to dispense with service where it appears necessary or expedient to do so.

¹⁷66 W.W.R. (n.s.) 233, at 235, 70 D.L.R.2d 621, at 622 (B.C. Sup. Ct. 1968). Mr. Justice Aikins documents in some detail the cost of newspaper advertising in several provincial capitals. Apparently, the cost could range from twenty-five dollars to 150 dollars depending on the city and the number of successive advertisements

decision in that case, the judge took into account the high cost of advertising in large metropolitan newspapers—as high as nine dollars and seventy-five cents per inch of space in the *Toronto Star*—and ordered publication of a relatively abbreviated notice.¹⁸ Even with an abbreviated notice, the cost in most metropolitan newspapers will be in excess of twenty dollars per entry. Also, a single entry is only remotely likely to come to the respondent's notice. The English courts have been hesitant to dispense with service in cases where the petitioner was financially unable to bear the cost of service.¹⁹ But surely such an approach fails to give sufficient weight to the fact that the cost of newspaper advertisements may alone prohibit many from obtaining a divorce.²⁰ Dispensing with substituted service is admittedly not a panacea for the overall problem of the expense of divorce proceedings, but it would at least remove some barriers for those seeking relief.

The rule-makers should also direct their attention to the forms of relief to be granted on a petition which has not been personally served on the respondent. Regarding the relief of divorce itself, it is unlikely that a deserting spouse will have any objections to a divorce which is worthy of serious consideration. In fact, we can probably assume he or she will not oppose a divorce decree being obtained where there has been separation without contact for three years. Lack of personal service should not be a weighty consideration where the petitioning spouse satisfies the court that there has been long term desertion without contact.²¹

A somewhat more difficult problem is posed by the related issues of custody and support, where the petitioner makes a claim for either in the action. But here again, if the respondent spouse has been out of contact with the children for three years there is probably little harm in making a

ordered. The abbreviated notice ordered in this case—to be published in the weekend editions of two Toronto newspapers—would cost approximately sixty dollars.

¹⁸ The parties had married in Toronto in 1955 and the petitioner had last seen her husband there in 1961. Since then his whereabouts were unknown. On the ground that there was no indication that he had left Toronto, the judge ordered service by newspaper advertisement there, refusing the requested order for service by posting the petition on a notice board in the district registry office in Vancouver.

¹⁹ See *Weighman v. Weighman*, [1947] 2 All E.R. 852 (C.A.).

²⁰ However, in Ontario the legal aid plan will, where necessary, meet the cost of substituted service in divorce cases. Pursuant to the discretion given by Ont. Reg. 257/69, Schedule 6(ix), the director and legal accounts office approve average amounts of seventy to ninety dollars for this disbursement, though amounts as high as 150 to 200 dollars have been approved.

²¹ Satisfying the court on this point could be a difficult and expensive process depending on the standard set by the court. If the court accepts an affidavit by the spouse specifically denying knowledge of the absent spouse and outlining the steps taken to contact that spouse, obtaining an order would be relatively simple. If the court is concerned that a spouse who is anxious to obtain a divorce may swear to a false affidavit, evidence of a private investigator would make fraud less likely, but would also increase the cost of obtaining the order, perhaps even to a point where it would be as expensive as placing an advertisement. A preferable approach might be to require an affidavit from the wife together with an affidavit by the lawyer setting out that he has to the best of his ability satisfied himself that the contents of the affidavit of the petitioner are accurate.

custody order without service. In any event, the custody order can be varied or rescinded by the court on the application of the absent spouse should he return.²²

The question of maintenance is a more complex one. It is unlikely that most wives will be concerned with obtaining a maintenance order against someone whom they are unable to locate. There may be other wives, however, who wish to obtain a maintenance order which can be used against the spouse in the event he returns. The threat of an order which has accumulated into a large amount over a long period of time could be a serious consideration for someone who has acquired a considerable amount of property during his period of absence. The most sensible approach to this type of situation would be to make it clear in the legislation and the matrimonial rules that an application for maintenance can, in such circumstances, be made in the action at any time following the decree nisi.²³ If this were coupled with an amendment clearly empowering the court to make a lump-sum payment to compensate the wife for any disparity between her income and that of her husband during the period of his absence,²⁴ any incentive a wife may have for taking *ex parte* maintenance proceedings at the time of the divorce would be removed. Such amendments would avoid the possibility that a respondent might be faced with an accumulated maintenance order about which he was never informed. It seems preferable that the matter of maintenance only be considered when there is at least a reasonable probability

²² Can. Stat. 1967-68 c. 24, § 11(2).

²³ *Id.* § 11(1). At the present time there is some doubt, on the strict wording of the various provisions, whether an application for maintenance can be made after the divorce has been granted. The act, *id.* § 11(1), provides: "Upon granting a decree nisi of divorce, the court may, if it thinks fit and just to do so having regard to the conduct of the parties and the condition, means and other circumstances of each of them, make one or more of the following orders, namely: . . ." (emphasis added). The § then sets out the forms of maintenance and custody orders which can be made. The problem of when the application for maintenance can be made turns on the interpretation of the word "upon." It seems likely that a court would interpret the word broadly and permit an application after the divorce decree. This is in keeping with the earlier case law which has generally permitted applications after the divorce decree. See, e.g., *Oliver v. Oliver*, 42 W.W.R. (n.s.) 634 (B.C. Sup. Ct. 1963); *Simmonds v. Simmonds*, [1955] 2 All E.R. 481 (Divorce Ct.); *Fisher v. Fisher*, [1942] 1 All. E.R. 438 (C.A.). However, to remove all doubts, it would be desirable to clarify the point by specifically spelling out in the § that an application for maintenance can be made at any time following the decree nisi. It might perhaps be desirable to require leave for late application as is the case in England. See U.K. MATRIMONIAL CAUSES R. 3(3) (1957), 2 THE SUP. CT. P. § 1635 (1967). See also rule 44(1), *id.* at § 1691 which permits the application at any time. However, in a recent decision interpreting the meaning of the words "upon granting a decree nisi," a British Columbia court held that because of this wording it had no jurisdiction to make a maintenance order to take effect at some indefinite future date. *Todd v. Todd*, 5 D.L.R.3d 92 (B.C. Sup. Ct., Local Ct. Judge, 1969). Because of the peculiar facts of the case (the wife had supported herself without help for ten years) and because the judge did not refer to any of the earlier English or Canadian jurisprudence on the matter, a different interpretation would still seem to be open in a different jurisdiction.

²⁴ This could occur when the deserted wife, left alone with several children, is forced to live on welfare while the absent husband is earning, or she believes he may be earning, a considerable income.

that the proceedings will come to his attention.

III. THIRD-PARTY PRACTICE

Third-party practice is the procedural device whereby a party to an action may bring in an additional party and claim against such party because of the claim that is being asserted in the action against the original party.²⁵ The reasons behind the practice are a combination of fairness to the (original) defendant, fairness to the third party and efficient and sound administration of justice. Great drawbacks characterized the old common-law procedure which required the defendants to assert any claims over against third parties arising out of the defendant's liability to the plaintiff in a later, separate action. The principle of *res judicata* (a judgment is finally binding only on those who were parties thereto and had an opportunity to be heard on the issues decided) applicable to *in personam* actions, while a necessary and just one, placed the defendant in an unfortunate if not invidious position. Since the third party was not a party to the original action between the plaintiff and defendant, he was not bound by the determination in that action. Consequently, in the second action, the defendant was frequently put to the trouble and expense of again proving matters already determined in the original action with the ever present possibility of embarrassment to the defendant and to the legal system because the findings in the original and in the later action might differ.²⁶ Further, this mode of proceeding could leave the defendant in the position of having to wait a considerable time before finally establishing his claim against the third party, while all the time the plaintiff's judgment was enforceable against him.²⁷ Moreover, in requiring this duplicity of actions, the procedure was expensive for the defendant and for the legal system.²⁸

It was with the object of overcoming these draw-backs of the common-law procedure that the first *Report* of the Royal Commissioners in England laid the foundation for modern third-party practice. They recommended that "where the defendant is or claims to be entitled to contribution or to indemnity or other relief over against any other person or persons, or where from any other cause it shall appear to the court fit that a question in the suit should be determined not only as between the plaintiff and defendant, and any other person, the court should have power to make such order as may be proper for the purpose of having the question so determined."²⁹

²⁵ J. MOORE, FEDERAL PRACTICE § 14-02[1] (1950-1968).

²⁶ *Barclays Bank v. Tom*, [1923] 1 K.B. 221, at 224 (C.A. 1922); *Pollington v. Cheeseman*, 23 Ont. W.R. 639, at 640 (High Ct. Chambers 1912); *Hall (Western) Associates Ltd. v. Trident Constr. Ltd.*, 65 W.W.R. (n.s.) 415, at 417, 69 D.L.R.2d 495, at 496 (Man. 1968).

²⁷ *Barclays Bank v. Tom*, [1923] 1 K.B. at 224.

²⁸ *Id.*; *Hall (Western) Associates Ltd. v. Trident Constr. Ltd.*, 65 W.W.R. (n.s.) at 417, 69 D.L.R.2d at 496.

²⁹ THE ROYAL COMMISSIONER REPORTS (1867-1874), FIRST REPORT OF THE COMMISSIONERS 12 (1869), cited in, Cohen, *Impleader: Enforcement of Defendants'*

The common feature of third-party practice which spread through the common-law world following this recommendation³⁰ is that in cases where the procedure is available, the defendant may join the third party as a party to the action between himself and the plaintiff. The third party is then given the right to defend the plaintiff's action against the defendant and if the plaintiff succeeds, and the defendant establishes his claim against the third party, the defendant will obtain a judgment against the third party in the same action as he suffers judgment in the plaintiff's favour.

In Ontario, a perennial problem of third-party practice has been the scope of its availability. The rules of practice of that province permit the issuance of a third-party notice whenever the defendant claims to be entitled to "contribution or indemnity from or any other relief over against any person not a party to the action."³¹ The type of claims that are to be included under the heading "contribution or indemnity" has caused relatively few problems.³² However, the term "any other relief over" has been the source of a great deal of litigation, restrictive interpretation and uncertainty. Despite the fact that the courts have often stated that the rule is remedial and should receive a liberal interpretation,³³ qualifications have been placed upon it. The result has been that third-party proceedings were rejected in many cases in which the theory of third-party procedure would seem to indicate clearly that it could be used. The qualifications have been numerous.³⁴ The right to serve a third-party notice has been refused where the defendant's right of action against the third party was technically independent of the outcome of the plaintiff's action, even though the defendant sought by third-party action to recover compensation for the damages he might have to pay the plaintiff. For example, in *Mitx v. Eastern & Chartered Trust Co.*, where the plaintiff's action was brought against a defendant occupier for negligence respecting injuries suffered when she slipped on a rug in the defendant's premises, the defendant was denied the right to join as a third party the company with whom the defendant had a contract for supply and maintenance of the rug. The ground for this refusal was that, technically, the defendant could pursue its claim against the third party for breach of contract regardless

Rights Against Third Parties, 33 COLUM. L. REV. 1147, at 1169-70 (1933). For a historical summary of the English and Ontario third-party practice rules indicating the extent to which the Royal Commissioners' recommendations were implemented, see *id.* at 1169-76 and 1182-85; HOLMESTED & LANGTON'S, ONTARIO JUDICATURE ACT & RULES OF PRACTICE 740-56 (5th ed. D. MacRae 1940), and 2 HOLMESTED & GALE, ONTARIO JUDICATURE ACT & RULES OF PRACTICE rule 167, §§ 1, 3 & 59 (W. Hemmerick ed. 1968).

³⁰ Cohen, *supra* note 29, documents the development of the practice in England, the United States and the Commonwealth.

³¹ ONT. R.P. 167(1).

³² See 2 HOLMESTED & GALE, ONTARIO JUDICATURE ACT & RULES OF PRACTICE rule 167, §§ 2, 14 & 51 (W. Hemmerick ed. 1968).

³³ *E.g.*, *Swale v. C.P.R.*, 25 Ont. L.R. 492, at 505 (Div. Ct. 1912). See also 2 HOLMESTED & GALE, *supra* note 32, rule 167, § 7.

³⁴ For a full listing and discussion of all the qualifications see 2 HOLMESTED & GALE, *supra* note 2, rule 167, §§ 59-74.

of the success of the plaintiff's claim.³⁵ The past cases have also held that there must be an equivalence in the measure of damages in the two actions, or as it has sometimes been stated, that the same principle for assessing damage must be applicable to both the main action and the third-party proceeding.³⁶ Further, it was held, *inter alia*, in *Drabik v. Harris*,³⁷ that an action for deceit could not be the subject of third-party proceedings.

Such restrictive qualifications create problems for defendants. When third-party procedures are denied to them, they are left subject to all of the hazards and drawbacks of the former common-law procedure. In at least some of the recent cases, the Ontario courts, evidencing concern for this problem, have extended the scope of this procedure.

In *Clarkson Co. v. Kapp*,³⁸ the Court of Appeal permitted a claim for relief over based on deceit. The claim of the plaintiff against the defendant in the case was for the recovery of dividends paid out of capital,³⁹ and the defendant directors sought relief over against their company's accountants on the ground, *inter alia*, that the accountants had fraudulently represented that there was a surplus on hand for distribution. In permitting this claim to be asserted by third-party proceedings, Mr. Justice Schroeder distinguished *Drabik* as a "decision on its own peculiar facts."⁴⁰ He held that the third-party action was appropriate here since the claim for relief over was "not independent of the result of the plaintiff's action; that if the plaintiff's action against the defendants should fail, the defendants' claim against the third party would be thereby defeated; and in any event the measure of damages as between the plaintiff and defendants is the same as between the defendants and the third party."⁴¹

In the subsequent case of *Allan v. Bushnell T.V. Co.*,⁴² Mr. Justice Laskin delivered the judgment of the Court of Appeal. He dealt in a more forthright manner with the question of restrictions on the availability of the procedure and showed a determination to broaden its availability and to clarify exactly when it may be used. In that case, the main action was one for libel arising out of a television news broadcast, and the defendant broadcasting company served a third-party notice. By this notice, they claimed relief over against the company which had supplied the news dispatch upon which the broadcast had been based, alleging that it was an implied term of the contract between them that the dispatches would contain

³⁵ [1966] 1 Ont. 1 (York County Ct. 1965).

³⁶ See *Drabik v. Harris*, [1955] Ont. W.N. 590, at 591-92 and cases there cited. See also 2 HOLMESTED & GALE, *supra* note 32, rule 167, §§ 62-63.

³⁷ *Supra* note 36. See also *McGlade v. Pashnitzky*, 50 Ont. L.R. 547 (1921).

³⁸ [1967] 1 Ont. 592.

³⁹ Contrary to The Corporations Act, ONT. REV. STAT. c. 71, § 67(3) (1960).

⁴⁰ [1967] 1 Ont. at 593.

⁴¹ *Id.* at 594 (emphasis added). In a subsequent case, *Atlantic Acceptance Corp. v. Zaborsky*, [1968] 2 Ont. 273 (High Ct.), the defendant, who was sued as the maker of a promissory note, was permitted to maintain a third-party action alleging fraudulent alteration of the note. Mr. Justice Donohue considered the third-party action to be one for deceit, and, in allowing it, he relied, *inter alia*, on the *Clarkson* case.

⁴² [1968] 1 Ont. 720.

only accurate information and would not expose the defendant to libel suits.⁴³ In permitting the third-party proceedings, Laskin rejected from the outset objections that such proceedings were inappropriate in a libel action, and that the main action and the third-party issue were founded upon different causes of action. On the latter point, he ruled that there was no requirement that there be a similarity in the form of action in the two proceedings. More important, however, he held that an equivalence in the measure of damages could no longer be demanded as a prerequisite to the permissibility of third-party proceedings. He acknowledged that cases such as *Drabik v. Harris*⁴⁴ and *Miller v. Sarnia Gas & Electric Co.*⁴⁵ had made this a prerequisite, but he rejected this as an impermissible gloss on rule 167. He then went on to state his view as to what was essential to a claim "for relief over" by way of third-party proceedings:

What, in my view, is central to resort to third party proceedings is that the facts upon which the plaintiff relies against the defendant should issue out of the relations between the defendant and the third party. I prefer this mode of expression to statements in the cases that there must be a common question or common questions between the plaintiff and the defendant and between the defendant and the third party. Since the "relief over" of which Rule 167 speaks means relief over in respect of the plaintiff's claim (see *Dipasquale et al v. Muscatello*, [1955] O.W.N. 1001 at p. 1004), there must be a connection of fact or subject-matter between the cause of action upon which the plaintiff sued and the claim of the defendant for redress against the third party; and, such claim would ordinarily arise out of relations between the defendant and the third party anterior to those between the plaintiff and the defendant which precipitated the main action.⁴⁶

Not all the recent Ontario cases, however, have helped to expand the availability of third-party procedure.⁴⁷ Two cases concerning attempted third-party proceedings to recover indemnity under insurance policies represent a backward step. The issue in these cases was the effect to be given to clauses in the insurance policies which purported to deny the defendant the right to institute an action against the insurer prior to the insured defendant himself suffering judgment. As early as 1912, Mr. Justice Middleton in *Pollington v. Cheeseman*⁴⁸ refused to interpret the clause in such a way as to take away the defendant's right to join the insurer as a third party. He pointed out that to permit such a clause to oust the third-party procedure would be to frustrate the principal policies of the practice: the securing of

⁴³ *Id.* at 721.

⁴⁴ [1955] Ont. W.N. 590.

⁴⁵ 2 Ont. L.R. 546 (Chambers 1900).

⁴⁶ [1968] 1 Ont. 720, at 723.

⁴⁷ Another case, in addition to those discussed above in the text, extending the availability of third-party procedure was *Slesar v. W. Funk Builders Ltd.*, [1968] 2 Ont. 594 (High Ct.). There, Mr. Justice Stark held, on a matter of first impression in Ontario, that the plaintiffs as defendants by counterclaim could issue a third-party notice.

⁴⁸ 4 Ont. W.N. 410, 23 Ont. W.R. 639, 8 D.L.R. 142 (High Ct. Chambers 1912).

one trial and one trial only of the issue between the plaintiff and the defendant and the removal of the possibility of inconsistent findings. However, in *International Formed Tubes Ltd. v. Ohio Crankshaft Co.*⁴⁹ the Court of Appeal refused to follow *Pollington*⁵⁰ and gave full effect to a provision in the insurance policy which expressly deprived the insured of the right to join "the company as a party to any action against the insured to determine the insured's liability." Subsequently, in *Duff v. Perkins*,⁵¹ the Senior Master⁵² interpreted *International Formed Tubes* as authority for forbidding the use of third-party procedure where the insurance policy, while not expressly forbidding third-party proceedings against the insurer, set up as a precondition to an action against the insurer the final determination of the insured's obligation to pay "by judgment against the insured after actual trial." The impact of this judgment will be considerable because the clause under consideration in that case is a statutory condition in automobile insurance policies in Ontario.⁵³

Manitoba has recently seen an extension of the availability of third-party procedure. In *Hall Associates (Western) Ltd. v. Trident Construction Ltd.*,⁵⁴ the Court of Appeal of that province held the procedure was available in a mechanics' lien action. The case involved a claim for 16,000 dollars by a subcontractor against the owner and the general contractor for certain work he had done. The general contractor contended that the work for which the plaintiff claimed was condemned by the architect and that as required by the owner, the general contractor had himself redone the work at a cost of 7,500 dollars. The plaintiff took the position that the work had been improperly condemned. To safeguard itself in case the plaintiff's position was correct, the general contractor served a third-party notice on the owner claiming indemnity to the extent of the plaintiff's claim. Over the objection of the owner, Mr. Justice Freedman, writing the majority opinion, held that section 57 of the Mechanics' Liens Act⁵⁵ of Manitoba authorized such a procedure. That section provides that the practice and procedure of the Court of Queen's Bench, which itself encompasses third-party practice, may be adopted and applied in any case not satisfactorily covered by the procedure provided for by the act. Freedman felt that this was a case where it was highly desirable for the two closely related claims to be adjudicated in a single action. To avoid a multiplicity of actions and the possible embarrassment of discordant findings, section 57 should be read as authorizing third-party procedure. In so holding, Freedman overruled an earlier Mani-

⁴⁹ [1965] 2 Ont. 240, 50 D.L.R.2d 214.

⁵⁰ Instead they preferred and followed the decision in *Piper v. Spence*, [1925] 1 W.W.R. 521, [1925] 1 D.L.R. 334 (Man. K.B. Chambers 1924).

⁵¹ [1968] 2 Ont. 1 (Master).

⁵² With some assistance from *Piper v. Spence*, *supra* note 50, which gave a similar effect to a clause identical to the one involved in *Duff v. Perkins*, *supra* note 51.

⁵³ The Insurance Act, ONT. REV. STAT. c. 190, § 203, statutory condition 10(2) (1960).

⁵⁴ 65 W.W.R. (n.s.) 415, 69 D.L.R.2d 495 (Man. 1968).

⁵⁵ MAN. REV. STAT. c. 157 (1954).

toba case.⁵⁶ He also made reference to the fact that the position as to the availability of third-party procedure in a mechanics' lien action varies across the country, some provinces permitting it while others do not.⁵⁷ He concluded that the outcome in any province depended on the wording of the particular Mechanics' Lien Act, those provinces not permitting it, not having a section akin to Manitoba's section 57.

IV. DISCOVERY

Most of the recent cases in the general area of pre-trial discovery raise the same basic problem. How much information must be provided to the opposing litigant before the trial and how much can be held back by a lawyer and his client to be used at trial, or not used at trial, as they may determine? This issue of the extent of the disclosure to be required has arisen in a variety of contexts recently, but most frequently in cases involving the production of documents when privilege is claimed.

Whether the claim for privilege is based on the solicitor-client relationship, Crown privilege or on the ground that a communication was made "without prejudice," the underlying issue is essentially the same. What is to be the primary interest? Is preference to be given to securing full disclosure before trial in order to prevent surprise and to ensure the presentation of all available information to the court, or is it preferable to permit the party resisting the disclosure to withhold some information because of more important values which need to be safeguarded?

Despite many general statements in past years to the effect that the scope of discovery is expanding and that the courts are requiring fuller disclosure,⁵⁸ it is clear from a number of the cases decided in the past year that there is still a great deal of information which is exempted from disclosure. There is also some evidence that the areas of protection are being expanded. There are clearly two sides to the question of how much information should remain privileged. On the one hand, to compel disclosure intrudes on a litigant's right to privacy. Disclosure may interfere with the sound administration of justice by informing a litigant of a legitimate weakness in his case in time for him to buttress it with false evidence. In some cases, it may be argued that to require the disclosure of information concerning the operations of government is against the public interest.

On the other side of the question, surprise and the suppression of in-

⁵⁶ *Dell v. Callum*, 60 Man. 155, 6 W.W.R. (n.s.) 428 (County Ct. 1952).

⁵⁷ Third-party proceedings are not permitted in mechanics' lien actions in Ontario, *Simmons Bros. v. Lee*, [1948] Ont. W.N. 737 (Master), or in Saskatchewan, *A.P. Green Fire Brick Co. v. Interprovincial Steel Corp.*, 42 W.W.R. (n.s.) 497, 39 D.L.R.2d 692 (Sask. 1963). They are permitted in Alberta, *Olson Johnson Co. v. McLeod*, 25 West. L.R. 472, 13 D.L.R. 94 (Alta. Sup. Ct. Chambers 1913); and in British Columbia, third-party proceedings are specifically authorized by the Mechanics' Lien Act, B.C. REV. STAT. c. 238, § 30(1)(1960).

⁵⁸ *See, e.g., Brennan v. J. Posluns & Co.*, [1959] Ont. 22 (High Ct.).

formation which can distort and impede the flow of information to the court will be eliminated by disclosure before trial. The chance that a decision will be based on accurate facts is thereby increased.

However, the courts often seem to be extending protection to information because of an unstated, and at times perhaps unconscious, belief in a "sporting theory of justice" which conceives of a lawsuit as a battle for survival. The sharing of information is, on this theory, seen as being unfair to the litigant who has acquired the information and likely to undermine the process itself by encouraging the less diligent litigant to relax in the battle and rely on discovery to provide him with the necessary material to prepare his case.⁵⁹

If the protection of privilege is afforded to documents because of a carefully considered view that to request the production of such information would cause serious harm to an important relationship, then the value of full disclosure of information before the trial may have to be sacrificed. However, there is also high value in seeing that all information is before the court to ensure it will arrive at a fair approximation of the truth. Before protections are provided which impede the free flow of information, we should be very certain that the protection is vital to the safeguarding of an important interest. Unfortunately, the courts often put most of their emphasis on the need to protect communication, without seriously considering the detrimental effects of protecting this information. Generally, only the former of the two competing interests is thoroughly canvassed. Perhaps the best example of this phenomenon is in the case of solicitor-client privilege.

A. *Solicitor-Client Privilege*

During 1968, four income tax cases involving the solicitor-client privilege were decided by Canadian courts.⁶⁰ All of these cases arose as a result of the seizure of documents from a lawyer's office during an investigation of a client's affairs by the Department of National Revenue. In all cases, the documents for which solicitor-client privilege was claimed had come into existence in the course of the client obtaining advice as to his affairs for tax purposes. Since the solicitor-client protection afforded under section 126A(1)(e) of the Income Tax Act⁶¹ by definition corresponds to the right

⁵⁹ To some extent, this attitude can be traced to the widely held view that an individual is entitled to retain the fruits of his labour and that each man must ultimately rely on his own efforts in the battle for survival. Much of the carry over of this attitude to civil litigation is undoubtedly unconscious, but if first-year law students in civil procedure classes can be used as a representative group, the concern is great that someone may get a free ride and use the results of someone else's work to defeat the man who has done that work. The concern is frequently so great that it stifles consideration of the fact that the end result of this free ride would be that the finder of fact would be able to hear all of the facts available before arriving at a decision.

⁶⁰ *Goodman v. Minister of National Revenue*, [1968] 2 Ont. 814, 70 D.L.R.2d 670 (High Ct.); *Re Milner*, 66 W.W.R. (n.s.) 129, 70 D.L.R.2d 429 (B.C. Sup. Ct. Chambers 1968); *Re Evans & Banffshire Apartments Ltd.*, 70 D.L.R.2d 226 (B.C. Sup. Ct. 1968); *Re Sokolov*, 70 D.L.R.2d 325 (Man. Q.B. 1968).

⁶¹ CAN. REV. STAT. c. 148 (1952), as amended Can. Stat. 1956 c. 39, § 28. Section 126A(1)(e) defines "solicitor-client privilege," as "the right, if any, that a

provided in the superior courts of the province where the matter arose, the decisions are applicable to the whole range of civil litigation.

With three exceptions, the courts held that the solicitor-client privilege protected the documents from disclosure to the tax authorities where they had come into existence during the course of obtaining legal advice. The first exception involved allegations of fraudulent preferences to evade payment of tax, supported by an affidavit which outlined specific events tending to prove the alleged fraud. In such a case, an order to produce the documents was made.⁶² A mere allegation of fraud without specifics was held to be insufficient to compel production.⁶³

The second exception covered documents which were not created as part of communications to a lawyer, but rather as part of the normal affairs of the client. Even documents submitted to the lawyer to obtain his advice were held not to be protected.⁶⁴

The final exception in the above noted cases applied to documents which were communications between the lawyer and a third party, an accountant. The lawyer had not prepared the communication either for contemplated litigation or for litigation in process. Two of the cases deal with this situation, *Re Goodman*⁶⁵ and *Re Sokolov*.⁶⁶ In the former, the finding was that such communications are not privileged. In the latter, they were held to be privileged provided they were called into existence for submission by the client to his lawyer for advice. This last exception is then rather uncertain. In neither case did the judge examine the issues involved in detail, and since both cases were decided at about the same time, the judge in *Re Goodman* (the later of the two cases) apparently made his decision without referring to the *Re Sokolov* decision. It is then an open question as to whether this exception will be upheld in future cases. We have conflicting decisions on the question, neither of which is compelling in its reasoning.

Whatever the exceptions, the serious questions do not concern the nature and extent of exceptions to the solicitor-client privilege set out in these cases. Rather, what requires examination is the need for the privilege itself in this type of situation. With the exception of a very few documents which came into existence after court action was contemplated, all of the materials protected in these four cases came into existence when a client sought and obtained the advice of a lawyer to help him organize his business affairs for tax purposes. If the decision is made that there is a need for privacy

person has in a superior court in the province where the matter arises to refuse to disclose an oral or documentary communication on the ground that the communication is one passing between him and his lawyer in professional confidence." However, for the purposes of this §, an accounting record of a lawyer, including any supporting voucher or cheque, shall be deemed not to be such a communication.

⁶² *Re Milner*, 66 W.W.R. (n.s.) 129, 70 D.L.R.2d 429 (B.C. Sup. Ct. Chambers 1968).

⁶³ *Goodman v. Minister of National Revenue*, *supra* note 60.

⁶⁴ *Re Evans & Banffshire Apartments Ltd.*, 70 D.L.R.2d 226 (B.C. Sup. Ct. 1968).

⁶⁵ *Goodman v. Minister of National Revenue*, *supra* note 60.

⁶⁶ 70 D.L.R.2d 325 (Man. Q.B. 1968).

when people discuss their business affairs with professional advisors, it is difficult to understand why the protection should be extended only to discussions with members of the legal profession, or, if *Re Sokolov* is to apply, to discussions with other professionals for submission to lawyers.

There is recent authority to the effect that there is no privilege in the case of communications between an accountant and his client when the tax planning is being done by an accountant.⁶⁷ This means, in effect, that an individual's business affairs are guaranteed privacy when they are communicated to a lawyer, but open to public scrutiny when communicated to an accountant. Such a position is difficult to defend on any logical basis. Is there a much higher value in obtaining advice from a lawyer than from an accountant, even to the extent that we must encourage clients to seek the counsel of lawyers by such incentives? A cynic might suggest that this anomalous result is actuated by a desire to keep other professionals out of the lawyers' territory. If we protect clients from disclosure when they communicate with lawyers to obtain advice, surely there can be no question of withholding the same protection when they communicate with other professionals to obtain similar advice.

A still more fundamental issue is raised by these cases. Why do we afford such paramountcy to the professional relationship of a solicitor and his client? Why protect communications between a lawyer and a client seeking assistance in ordering his affairs, and yet deny protection for communications with other professionals? There is unquestionably a value in encouraging people to order their affairs in accordance with the law. But it is difficult to defend the position that it is more important to society for the purpose of protecting communication from disclosure, that the communication be with legal advisors as opposed to with either a doctor or a psychiatrist. However, the courts seem prepared to extend a privilege to communications with lawyers, but not to communications with members of other professions⁶⁸ who normally deal with matters which are more personal in nature and which are of the utmost importance to the individual involved. It is time for a more critical appraisal of the situations in which solicitor-client privilege is essential to the administration of justice. Only in those cases where protection is essential should we be prepared to forego a full disclosure of the evidence.

⁶⁷ *Missiaen v. Minister of National Revenue*, 61 W.W.R. (n.s.) 375, 68 D. Tax Cas. 5039 (Alta. Sup. Ct. 1967).

⁶⁸ 2 ROYAL COMM'N INQUIRY INTO CIVIL RIGHTS, REPORT No. 1, at 821 (Ont. 1968). The Report states that only in Quebec is there a physician-patient privilege, CODE OF CIVIL PROCEDURES § 308 (Que. 1965), although in an unreported Ontario case, *Dembie v. Dembie*, Ontario High Court of Justice, April 6, 1963, it was held that a psychiatrist should not be compelled to testify about confidential communications between himself and his patient. The commission however recommended that no such protection should be afforded doctors or psychiatrists, *id.* at 823, 832.

In the recent judicial inquiry in Toronto into the behaviour of Judge Kurata, Mr. Justice Keith ordered a psychiatrist to give evidence of communications made to him during treatment following an alleged suicide. See *The Globe and Mail* (Toronto), March 23, 1969, at 4, col. 8.

There are strong arguments to be made for the privilege where the information sought is part of the process of obtaining advice in impending litigation. If a lawyer were required to produce such communications, it is likely that clients would less fully confide in their lawyers, thus hampering the lawyer in his preparation and reducing the effectiveness of the adversary system. It is also possible that individuals would not seek the assistance of lawyers in resolving disputes.⁶⁹ Both of these possibilities would have to be seriously considered before all solicitor-client communications were left unprotected. However, when no litigation is pending and the client has merely been seeking legal assistance in arranging his affairs, any protection seems unnecessary and potentially harmful. There is a substantial possibility that the ability of a court to ascertain the facts in the litigation will be hampered if such communications are protected. If communications are revealed, it is unlikely that clients will stop seeking legal advice. Clients do not seek legal advice because they anticipate future litigation but rather because they wish to avoid litigation. Thus, they will communicate freely with a lawyer to get the best possible advice. The threat that their communications may be revealed in future litigation is a possibility which is far too remote to affect communication. The interference will be minimal, and the improvement in the fact-finding process before the trial and at the trial may be substantial in a given case if the solicitor-client privilege is modified.

Recently, the English courts have extended the protection of solicitor-client privilege to communications with foreign lawyers in a situation where no litigation was contemplated.⁷⁰ Further, a British Columbia Supreme Court judge wrote a decision in 1968 which extended the protection into a new and more questionable area.⁷¹ In this case, an insured motorist sued his insurer claiming indemnity for damages awarded against him in an earlier action. In the earlier action, the insurer and the insured had been represented by the same firm of lawyers. The issue of the liability to indemnify arose early in the first action, the insurer taking a non-waiver agreement. Although this conflict existed, the court in the second action found that the lawyers in the first action were solicitors for both parties for the purposes of that action. Moreover, despite this finding, the court in the action between the insured and the insurer held that documents passing between the insurer and the lawyers in that first action relating to the question of liability

⁶⁹ For a more complete discussion of the problems which might be created by a drastic limiting of the protection afforded solicitor and client communications, see *Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385 (1947). See also *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, at 1027-46 (1961), and Tolman, *Discovery under the Federal Rules: Production of Documents and the Work Product of the Lawyer*, 58 COLUM. L. REV. 498 (1958).

⁷⁰ See *Garfield v. Fay*, [1968] 2 W.L.R. 1479 (Probate Ct.). It seems from this case that as long as the professional consulted is a lawyer one can speak to him at any time without serious fear of being interfered with.

⁷¹ *Chersinoff v. Allstate Ins. Co.*, 65 W.W.R. (n.s.) 449, 69 D.L.R.2d 653 (B.C. Sup. Ct. Chambers 1968).

to indemnify were protected by the solicitor-client privilege. Thus, we are left with the rather surprising situation that a client is not entitled to see all of the information contained in the files of his own lawyer in an action in which that lawyer represented him. Admittedly, the insurer was seeking advice on the issue of liability to indemnify at the time the first action was being proceeded with, and it is arguable that the issue of liability to indemnify was not one of the matters in issue in the first action. But the information was clearly important to the insured. It was information received by his lawyer while that lawyer was acting for him and was retained in the same file. If his insurer wanted to protect this information, other counsel could have been instructed or the insurer could have advised the insured to do so. Since this was not done, the insurer had taken the position that a single lawyer could act for both. Granting protection to communications made in such circumstances encourages clients to continue to instruct counsel after a conflict of interest has arisen.⁷² It is a highly questionable policy which encourages a lawyer to continue to act for two parties after a potential conflict of interest is known to exist.

Overall, what appears to be necessary is a more rigorous approach to the subject of solicitor-client privilege—one that attempts a genuine balancing of the basic interests involved. In any general consideration of the problem and in each individual case that arises, we must ask *how* much protection should be afforded to solicitor-client communications and *why*. What would be the costs to the administration of justice of granting the privilege? Can granting the privilege really be justified in view of the denial thereof to other professional communications? Until our courts squarely face these questions, we are likely to continue to see small additions made to the territory of the privilege without sound reasons and with potentially harmful effects on the openness of disclosure in lawsuits which is a value our courts often seem to ignore.

B. *Crown Privilege*

The right of government to refrain from producing documents and to prevent others from producing them was reviewed by the British Columbia Court of Appeal in the case of *Gronlund v. Hansen*.⁷³ This case involved a suit brought by the widow of a seaman killed in the sinking of a fishing vessel. The defendant was the master of the vessel and was in charge of it at all material times. The plaintiff sought an order compelling production

⁷² On appeal, the British Columbia Court of Appeal reversed the trial decision in part, ordering production of documents which related to the defence of the first action. But they upheld the trial judge's holding that the documents which had been prepared by the insurer in anticipation of a claim by the insured for indemnity were privileged. See *Chersinoff v. Allstate Ins. Co.*, 67 W.W.R. (n.s.) 750, 3 D.L.R.3d 560 (B.C. 1969).

⁷³ 64 W.W.R. (n.s.) 74, 68 D.L.R.2d 223 (B.C. 1968). For a detailed discussion of the origin and present state of the law of Crown privilege see, Linstead, *The Law of Crown Privilege in Canada and Elsewhere*, 3 OTTAWA L. REV. 79 (1968), 449 (1969).

of statements made by the defendant at a preliminary inquiry held pursuant to the Canada Shipping Act.⁷⁴ On the return of the motion, the affidavit of the Minister of Transport was filed. In the affidavit, the minister claimed the protection of Crown privilege on the ground that forcing production would "prejudice the candor and completeness of the information that would be furnished in the course of preliminary inquiries respecting shipping casualties." The Court of Appeal sustained the claim of the minister and held that the defendant need not produce statements made to the inquiry commissioner. The order was made without the court examining the documents in question.⁷⁵ Although the court did not find that the minister's affidavit was conclusive,⁷⁶ it is clear from the judgment that as long as the claim of privilege is reasonable, the court is not likely to go behind the minister's affidavit in testing the validity of the claim of privilege.

Most courts have now said that they do not consider the affidavit of the minister conclusive on the issue of Crown privilege. This view that the affidavit is not conclusive is of relatively recent origin. The contrary view was laid down by the English House of Lords in *Duncan v. Cammell-Laird & Co.*⁷⁷ in 1942. This position now appears to have been laid to rest both in England⁷⁸ and in Canada.⁷⁹ However, the way in which the court dealt with the matter in *Gronlund* indicates that the apparent change in the attitude of courts to the claim of Crown privilege may not be as significant as one would expect. In his judgment, Chief Justice Davey of British Columbia expressed some misgivings about the validity of the minister's claim, and his analysis of the need for protection of the information casts serious doubt on the minister's claim⁸⁰ of Crown privilege. However, he upheld the claim without looking at the documents involved. This is some evidence that the minister's affidavit is still likely to be treated with considerable deference even

⁷⁴ CAN. REV. STAT. c. 29 (1952).

⁷⁵ The only documents which actually existed were the notes of the commissioner made at the hearing and his report to the minister.

⁷⁶ Indeed Mr. Justice Robertson specifically held that the court was entitled to examine the documents in question. *Gronlund v. Hansen*, 64 W.W.R. (n.s.) at 92, 68 D.L.R.2d at 239.

⁷⁷ [1942] A.C. 624, [1942] 1 All E.R. 587.

⁷⁸ *Conway v. Rimmer*, [1968] 2 W.L.R. 998 (H.L.), a decision of the House of Lords in which the Court held that it was entitled to examine the documents in question despite a proper objection by way of affidavit by the minister with jurisdiction. Following examination, the Court ordered them produced. *Id.* at 1535.

⁷⁹ *Regina v. Snider*, [1954] Sup. Ct. 479, [1954] 4 D.L.R. 483, 109 Can. Crim. Cas. Ann. 193. *But see* the approach embodied in legislation presently pending before Parliament to establish the Federal Court of Canada, Bill C-192, Second Session, Twenty-Eighth Parliament, 18-19 Eliz. 2 (1969-70). (First Reading, March 2, 1970). With regard to discovery against the federal crown, clause 41 of the Bill provides that a court may examine the documents for which a minister has claimed privileges except where he has certified that production of the document would be "injurious to international relations, national defence or security, or to federal-provincial relations or that it would disclose a confidence of the Queen's Privy Council of Canada." In this latter class of cases the Bill provides, clause 41(2), that the court shall refuse production "without any examination of the document."

⁸⁰ 64 W.W.R. (n.s.) at 76, 68 D.L.R.2d at 226.

where the claim is somewhat dubious.

Any court is understandably reluctant to upset the judgment of a cabinet minister sworn to in affidavit form. But there are reasons why a court should not bow lightly to such a judgment. Ideally, the person making the decision to extend the protection of Crown privilege to any information should attempt to balance the need to protect a government document from public examination against the interest that the administration of justice should not be frustrated because one of the litigants, and consequently the court, does not have all of the facts available. It seems likely that a minister who has not become fully acquainted with the litigation may tend to underestimate the seriousness of the failure to disclose information on the outcome of litigation and claim privilege where the harm to the public interest from disclosure is not great. When faced with a choice as head of a large government department, it is undoubtedly much easier to decide not to disclose information than to disclose it. Non-disclosure is almost certain to be safer from a political point of view and more popular with employees in the department. Disclosure can expose departmental errors which can be politically embarrassing to the minister and lead to disruption within the department itself. Thus, the pressures to protect information both within the department and outside it are likely to be difficult to resist. In such a situation, it is unlikely that the value of full disclosure in civil litigation will seem very important to the minister or be weighed very heavily, if at all, by him in arriving at his decision.

It is true that the courts may tend to over-estimate the importance of disclosure for the administration of justice and underestimate the need to protect government documents, but to date there is much less evidence of that than of the opposing tendency of cabinet ministers to protect information which is of minor consequence to the running of the government but potentially embarrassing to the government department involved.⁸¹

In *Gronlund v. Hansen*, the minister expressed the concern that witnesses might be less candid in their testimony at the preliminary inquiry under the Canada Shipping Act if they knew that their evidence might be used in a later civil suit. No one can say with any degree of certainty that this is not

⁸¹ See, e.g., *Reese v. The Queen*, [1955] Can. Exch. 187, [1955] 3 D.L.R. 691, where the minister claimed the protection for letters between two departments of government concerning the transfer of mineral rights in certain lands. The court sustained the claim even though proof of the transfer was critical to the plaintiff's claim. See *Administrative Law—Discovery against Crown in Right of Canada when Defendant in Civil Proceedings*, 33 CAN. B. REV. 1186 (1955), for a discussion of the case. See also *Whitehall v. Whitehall*, [1957] Sess. Cas. 30 (Sessions Ct. 1956) and *Gain v. Gain*, [1961] 1 W.L.R. 1469, [1962] 1 All E.R. 63 (Divorce Ct. 1961).

Another illustration is the assertion by Federal Immigration Minister Allan MacEachen that there is a long standing tradition that instructions from one officer of a department to another are privileged documents, not for publication. The communications in question were instructions issued by the department to immigration officers as to handling American draft-dodgers and deserters. This statement was made in reply to a request to produce such inter-departmental communications in a debate in the House of Commons. *The Globe & Mail* (Toronto), May 9, 1969, at 29, cols. 2-5.

accurate. To prove or disprove the proposition empirically would be difficult. We should, however, ask whether the possibility of testimony being used in a subsequent civil suit against an employer is any more likely to lead to a lack of candor than the fact that the act provides that following a preliminary inquiry a pilot may have his licence suspended temporarily.⁸² Since the pilot is not a member of the ship's crew, the possibility of his temporary suspension may not affect the evidence to be given, but a close relationship could exist between the person testifying and the pilot, making the witness reluctant to disclose information harmful to the pilot. This type of relationship is as likely to interfere with candor at the hearing as the possible release of evidence in a subsequent civil suit against the owner.

In addition, it is unclear from the Canada Shipping Act what use can be made of the evidence for the purpose of further prosecutions under the act. This is another fact which seems more likely to affect candor than the possible use of the information in a civil suit.

In *Gronlund* there is some question as to how important the discovery of this information was to the plaintiff in prosecuting her claim. The defendant had already admitted a number of critical facts in a reply to a notice to admit facts contained in the statement of claim.⁸³ It could be that the need of the plaintiff for the information contained in the reports in question was not great and that there was little likelihood that the outcome of the action would be affected. Unfortunately, the court does not discuss the question of the extent to which production was critical to the plaintiff's case. If it was not at all critical, then little is lost in acceding to the minister's claim of privilege. On the other hand, if the plaintiff needs the information to properly prosecute an action and is unable to obtain the information in any other way, a much closer appraisal of the minister's claim should be made by the court, including an examination of the documents themselves.

The fair administration of justice is an important public interest which deserves serious consideration in any conflict with the need for secrecy of governmental communications. It may not infrequently be necessary for the secrecy of such communications to be compromised in order to protect the fair administration of justice. *Gronlund v. Hansen* did not seem to be such a case because much of the necessary information had already been made available to the plaintiff. However, it is to be hoped that Canadian courts will consider both values more critically in subsequent cases.

C. Without-Prejudice Communications

The protection of "without-prejudice" communications written with the view to settling litigation was the subject of the interesting Ontario decision in *I. Waxman & Sons v. Texaco Canada Ltd.*⁸⁴ in 1968. In this case the

⁸² Canada Shipping Act, CAN. REV. STAT. c. 22, § 555(2) (1952). The suspension is for not more than three days unless the minister has notified the pilot that a formal investigation will be held.

⁸³ 64 W.W.R. (n.s.) at 77, 68 D.L.R.2d at 227.

⁸⁴ [1968] 1 Ont. 642 (High Ct.), *aff'd*, [1968] 2 Ont. 452.

plaintiff, *W*, sued two defendants, *H* and *T*, alleging they had negligently caused severe damage to a piece of equipment, owned by the plaintiff, while carrying out repairs thereon. The same piece of equipment had been the subject of earlier litigation (or threatened litigation) between *W* and the United Steel Corporation which had sold the equipment to *W*. During the course of discussions concerning this earlier dispute between *W* and this vendor, three letters passed between the parties which were part of settlement negotiations. The defendants in the second action sought to have these letters produced, alleging that it was possible that they contained information relevant to the second action. The judges hearing the case ruled unanimously that the letters were privileged communications in the first action and that to encourage negotiations and settlements it was desirable that the privilege should protect the parties to settlement negotiations "against all persons unless it is waived or brought within some recognized exceptions."⁸⁵ Thus, once a document is covered by this privilege, it cannot lose the privilege and is always protected from production. The policy behind the decision is clearly desirable. All efforts to settle disputes without litigation should be encouraged, and some protection for settlement negotiations is essential if people are to be encouraged to make serious efforts to settle. In order to avoid a trial, a party may be prepared to compromise about certain matters in issue which he would insist upon if he had to go to trial, and he may be unwilling to make the attempt to compromise if he knows his attempt to compromise may be used against him at trial. In *Waxman*, however, production was sought not for use in the litigation for which they were produced, but for use in subsequent litigation involving different defendants. Is it necessary to protect the earlier settlement negotiations under these circumstances? The court said yes, on the ground that to do otherwise would discourage the settlement of disputes. Perhaps this is true, but in most cases it would require great foresight to anticipate future litigation involving similar subject matter when compromising a dispute. It seems unlikely that *Waxman* would have been hesitant to settle his dispute with the vendor if he had known that the settlement negotiation letters would be available to a future litigant in case something happened to the machine at some later date. He might anticipate future litigation against the vendor if the machine is damaged because of a defect about which he is complaining (and perhaps the communications should be protected in such a situation), but it is not likely that he will anticipate damage arising because of the intervention of a third party. Such foresight is unusual, and even if present, future remote possibilities are unlikely to affect a litigant's conduct in the existing dispute. There will, of course, be situations in which the possibility of future litigation will not seem so remote at the time settlement negotiations are proceeding. One

⁸⁵ [1968] 1 Ont. at 657 (Fraser, J.). The exceptions to the granting of the privilege referred to in the case were: where the communications contained threats, *id.* at 645, 656; where it constituted an act of bankruptcy, *id.* at 648, 656; where the correspondence constitutes or leads up to a new contractual relationship, which is in issue, *id.* at 646, 656; and in some circumstances where fraud is in issue, *id.* at 656.

such situation is that in which a manufacturer of a product has been sued for negligent manufacture of goods. As the manufacturer attempts to settle such a suit, the possibility of similar suits concerning the same product will be a real consideration, and the possibility that negotiations may be subject to production in later suits could inhibit settlement. But there is little likelihood that such considerations could have been in the litigant's mind when the settlement letters in issue were written in *Waxman*. That being the case, the need to extend the "without-prejudice" communications protection to those letters is not critical. Looking at the situation from the point of view of the defendants in the second action in *Waxman*, it is possible that information contained in the letters could be critically important to their case, and that the possibility of a decision based on an accurate finding of facts will be substantially reduced if the letters are not available. The court gives no indication of the contents of the letters although the letters were examined by the judge, so we do not know how important they were in the action. However, if they are of any importance, it is difficult to understand how, in a case such as this, the need for full disclosure in litigation can be outweighed by the possibility that a party to a dispute will hesitate to settle it because of a concern that documents containing settlement negotiations will be subject to production in a later lawsuit which arises from events which have not yet occurred and will likely never occur.

There may be some minor concern that letters designed to achieve the settlement of a dispute may unfairly indicate the merit of a party's position because he is anxious to settle and has conceded matters which were not true in order to get a compromise. This should not be a serious problem, however, provided this factor is kept in mind in evaluating the weight to be given to the letters.

In summary, all of the recent decisions involving privileged communications demonstrate a continuing tendency on the part of the courts which will not find favour with those who value full pre-trial disclosure of evidence. The tendency is to extend the boundaries of the areas protected by privilege without carefully examining the underlying purpose of the privilege and the question of whether the extension is necessary to achieve its purpose. Discovery before trial is an important tool for ensuring that the adversary process does not degenerate into an unequal battle between those with information and those without information, money, or facilities to acquire that information. The possibility of this occurring becomes greater as the boundaries of privilege are widened. While our concept of privilege remains an absolute one—bestowing a complete immunity from production despite the opposing party's inability to obtain the information in any other way—the extension of the boundaries of privilege remains a serious problem. As long as this concept of absolute privilege prevails, the courts should examine each new claim for privilege in great detail and be willing, where necessary, to make fine distinctions. Unfortunately, the cases decided in 1968 give little evidence that the courts appreciate this need for caution.

But perhaps what is really necessary is a re-examination of the nature of

the privilege we accord the various types of communications. Is it essential that in all cases privilege be absolute? Might it not be possible to make exceptions to the protection granted in cases where the opposing party is vitally in need of information to pursue his claim or defence and can only obtain the necessary information from documents which are otherwise privileged? To date, the approach of the English and Canadian courts has tended towards absolute privilege which is unassailable no matter how great the need of an individual litigant. The information may be vital to his case but unavailable to him because of a lack of financial resources to do investigations or because the evidence is no longer available due to changed circumstances or because witnesses are not available. In such cases, might it not be possible for the courts to breach those sacrosanct areas established by privilege without seriously endangering the central purpose of the protection?

Such an approach has been taken by the American courts in the area of the protection or privilege afforded lawyers' "work product." This approach, which stems from the decision in *Hickman v. Taylor*,⁸⁶ grants a qualified privilege to the lawyer's preparation for trial including such matters as statements from witnesses and reports prepared by experts, but does not include direct communications between the lawyer and his client which are covered by the solicitor-client privilege. The *Hickman* decision permits a court to order production of such materials when a party shows good cause. An example of "good cause" would be the situation where the information is vital to the case and it is not available to the party in any other way. There seems little doubt that the Canadian courts would do well to adopt the dichotomy established by the actual decision in *Hickman*. This would involve dividing what is at present our unitary, absolute solicitor-client privilege into two distinct protections: an absolute privilege for actual solicitor-client communications, and a qualified privilege for the lawyer's work product which at present forms part of our absolute solicitor-client privilege. Such a step would at least enable us to remove some of the indefensible scourges from our law of privilege.⁸⁷ Moreover, consideration should be given to extending the *Hickman* decision to all of our absolute privileges. The number of cases in which the privilege would in fact become qualified should be few, and com-

⁸⁶ 329 U.S. 495, 67 S. Ct. 385 (1947). In this case the United States Supreme Court held that certain documents were protected because they were part of the lawyer's work product in preparing for trial (a protection similar to that afforded in this country under the blanket of solicitor-client privilege). However, in the course of the judgment, the Court made it clear that the information obtained or prepared by a lawyer with an eye toward litigation was not always free from discovery and should be subject to production if the party seeking the information can show good cause. Subsequent decisions have ordered production in cases where good cause was shown (although the precise boundaries of what amounts to good cause are still rather vague), see, e.g., *Sharon Steel Corp. v. Travelers Indem. Co.*, 26 F.R.D. 118 (N.D. Ohio 1960). For an extensive discussion of the background, subsequent history and application of the *Hickman* doctrine, see J. MOORE, *FEDERAL PRACTICE* at § 26.23 *et seq.*

⁸⁷ E.g., *Crits v. Sylvester*, [1955] Ont. W.N. 243 (High Ct. 1954), denying the plaintiff, in an action for damages for injuries sustained in a hospital explosion, access—*inter alia*—to the reports on the explosion made by the Department of Health and the hospital's own investigators.

munications could continue with little fear that they would later be revealed. At the same time, the administration of justice would be improved by having those few cases tried with the relevant evidence available to both parties.⁸⁸

D. *Medical Examinations for Discovery*

There was one development of some importance in the area of medical examination in 1968. In *Barwick v. Targon*,⁸⁹ a High Court judge held that the provisions of the Ontario Judicature Act which permit medical examinations for discovery⁹⁰ were sufficiently broad to enable him to require a plaintiff to submit to a psychiatric examination. The order was sought by the defendant in an action for breach of promise of marriage. The plaintiff in her statement of claim had alleged, among other things, that as a result of the cancellation of the marriage she had suffered psychiatric depression, requiring psychiatric treatment, and claimed damages for this injury. In making the order the judge found that if he did not permit an examination in a case such as this he would deny "the defendant and the Court assistance in reaching a just result"⁹¹ and further, prevent the defendant from obtaining material which was essential to the proper preparation and presentation of

⁸⁸ Two further cases in the area of discovery deserve to be mentioned. In *Mark Fishing Co. v. United Fishermen & Allied Workers Union*, 64 W.W.R. (n.s.) 530, 68 D.L.R.2d 410 (B.C. 1968), the plaintiff applied for an order that the defendant union be required to make a further and better affidavit of documents. Relying on early British Columbia and English authorities, *Irwin v. Jung*, 17 B.C. 69, 1 W.W.R. 524, 1 D.L.R. 153 (1912) and *Jones v. Monte Video Gas Co.*, 5 Q.B.D. 556 (C.A. 1880), the defendant argued that on such an application a contentious affidavit may not be used to show that the affidavit of documents is insufficient. The British Columbia Court of Appeal disapproved of and refused to follow these early cases. They held that such an application may be supported by material showing the facts upon which the allegation that the discovery is unsatisfactory or insufficient is based, and that the judge may consider such material.

Silverhill Realty Holdings Ltd. v. Minister of Highways, [1968] 1 Ont. 357 (1967), involved the question of the discoverability, in expropriation proceedings directed towards establishing the value of the lands taken, of the expropriating authorities' procedures in determining the value of lands. The majority of the Court of Appeal held that the matter need not be determined because of the inadequacy of the stated case which the court was asked to adjudicate. Mr. Justice Laskin dissented on this point, and dealt with the question of the scope of discovery. He held that questions relating to estimates made or procured during the period in which preparations are under way to have the question of compensation determined by the Ontario Municipal Board need not be answered, since they are privileged. But he held that the claimant was entitled to discover whether, prior to that period, the expropriating authority had estimates of the land's value prepared by its own staff or by outside experts, and if so, when those estimates were made and the factors and formulae considered in formulating the valuation so made. His reasons for so holding were that in expropriation proceedings opinion evidence of experts is fundamental to the question before the trier of fact and hence there should be wider, pre-hearing access to the expert opinions and reports available to the opposing parties.

⁸⁹ [1969] 1 Ont. 1 (High Ct. 1968). We are informed by plaintiff's counsel that he obtained leave to appeal to the Court of Appeal from this decision, but on the case being settled, the appeal was abandoned.

⁹⁰ The Judicature Act, ONT. REV. STAT. c. 197, § 75 (1960), *as amended*, Ont. Stat. 1966 c. 73, § 2.

⁹¹ [1969] 1 Ont. at 2.

his case.

This case is the latest in a long line of Ontario decisions on the scope of the medical examination,⁹² and the first in which a psychiatric examination has been ordered. In one earlier case, another High Court judge had indicated that he felt that the statute was sufficiently broad to permit the ordering of a psychiatric examination, but the issue in that case was a request for a neurological, rather than a psychiatric, examination.⁹³ In all of the earlier Ontario cases where the matter was in issue, the courts had held that a psychiatric examination could not be ordered since the enabling section provided only for a *physical* examination. The reasoning was that an examination by a psychiatrist was in no sense a physical examination but was a mental examination, and to permit such an examination was to distort the language of the statute.⁹⁴ It is of interest to note that in two of the provinces permitting medical examinations the words "physical examination" are not used in the rules governing the matter. Rather, the provisions simply refer to examination by a medical practitioner.⁹⁵ In these jurisdictions then, there would be much less difficulty in interpreting the provisions so as to permit an order for psychiatric examination. In Ontario, however, most judges have felt constrained by the words "physical examination." But this form of reasoning did not appeal to the judge in *Barwick v. Targon*:

It seems to me there are many cases where mental injury is closely associated with physical well-being and separation would be difficult. Here the pleadings make clear that association. To say that you can have a neurological examination but not a psychiatric examination is to my mind a case of semantics. If this woman has an injury, disorder or disease of the mind, caused by the act of the defendant, the brain in which is the seed of the mind being part of the body, her ailment in my respectful opinion comes within the statute.⁹⁶

There is substantial medical evidence to support the proposition that a clear distinction between the mental and physical components of a disability is virtually impossible to make, at least in the cases which most frequently come before the courts, that is, those involving injured parties seeking financial compensation.⁹⁷ As more cases involving claims for mental impairment

⁹² See the cases cited notes 93 & 94 *infra*.

⁹³ *Taub v. Noble*, [1965] 1 Ont. 600 (High Ct. 1964).

⁹⁴ See *Larmond v. Nesbitt*, [1962] Ont. W.N. 217 (High Ct. Chambers); *Cohen v. Toronto Baseball Club*, [1962] Ont. W.N. 231 (High Ct. Chambers), and *Metcalfe v. Neubrand*, [1964] 1 Ont. 637 (Sup. Ct. Chambers)—all decisions of supreme court masters. See also *Smith v. Thyssen*, [1965] 2 Ont. 797 (High Ct. Chambers), and *Angelov v. Hampel*, [1965] 2 Ont. 178 (High Ct.)—both decisions of high court judges.

⁹⁵ B.C. SUP. CT. R. 0.31b, M.R. 370v (1961); ALTA. R.C. 217(1), Alta. Reg. 390/68. Other jurisdictions have provisions similar to those found in Ontario and use the term physical examination to designate the type of examination permitted see, e.g. SASK. REV. STAT. c. 73, § 50 (1965).

⁹⁶ [1969] 1 Ont. at 4.

⁹⁷ See *Weiss, Physical Complaints of Neurotic Origin*, in AN OUTLINE OF ABNORMAL PSYCHOLOGY 267 (2d ed. G. Murphy & A. Bachrach 1954); *Neustatler, Psychiatric Disorders in Compensation Cases*, 30 MEDICO-LEGAL J. 164 (1962) and H.

alleged to have been caused by bodily injury arise, we will have many cases in which there will be a serious imbalance in the ability of the respective parties to prove their position in court if the plaintiff is the only party who can present evidence by a psychiatrist who has examined the claimant. The *Barwick v. Targon* decision should go a long way in helping to alleviate the imbalance if subsequent decisions follow the line of reasoning adopted in the case.

There are, however, difficulties inherent in adopting the approach taken in *Barwick v. Targon*. Perhaps the most important difficulty is that a forced psychiatric examination is a more substantial invasion of one's privacy than almost any other medical examination. The psychiatric examination will concern itself with questions which delve into the very essence of a person's individuality, probing beliefs, plans, ideals, and personal relationships with other human beings. While other medical examinations do invade the private life of the individual, generally the invasion will not be into areas which are as sensitive as those touched on by a psychiatric examination.⁹⁸ Such an invasion of privacy at the instance of a civil court should only be permitted if there are strong arguments in its favour which counterbalance this invasion.

However, the arguments in favour of permitting psychiatric examination, at least of a plaintiff who claims damages for alleged psychiatric injuries, are strong. In such cases, the basic argument is the same as that justifying physical examinations. Mr. Justice Haines has said that "by putting his physical condition in issue through claiming damages for injury, I think it may well be said that the plaintiff has waived any rights he has to deny to the defendant from whom he is claiming damages, the opportunity to ascertain the nature and extent of his injuries by suitable examinations conducted by medical practitioners."⁹⁹ To permit a plaintiff to claim damages for alleged

DAVIDSON, FORENSIC PSYCHIATRY chs 4, 11 (1952). The medical evidence indicates that many seemingly physical disorders are mental in origin and that certain neurotic disorders are closely related to the medical history of the patient. Attempting to separate a physical from a mental examination ignores completely the fact that symptoms which appear to be completely physical may be impossible to investigate without a more complete examination of the person's whole make-up. There is considerable evidence that this type of inter-relationship between mental and physical disorders is more prevalent in persons sustaining those personal injuries which the courts are called upon to adjudicate. Dr. Neustatler, an English psychiatrist, in discussing injuries in compensation cases in the article mentioned above says: "Whatever the injury, hysterical features are frequently and not very surprisingly present, though usually, . . . in inverse ratio to the severity of the condition. That such hysterical features are common is perhaps not very surprising, for it is asking too much of human nature to relinquish symptoms when the alternative is a handsome reward often running into thousands." *Psychiatric Disorders in Compensation Cases*, 30 MEDICO-LEGAL J. at 164 (1962).

⁹⁸ See REPORT OF THE ATTORNEY GENERAL'S COMM. ON MEDICAL EVIDENCE IN COURT IN CIVIL CASES 88 (Ont. 1965). While the distinction between physical examinations and mental examinations is hazy when viewed from the perspective of the medical profession, it seems likely that judges who have relied on such a distinction in refusing to order such examinations reflect a much more widely held popular view that there is a substantial difference between being examined by a psychiatrist and being examined by another medical practitioner.

⁹⁹ Taub v. Noble, [1965] 1 Ont. at 601-02 (Haines, J.).

psychiatric injury without providing his opponent adequate means to defend the claim is unjust.¹⁰⁰ By making the claim and presenting psychiatric evidence on his own behalf, the plaintiff can no longer claim the right to protection of privacy since he has by his conduct demonstrated a willingness to put his private life in question.

Another argument weighing in favour of ordering a psychiatric examination in such cases is the relatively inexact nature of psychiatry and psychology.¹⁰¹ This fact is compounded by the possibility that a psychiatrist who testifies on behalf of a claimant in a civil action may be a person who is frequently called upon to testify on behalf of plaintiffs. There is some evidence that psychiatrists who make a practice of testifying on one side in actions may form a bias in favour of the side for which they normally testify.¹⁰² If the courts prevent the defendant from obtaining an independent evaluation, the court will hear evidence from a witness who is subject to a relatively high degree of error because of the nature of his craft, and who is made more prone to error because of his acquired biases.

The question of the court having power to order psychiatric examination in cases where the plaintiff has put his own mental condition in issue may appear to some to be a difficult question. However, it cannot be answered by giving only one side the power to call evidence. Either we must permit an examination by the defendant or we must be prepared to exclude all such evidence on the basis of the threat to privacy and its inherent lack of scientific accuracy. To permit one side to present such evidence and at the same time effectively prevent the other side from testing it is to seriously limit the possibility that fair decisions will be made.

A far more difficult question is whether psychiatric examination should

¹⁰⁰ The injustice is made clear by a case such as *Hansen v. Hudson* (Ont. High Ct., Number 5863/1964, unreported.) There the plaintiff alleged that he suffered "severe mental shock" as a result of being shot at by the defendant Hudson, a police officer. On March 10, 1966, the senior master, without written reasons, dismissed an application by the defendants for an order "that the plaintiff Frank Hurt Hansen submit himself to a psychiatric examination by Dr. Kenneth G. Gray of the City of Toronto with regard to his alleged psychiatric injuries." The defendants' appeal from the order of the senior master was dismissed on March 15, 1966, by Justice Stewart, without written reasons. Leave to appeal to the Court of Appeal from the order of Stewart was refused on March 22, 1966, by Mr. Justice Haines, without written reasons. We are advised by counsel for the defendants that the case was settled prior to trial and that one of the factors which he considered in recommending a settlement to his clients was his inability to obtain a psychiatric examination of the plaintiff and thereby be properly prepared for trial.

¹⁰¹ See Ash, *The Reliability of Psychiatric Diagnoses*, 44 J. ABNORM. SOC. PSYCHOL. 272 (1949) and Schmidt & Fonda, *The Reliability of Psychiatric Diagnoses: A New Look*, 52 J. ABNORM. SOC. PSYCHOL. 262 (1956). In both the experiments reported, it was found that where psychiatrist evaluated the same persons independently, while their diagnosis agreed with respect to major categories in more than fifty per cent of the cases, the percentage of agreement dropped markedly with respect to diagnoses of the sub-types of a disorder. Agreement was almost absent in cases involving personality pattern and trait disorders and the psycho-neurosis. Psycho-neurosis is the trait often feigned by malingerers in personal injury actions.

¹⁰² See H. DAVIDSON, *FORENSIC PSYCHIATRY* 76 (1952).

be permitted in cases other than those in which the plaintiff himself puts his mental condition directly in issue. For instance, should a defendant who has raised the question of the plaintiff's mental condition by alleging in his statement of defence that the plaintiff is malingering, be able to obtain an order for psychiatric examination of the plaintiff?¹⁰³ Here, we can no longer argue that as a pre-condition to asserting his own psychiatric injury the plaintiff must, out of justice to the defendant, submit to a psychiatric examination. It is not he, but the defendant who injects the issue into the case. If psychiatric examination is really an invasion of privacy which will be objected to by many people, it would therefore seem to be dangerous to extend such examinations to this type of case. It would give all personal injury defendants a powerful strategic weapon. The defendants could put all personal injury plaintiffs to the option of submitting to a psychiatric examination or abandoning their claim by the simple allegation of malingering.¹⁰⁴

V. THE AVAILABILITY OF JURY TRIAL

This century has, in general, seen an ever increasing diminution in the role of the civil jury. Today, the modern home and stronghold of the civil jury is clearly the United States. In that country, the civil jury remains inviolate behind constitutional guarantees of the right to jury trial in civil actions.¹⁰⁵ Elsewhere in the common-law world, the role of the civil jury has declined as a result of legislation and court decisions. In England, the

¹⁰³ Neustatler, *Psychiatric Disorders in Compensation Cases*, 30 MEDICO-LEGAL J. 164 (1962), points out that there is a strong possibility that physical symptoms will be prolonged or worsened by hysteria, and that hysteria may be consciously simulated by the plaintiff to achieve a result preconceived by him. This phenomenon is what is commonly referred to as malingering.

Malingering definitely introduces the possibility that fraud may be perpetrated by a claimant whose malingering perpetuates his physical symptoms. See Hays, *Hysterical Amnesia and the Podola Trial*, 29 MEDICO-LEGAL J. 27 (1961). Psychiatric examination may be useful or essential to exposing a malingerer. H. DAVIDSON, *FORENSIC PSYCHIATRY* 170-72 (1952), deals with the problem of the malingerer in personal injury actions, giving some criteria for differentiating between a true psychoneurosis and a malingered one.

¹⁰⁴ Notwithstanding this argument, the U.S. FED. R. CIV. P. 34(a) cited in, 28 U.S.C.A. (1968), provides: "In an action in which the mental or physical condition of a party is in controversy, the court . . . may order him to submit to a physical or mental examination by a physician."

¹⁰⁵ See F. JAMES, *CIVIL PROCEDURE* 337-48 (1965). The federal constitution guarantees the right to jury trial in civil actions in federal courts, and nearly every state constitution contains a similar guarantee as to trial in state courts. Since they merely preserve the right of jury trial as it existed in English history at some time past, they do not guarantee jury trial in all civil cases, e.g., in matters historically the subject of suits in equity, jury trial is not constitutionally guaranteed. Compare on this point the similar Ontario provision, ONT. REV. STAT. c. 197, § 58(4) (1960). The constitutional right to jury trial is held to be one which can be waived by the parties, and statutes and court rules may prescribe reasonable conditions for obtaining jury trial, such as timely demand, and may provide that failure to take these steps constitutes a waiver.

civil jury has virtually disappeared.¹⁰⁶ In Australia, the jury trial has been abolished in a majority of states in actions arising out of motor vehicle accidents.¹⁰⁷ In Canada, only in British Columbia and Ontario does the jury still play a significant role in civil cases. In Nova Scotia, juries are used for the trial of only about two to four per cent of civil cases.¹⁰⁸ In Prince Edward Island, about two civil cases are tried by a jury in a year.¹⁰⁹ Manitoba has seen only four civil jury trials in the last twenty-five years.¹¹⁰ Saskatchewan had six cases tried by a jury in 1967.¹¹¹ In Alberta and Quebec, jury trials in civil cases are rare.¹¹²

Detailed and comprehensive figures on the extent of the use of the civil jury in British Columbia and Ontario are not readily available, although it is universally recognized that in those two provinces the role of the jury is significant. In British Columbia, ten per cent of all civil cases are tried by a jury,¹¹³ while in Ontario one study¹¹⁴ suggests that juries decide about one-half of all the automobile cases tried in the county of York.¹¹⁵

In 1968, the civil jury in Ontario came under attack. In his *Report of the Royal Commission Inquiry into Civil Rights*, the Honourable James C. McRuer recommended that trial by jury in all civil cases except those based on defamation should be abolished.¹¹⁶ If the recommendation itself was not surprising, the peremptory manner in which it was made was very disappointing. In the report, a mere page and a half is devoted to the subject and only very brief reasons are given for the commission's conclusion. The commission was content to document the decline of the role of the civil

¹⁰⁶ See R. JACKSON, *MACHINERY OF JUSTICE IN ENGLAND* 64-65 (3d ed. 1960). This is a result partly of legislation and subordinate legislation, see Administration of Justice (Miscellaneous Provisions) Act, 23 & 24 Geo. 5, c. 36, § 6 (1933) and R.S.C. ORD. 36, rs. 1 & 2, and partly of the manner in which this legislation has been interpreted by the Court of Appeal. See, e.g., *Ward v. James*, [1965] 2 W.L.R. 455, [1965] 1 All E.R. 563 (C.A.). For an interesting discussion of the professional and political response to the *Ward* decision, see B. ABEL-SMITH & R. STEVENS, *LAWYERS AND THE COURTS* 308-09 (1967). They suggest that it was possibly in response to these reactions that in a later decision, *Hodges v. Harland & Wolff Ltd.*, [1965] 1 W.L.R. 523 (C.A.), the Court of Appeal attempted to restrict the scope of *Ward v. James*. A recent, concise description of the history of the right to jury trial in civil actions in England can be found in W. CORNISH, *THE JURY* 74-76, 210, 227-28 (1968).

¹⁰⁷ See J. FLEMING, *LAW OF TORTS* 272-73 (3d ed. 1965). In other areas of tort litigation, the jury system in Australia has withstood serious challenge in most states.

¹⁰⁸ 2 ROYAL COMM'N INQUIRY INTO CIVIL RIGHTS, REPORT No. 1 at 859-60 (Ont. 1968).

¹⁰⁹ *Id.*

¹¹⁰ *Wilcott v. Canadian Accident & Fire Assurance Co.*, 66 W.W.R. (n.s.) 54, at 55 (Man. Q.B. 1968).

¹¹¹ 2 ROYAL COMM'N INQUIRY INTO CIVIL RIGHTS, REPORT No. 1, at 859-60 (Ont. 1968).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Linden & Somers, *The Civil Jury in the Courts of Ontario: A Postscript to the Osgoode Hall Study*, 6 OSGOODE HALL L.J. 252 (1968).

¹¹⁵ E.g., Metropolitan Toronto.

¹¹⁶ 2 ROYAL COMM'N INQUIRY INTO CIVIL RIGHTS, REPORT No. 1, at 859-60 (Ont. 1968).

jury in England and in Canada, and to assert that a jury trial increases the "length of trial by at least one-half, if not more," thus increasing the burden on the unsuccessful party. The report also stated that the jury trial has become a coercive weapon used by insurance companies against personal injury plaintiffs. Whatever be one's personal evaluation of the worth of the civil jury, one could surely have hoped for a more extensive inquiry with some semblance of an objective evaluation of the arguments for and against the civil jury by a Royal Commission making a recommendation on the subject of its continuation or abolition.

Shortly after the publication of the *McRuer Commission Report*, two articles from Ontario appeared dealing with the subject of the civil jury. One, by Professor Linden and Richard Somers,¹¹⁷ supplied empirical data on jury versus non-jury trials in automobile cases in Ontario and indicated that several of the more frequent criticisms of the civil jury were not borne out by systematic investigation.¹¹⁸ The other, an eloquent defence of the civil jury by Mr. Justice Haines of the Ontario Supreme Court,¹¹⁹ relied heavily upon published empirical data on jury trials. Even given his supporting data, one may not agree with Mr. Justice Haines's position. However, his detailed arguments and well-documented approach is a stark contrast to the peremptory conclusions of the Royal Commission Inquiry into Civil Rights.

Early in 1970 the Attorney-General of Ontario announced that he would seek legislation to implement the *McRuer Commission Report* recommendation regarding the abolition of jury trials. However, he subsequently announced that he would not at present seek such legislation.^{119A}

In Ontario, recent cases on the right to trial by jury have been numerous. In contrast to the *McRuer Report's* attack on civil juries, the cases seem to indicate increasing judicial protection of the right to jury trial in cases where it is available. The cases have reaffirmed two principles. First, unless and until a change is made in the present statutes and rules relating to jury trials, the Ontario courts will jealously guard the broad, though not unlimited, right of either party to a trial by jury conferred by those statutes and rules.¹²⁰

¹¹⁷ *Supra* note 114.

¹¹⁸ *E.g.*, that juries find in favour of the plaintiff all or most of the time, that they consistently assess higher damages than judges, that there is greater delay in getting to trial with a jury and that the abolition of jury trials would lead to great savings of court and of judges' time.

¹¹⁹ Haines, *The Future of the Civil Jury*, in *STUDIES IN CANADIAN TORT LAW* 10 (A. Linden ed. 1968).

^{119A} See *Globe and Mail*, April 21, 1970, at 2, col. 7, and *Toronto Star*, June 15, 1970, at 8. The announcement of the proposed legislation produced a controversy in the *Toronto press*, fed by considerable opposition to such legislation from some members of the legal profession.

¹²⁰ The governing Ontario statutes and rules are the *Judicature Act*, *ONT. REV. STAT. c. 197*, §§ 55-58 (1960) and *ONT. R.P. 400*. Actions of libel, slander, criminal conversation, seduction and malicious arrest, malicious prosecution and false imprisonment are automatically tried by jury unless the parties waive such trial, *ONT. REV. STAT. c. 197*, § 55 (1960). Actions against a municipality for damages in respect of injuries sustained by reason of the municipality's default in keeping in repair a highway or bridge must be tried by a judge sitting alone, *ONT. REV. STAT. c. 197*, § 56 (1960).

The tenor and actual decisions in most of the recent cases make this quite clear. Second, on two occasions, the Court of Appeal reaffirmed the principle, which is of recent origin,¹²¹ that if a party is to be deprived of a jury trial because of the complexity of the issues or the evidence, a decision must only be made when the complexity is actually established; mere apprehension of complexity by a judge is not a sufficient ground for dispensing with jury trial. This principle appears to be emerging as a substantial restriction on the pre-trial jurisdiction of a judge in chambers to dispense with the jury by striking out a jury notice,¹²² and upon the practice of trial judges of dispensing with the jury at the outset of the trial. In *Otonabee Motors v. B.A. Oil Co.*,¹²³ the Court of Appeal restored a jury notice, which had been struck out by Mr. Justice Richardson in chambers, on the ground that the case was too involved to be tried with a jury. The court, while conceding that the issues to be developed at trial might well be too complicated to be left to a jury, pointed out that as the case then stood it had not been made to appear that the complexity actually existed. In such circumstances, the court ruled that the matter should be left to the trial judge. In *Martin v. St. Lawrence Cement Co.*,¹²⁴ Mr. Justice Haines, at the outset of the trial of an occupier's liability case, intimated that the case was one which might more properly be tried without a jury. Upon a motion then made by plaintiff's counsel to have the jury discharged, the judge dispensed with the jury on the ground that the issues involved were so complex that it would be difficult to make a jury understand them, and that the case could not be fairly and properly tried by a jury. On appeal by the defendant from Haines's judgment for the plaintiff, the Court of Appeal stressed that the trial judge should not have discharged the jury before any evidence had been adduced for at that point he enjoys no greater advantage than a judge sitting in chambers. Rather, he should have exercised his discretion only after all or a substantial portion of the evidence had been heard.¹²⁵

The recent activity of the Ontario Court of Appeal in reviewing, and in a number of cases reversing,¹²⁶ the trial judge's exercise of discretion in dis-

In all other cases, there is a prima facie right to jury trial if a jury notice is timely served, ONT. REV. STAT. c. 197, §§ 57 & 58 (1960). See 3 HOLMESTED & GALE, ONTARIO JUDICATURE ACT & RULES OF PRACTICE §§ 55-58, rule 400 (W. Hemmerick ed. 1968).

¹²¹ Compare *Ryan v. Whitton*, [1964] 1 Ont. 111 (1963), and *Cole v. Trans-Canada Air Lines*, [1966] 2 Ont. 188 (High Ct.), with *Martin v. Deutch*, [1943] Ont. 683. These cases are discussed in Binavince & Choquette, *Recent Developments in Canadian Law—Civil Procedure*, 2 OTTAWA L. REV. 147, at 167 (1967).

¹²² ONT. R.P. 400.

¹²³ [1968] 1 Ont. 573.

¹²⁴ [1968] 1 Ont. 94.

¹²⁵ The court then went on to order a new trial with a jury (subject to a further order of the court) on the ground that the action was a simple occupier's liability case without any complicating factors and that it was by no means certain that a jury, acting reasonably, must have inevitably acquitted the plaintiff of contributory negligence (as did Haines, J.). *Id.* at 95-96.

¹²⁶ *Martin v. St. Lawrence Cement Co.*, [1968] 1 Ont. 94; *Sdraulig v. C.P.R.*, [1968] 1 Ont. 377, 66 D.L.R.2d 475 (1967); *Nag v. McKellar*, [1969] 1 Ont. 764.

pensing with the jury raises the question of an appellate court's role in this context. The Ontario court has recognized limits to the reviewability of the discretion of the trial judge. It has stated that it is not its function to interfere merely because it would have exercised the discretion differently.¹²⁷ On the other hand, the scope of review it has exercised is a broad one. As was recently stated by Mr. Justice Schroeder, the court has not hesitated to interfere when it appeared that the trial judge exercised his discretion "under a mistake of law, in disregard of principle, under a misapprehension as to the facts, on the ground that it took into account irrelevant matters, that he failed to exercise his discretion, or that his order would result in injustice."¹²⁸

In the future, however, we may expect greater reticence on the part of the Ontario Court of Appeal in reversing trial judges on this matter. In the subsequent appeal to the Supreme Court of Canada in *Sdraulig v. C.P.R.*,¹²⁹ the Court held the above statement of principle by Schroeder to be far too broad. They ruled that only in the most exceptional circumstances, such as where the trial judge discharged the jury only because he believed (erroneously) that as a matter of law he was bound to do so,¹³⁰ or where he overlooked a clear, established ground for dispensing with the jury,¹³¹ should the appellate court disturb the trial judge's ruling.¹³² It was held by the Supreme Court, reversing the Ontario Court of Appeal, that *Sdraulig* was not such a case. There, in an action under The Fatal Accidents Act,¹³³ the trial judge had withdrawn the issue of liability from the jury on the ground that, *inter alia*,¹³⁴ he considered the conduct of plaintiffs' counsel to be prejudicial because he twice attempted to put before the jury a piece of inadmissible evidence. The Ontario Court of Appeal reversed the trial judge and ordered a new trial because it could not be said that the incident had prejudiced the defendant company in its right to a fair trial, and because the trial judge had exercised his discretion on such tenuous grounds that it could not be

¹²⁷ *Majcentic v. Natale*, [1968] 1 Ont. 199, at 201; *Sdraulig v. C.P.R.*, [1968] 1 Ont. at 383-84, 66 D.L.R.2d at 481-82.

¹²⁸ *Sdraulig v. C.P.R.*, [1968] 1 Ont. at 384, 66 D.L.R.2d at 482.

¹²⁹ *C.P.R. v. Sdraulig*, 5 D.L.R.3d 177 (Sup. Ct. 1969).

¹³⁰ As in *Logan v. Wilson*, [1943] 4 D.L.R. 512 (Sup. Ct.), where the trial judge was under the mistaken belief that if evidence might tend to show medical malpractice in an attempt to reduce damages he was bound to remove the matter from the jury.

¹³¹ *E.g.*, where the existence of insurance is revealed in the answer of a witness. Mr. Justice Spence, *supra* note 129, at 183, stated that a whole series of Ontario cases (*e.g.*, *Fillion v. O'Neill*, [1934] Ont. 716) had established this as a ground for dismissing the jury and for reversing a trial judge's refusal to do so, but indicated that this "special jurisprudence . . . should not be extended beyond that type of case."

¹³² The Court, while in disagreement on another issue in this case—as to whether or not there was evidence of negligence—were unanimous in condemning and reversing the Ontario Court of Appeal on the question of reviewing the trial judge's exercise of discretion.

¹³³ ONT. REV. STAT. c. 138 (1960).

¹³⁴ The trial judge gave other reasons for this action, *see* [1966] 2 Ont. 111, at 119-21, but in neither appellate court were these reasons relied upon by defendant's counsel. *See* [1968] 1 Ont. at 383, 66 D.L.R.2d at 481; and 5 D.L.R.3d at 181.

regarded as the exercise of a judicial discretion at all.¹³⁵ In reversing the Court of Appeal, the Supreme Court of Canada stated simply that the trial judge had given reasons "which he, in the exercise of his discretion, regarded as providing adequate basis for such a course in order that justice should be done."¹³⁶ They held the trial judge's exercise of discretion in this matter was not reviewable in the circumstances of this case, and in general, only in the most exceptional circumstances limited to those already determined by decided cases.¹³⁷

While the opinions of the Supreme Court of Canada in *Sdraulig* made no reference to recent Ontario cases other than *Sdraulig* itself, it seems that the Court intended to make a firm and general statement on the matter. Consequently, doubt is cast upon the correctness of other recent Ontario cases.¹³⁸ Though the Supreme Court did not express itself in such policy terms, it appears to have affirmed clear preference for a rule which will maximize the avoidance of expense and delay of a new trial and which will discourage appeals, over one that jealously guards the litigant's right to jury trial.

The recent Manitoba case of *Wilcott v. Canadian Accident & Fire Assurance Co.*¹³⁹ illustrates, as did the English Court of Appeal's decision in *Ward v. James*,¹⁴⁰ how the civil jury can in fact be abolished not only by express legislation to that effect, but also by a legislative change in the prima facie rule as to its availability. In contrast to Ontario,¹⁴¹ where there is in general a prima facie right to jury trial, in Manitoba prima facie the trial is to be by a judge alone and he who desires trial by jury has the onus of establishing the need for same.¹⁴² When such a principle is administered by

¹³⁵ [1968] 1 Ont. at 384, 66 D.L.R.2d at 482. The Ontario Court of Appeal assigned a further ground for ordering a new jury trial—the trial judge's failure to afford plaintiffs' counsel an opportunity to present arguments against taking the issue of liability from the jury, and his failure to give plaintiffs' counsel the election of proceeding without a jury or of taking on adjournment to the next sittings. In the Supreme Court of Canada, the majority opinion, given by Mr. Justice Judson, did not deal with the point, and Justice Spence stated that he could not conclude that the trial judge did not permit argument, 5 D.L.R.3d at 183.

¹³⁶ *Id.* at 183 (Spence, J.).

¹³⁷ Both opinions in the Supreme Court of Canada referred to *Telford v. Second*, [1947] Sup. Ct. 277, and *Mizincki v. Robillard*, [1957] Sup. Ct. 351, as correctly stating the relevant principles.

¹³⁸ The opinions in *Sdraulig* would appear to cast doubt on the correctness of the Ontario Court of Appeal's decisions in both *Martin v. St. Lawrence Cement Co.*, [1968] 1 Ont. 94, and *Nag v. McKellar*, [1969] 1 Ont. 764.

¹³⁹ 66 W.W.R. (n.s.) 54 (Man. Q.B. 1968). In a subsequent case, *D. C. H. McCaffrey*, counsel for the plaintiff in *Wilcott*, was again refused a jury trial. In that case, *Kisiw v. Dietz*, 5 D.L.R.3d 764 (Man. Q.B. 1969), the fact that the plaintiff had allegedly suffered brain damage and blindness in a motor vehicle collision was held to be no reason for a trial by jury.

¹⁴⁰ [1965] 2 W.L.R. 455, [1965] 1 All E.R. 563. See B. ABEL-SMITH & R. STEVENS, *LAWYERS AND THE COURTS* 308-09 (1967) for political and professional response characterizing *Ward v. James* as "judicial abolition of trial by jury."

¹⁴¹ See the discussion and references *supra* note 120.

¹⁴² The Queen's Bench Act, MAN. REV. STAT. c. 52, § 65(4) (1954): "[A]ll issues of fact shall be tried and all damages shall be assessed by a judge without a jury, unless

judges who are the alternate and competing trial institution, the outcome in any particular case is predictable. The applicant for trial by jury may be put, as he was in *Wilcott*, in the unenviable position of having to convince a judge "that the case can be more satisfactorily tried by a jury than by a Judge,"¹⁴³ or that there are some special circumstances requiring trial by jury rather than in the ordinary way by a judge sitting without a jury,¹⁴⁴ or even that a jury is more likely to come to a correct and just conclusion.¹⁴⁵ To expect judges, when given such principles to administer, to hold that they are less capable of arriving at a correct and just decision than a jury, is indeed to expect a great deal. In *Wilcott*, Justice Wilson did not see his way clear to make such a holding.¹⁴⁶ There, on an application for a trial by jury in an action for indemnity under a fire insurance policy, the special circumstance relied upon by the applicant was a direct conflict on matters of fact. This, it was argued, would require the court to fix a preference between conflicting testimony and thus impugn the integrity of the party whose evidence was rejected. Such a conflict in testimony involving "hard swearing" by either side did not, in Wilson's opinion, make the case more fit to be tried by a jury than a judge.¹⁴⁷ He concluded: "the difficulty of any judicial task is no ground for transferring it to a jury."¹⁴⁸

In British Columbia, as in Ontario, there is a presumption in favour of jury trial if a litigant so requests. However, the request may be denied, *inter alia*, "where the issues are of an intricate or complex character."¹⁴⁹ This provision was applied in *York v. Lapp*¹⁵⁰ to deny the plaintiff's request for jury trial in a medical malpractice suit against a hospital and four doctors, arising out of the unsuccessful treatment of a broken leg which led ultimately to the amputation of the leg. Mr. Justice Gould, in so holding, pointed out that he would have decided in favour of jury trial, which would have been against his own personal views but in conformity with what he believed to be the trend in the exercise of judicial discretion, had it not been for the

otherwise ordered by a judge." Sections 65(1) and 65(4) are provisions relating to the trial of certain tort actions and actions against municipalities, analogous to the Judicature Act, ONT. REV. STAT. c. 197, §§ 55, 56 (1960). A recent article, McCaffrey, *Trial By Jury (Civil)*, 37 MAN. B. NEWS 1 (1969), surveys the history of the right to a jury trial in Manitoba in civil actions.

¹⁴³ 66 W.W.R. (n.s.) 54, at 58 (Man. Q.B. 1968).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 57. See also *Bryce v. Northland Greyhound Lines*, 62 Man. 20, 11 W.W.R. (n.s.) 113 (1953).

¹⁴⁶ This is in line with other holdings on this subject in Manitoba, e.g., *Bryce v. Northland Greyhound Lines*, *id.* In only two cases in the last twenty-five years has there been a jury trial in Manitoba in cases where jury trial is optional, and one of these was by agreement of the parties. See 66 W.W.R. (n.s.) at 55.

¹⁴⁷ By way of contrast, see *Ward v. James*, [1965] 2 W.L.R. 455, at 466, [1965] 1 All E.R. 563, at 571 (Lord Denning, M.R.): "[W]hen one or other party must be deliberately lying then trial by jury has no equal." See also 1 THE SUP. CT. P. 459 (1967).

¹⁴⁸ 66 W.W.R. (n.s.) at 60, quoting from Justice Freedman in *Bryce v. Northland Greyhound Lines*, 62 Man. 20, at 23, 8 W.W.R. (n.s.) 202, at 205 (Q.B. 1953).

¹⁴⁹ B.C. SUP. CT. R. 0.36., R.R. 5 (1961).

¹⁵⁰ 65 D.L.R.2d 351 (B.C. Sup. Ct. 1967).

British Columbia Court of Appeal decision in *McDonald v. Inland Natural Gas* in 1966.¹⁵¹ In *McDonald*,¹⁵² an action for personal injuries arising out of a domestic natural gas explosion, a non-jury trial had been ordered on the basis of complexity and intricacy of the issues, both as to proof (*e.g.*, whether certain alleged defects were in equipment installed by the defendant company or in equipment installed by the father of the plaintiff) and as to the applicable law (*e.g.*, breach of warranty and causation of damage). In *York*, Gould concluded, without elaboration or explanation, that the issues were sizeable, more complex, and intricate than in *McDonald* and hence he felt obliged to refuse a jury trial.¹⁵³

VI. JUDICIAL CONDUCT OF TRIALS

Several recent appellate decisions expressed disapproval of the manner in which judges had conducted trials. The cases are of interest because of the type of judicial conduct reviewed. Each involved conduct different in kind to those matters, such as improper dispensing with the jury and misdirection on the law, which normally form the basis of appellate review of trial decisions.

*Majcenic v. Natale*¹⁵⁴ was an appeal from the judgment of Mr. Justice Haines at trial on assessment of damages for the injuries suffered by the pedestrian plaintiff when struck by the defendant's motor vehicle. The trial had commenced with a jury, but during its course the jury was dispensed with, and the judge alone assessed the damages and awarded the plaintiff a substantial sum. The defendant appealed, asking for reduction of damages, or alternatively, a new trial. The Ontario Court of Appeal granted the latter relief on the ground that Haines's handling of the original trial had been unsatisfactory. The court felt that the manner used by the trial judge to obtain a settlement placed him in such a position that he should have declared a mistrial.¹⁵⁵ On several occasions both prior to and during the trial, Haines had discussed with counsel the possibility of either settling the case or dispensing with the jury. In the course of these discussions, the judge volunteered his view as to the proper range of general damages. The Court of Appeal thought that it was permissible for a trial judge to express an

¹⁵¹ 57 W.W.R. (n.s.) 87 (B.C. 1966).

¹⁵² The *McDonald* decision is analyzed and discussed in Binavince & Choquette, *Recent Developments in Canadian Law—Civil Procedure*, 2 OTTAWA L. REV. 147, at 168-69 (1967).

¹⁵³ In Ontario, it has been long established that the proper forum for medical malpractice suits is a judge without a jury. See the cases collected in 3 HOLMESTED & GALE, ONTARIO JUDICATURE ACT & RULES OF PRACTICE, § 28, rule 400 (W. Hemmerick ed. 1968).

¹⁵⁴ [1968] 1 Ont. 199 (1967), *rev'g and new trial ordered*, [1968] 1 Ont. 189 (High Ct. 1967).

¹⁵⁵ As he had been requested to do, at the trial, by counsel for the defendant. The court also held that a new trial was necessary on the ground that the trial judge's questioning of witnesses had amounted to an excessive interference in counsel's conduct of the case. [1968] 1 Ont. at 203-04.

opinion as to the range of damages when jointly requested by counsel to do so,¹⁵⁶ but “[w]hen the opinion is expressed gratuitously counsel is forced to accept a risk which he did not invite and with which he should not be confronted and the risk is particularly onerous when counsel do not agree with the opinion expressed.”¹⁵⁷

The case is a rare example¹⁵⁸ of reference in a reported decision to a procedure which, though not provided for in the Ontario Rules of Practice,¹⁵⁹ is not uncommon in Ontario. In that province, it is the regular practice of a number of trial judges to hold an informal pre-trial conference in chambers immediately prior to the commencement of a trial. Frequently, a major subject for discussion at these conferences is the possibility of settlement.¹⁶⁰ Such a practice, which actually amounts to judicial involvement in seeking pre-trial settlement of cases, poses a problem for a judicial process which has traditionally viewed the judge’s role as that of an “impartial” arbitrator.¹⁶¹ How far can and should a judge go in attempting to obtain or bring about a settlement of cases? The *Majcenic* case points out in a specific way the general problem. What degree of involvement in the settlement process is compatible with the impartiality we expect of the trial judge? The Court of Appeal decision designates as incompatible one type of conduct—unsolicited judicial expressions of opinion as to the settlement value of the case—without directly questioning the general practice of pre-trial conferences aimed at exploring settlement.

A wide range of opinion exists in the United States as to the proper role of the judge in promoting settlements as part of the formal pre-trial conference provided by the Federal Rules of Civil Procedure,¹⁶² and by the rules

¹⁵⁶ *Id.* at 202. The court viewed this as being an aid to settlement and unobjectionable in that any risk inherent in the procedure was one assumed by counsel in making the request.

¹⁵⁷ *Id.* at 202-03.

¹⁵⁸ In *Bell v. Smith*, 68 D.L.R.2d 751 (Sup. Ct. 1968), the trial judge had conducted an in-trial conference, apparently to canvass settlement, with the plaintiff personally and in the absence of counsel. There is no indication that such conferences with the parties personally are common in Ontario.

¹⁵⁹ The Ontario Rules of Practice make no express provision for a pre-trial conference. The rules of court of several provinces *e.g.*, B.C. SUP. CT. R. 0.34a, R.R. 1-3, M.R. 401-03 (1961); N.S.R. SUP. CT. 0.32 R. 1, *as amended by order of the Judges of the Supreme Court*, January 22, 1968 (effective February 10, 1968); ALTA. R.C. 219, Alta. Reg. 390/68, do make provision for such a conference, as do the rules of most United States jurisdictions, see *infra* note 163. Whereas a pre-trial conference formally authorized by court rules may take place quite some time before trial and may be conducted by a judge other than the one who eventually tries the case, the Ontario conference—when it occurs—will be conducted by the trial judge immediately prior to the commencement of the trial. See generally, Haines, *The Future of the Civil Jury*, in *STUDIES IN CANADIAN TORT LAW* 10, at 22-24 (A. Linden ed. 1968).

¹⁶⁰ Haines, *id.* Settlement is not, however, the only subject discussed in such informal conferences. Matters traditionally canvassed at formal pre-trial conferences, *e.g.*, obtaining admissions, and the narrowing and clarification of issues, are also discussed.

¹⁶¹ *Bell v. Smith*, 68 D.L.R.2d 751, at 758 (Sup. Ct. 1968); *but cf.* *Majcenic v. Natale*, [1968] 1 Ont. 199, at 203 (1967).

¹⁶² FED. R. CIV. P. 16, contained in, 28 U.S.C.A. (1960).

of court in most states.¹⁶³ Many feel that a judge presiding at the pre-trial conference should not canvass or urge settlement upon the parties since this will compromise the judge's impartiality¹⁶⁴ especially where he is to try the case.¹⁶⁵ These commentators and judges would share the position taken by the Ontario Court of Appeal in regard to the trial judge volunteering an opinion as to the settlement value of the case. Others, however, feel that there is no objection to judges suggesting figures, provided that they are not persistent or coercive regarding settlement.¹⁶⁶ In personal injuries cases, some even go so far as to approve of, and indulge in, unsolicited judicial recommendation of figures, coupled with a high degree of "head knocking" and coercion in an endeavour to obtain acceptance of such figures.¹⁶⁷ Justification for the approval of unsolicited judicial opinion as to settlement value range from the pragmatic belief that more personal injury cases must be settled if courts are to continue to function and if the creation of non-fault compensation schemes are to be avoided,¹⁶⁸ to arguments which attempt to meet the accusation of loss of impartiality. Arguments of the latter kind are perhaps worth noting as a contrast to the view of the Ontario Court of Appeal as expressed in *Majcenic*. Judge Skelly Wright has jokingly expressed the view that there is little chance of any great injustice resulting from a judge stating what he thinks a case should settle at, since that figure would generally be the correct value of the damages, that is, midway between what the two lawyers think it is worth.¹⁶⁹ In a more serious vein, Judge Kincaid rejects the notion that any "judge worthy of his position would allow" pre-trial conference settlement figures to affect his judgment.¹⁷⁰ Moreover, he suggests that judges recognize, as do counsel, "that any terms discussed are in contemplation of compromise only and have no bearing on or relationship to the value of the case after adjudication. The value of a

¹⁶³ A count taken in 1955 showed forty-one state jurisdictions as authorizing pre-trial conferences: REPORT OF THE COMMITTEE ON PRE-TRIAL PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, (Sept. 9, 1965) quoted in 1 A. BARRON & HOLTZOFF, FEDERAL PRACTICE & PROCEDURE 833 (Wright ed. 1960).

¹⁶⁴ See F. JAMES, CIVIL PROCEDURE 228; Clark, *Objectives of Pre-Trial Procedure*, 17 OHIO ST. L.J. 163, at 167 (1956).

¹⁶⁵ The formal pre-trial conference under United States practice takes place some weeks before the trial date and will not necessarily be conducted by the trial judge.

¹⁶⁶ E.g., Laws, *Pre-Trial Procedure*, 1 F.R.D. 397, at 400-02 (1940); Kincaid, *A Judge's Handbook of Pre-trial Procedure*, 17 F.R.D. 437, at 449 (1955). For a similar Canadian view, see Haines, *Criminal and Civil Jury Charges*, 46 CAN. B. REV. 48, at 81 (1968).

¹⁶⁷ See Wright, *Pre-Trial Conference*, 28 F.R.D. 141, at 145-47 (1960) for a frank description of the practice of judges at pre-trial conferences in the United States District Court for the Eastern District of Louisiana. There the judges have no hesitation in suggesting settlement figures in personal injuries cases and in such cases, they bring considerable pressure to bear on counsel to settle.

¹⁶⁸ *Id.*

¹⁶⁹ While this particular statement may not be either very accurate or very helpful, Judge Wright's overall attitude, see *supra* note 167, is perhaps worthy of consideration—in an imperfect world it may be preferable to resort to realistic solutions rather than to strive for perfect ones.

¹⁷⁰ Kincaid, *supra* note 166.

case before trial when faced by both sides with the hazards of ultimate outcome is quite different from its worth after liability has been established by the trier of fact."¹⁷¹

Canadian comment on the whole subject of judicial encouragement of settlement has been sparse.¹⁷² Writing in 1966, former Chief Justice McRuer roundly condemned the practice of judges attempting to promote settlement at pre-trial conferences. He viewed "judicial conciliation" as quite alien to the process of administering justice according to law.¹⁷³ Recently, the subject was discussed at a meeting of Ontario lawyers active in litigation.¹⁷⁴ A vote taken at the conclusion of the discussion indicated a considerable, though by no means unanimous, opposition to the practice of judges canvassing or attempting to induce settlement either immediately before or during the trial.¹⁷⁵ The convenors of the meeting considered that there was a sufficient expression of opinion against such practices to bring the matter to the attention of the Ontario bench.

The subject of judicial exploration of settlement possibilities after the trial is underway arose in *Tecchi v. Cirillo*.¹⁷⁶ In that case, it was clear from the record that the trial judge had been convinced that every effort should be explored to achieve a settlement in the case. The Ontario Court of Appeal ordered a new trial, but not on the ground that it was per se improper for the trial judge to consider settlement of the case after the trial had commenced. They seemed to imply that judicial consideration of the appropriateness of settlement at a trial was permissible.¹⁷⁷ However, they held that it was not permissible for the judge to pre-judge the case or to give that appearance. It was clear that this had occurred in *Tecchi*, for the judge had expressed, prior to hearing any defence witnesses, that the plaintiff was entitled to substantial damages.¹⁷⁸

In *Tecchi*, the Court of Appeal found a further ground for awarding a

¹⁷¹ *Id.*

¹⁷² In addition to the comments discussed in the text see Haines, *The Future of the Civil Jury*, in *STUDIES IN CANADIAN TORT LAW* 10, at 24 (A. Linden ed. 1968); Haines, *Criminal and Civil Jury Charges*, 46 *CAN. B. REV.* 48, at 81 (1968).

¹⁷³ McRuer, *The Motor Car and the Law*, 4 *OSGOODE HALL L.J.* 54, at 70 (1966).

¹⁷⁴ The Advocates' Society "Workshop," Toronto, May 9, 1969.

¹⁷⁵ The vote indicated that of those present, seventy-one were against and forty-two were in favour of the practice of judges participating in or attempting to induce settlement after a case is called for trial. There were, however, forty abstentions.

¹⁷⁶ [1968] 1 *Ont.* 536.

¹⁷⁷ *Id.* at 537. The implication seems apparent in the following passage:

It is obvious from the record that the trial judge was convinced that every effort should be explored to achieve a settlement in the case and that the case was of a nature warranting genuine efforts of settlement. Be that as it may, it is equally obvious to us upon the record that the Judge permitted himself, in his remarks, spread throughout the record, to go beyond judicial consideration of the appropriateness of settlement and permitted himself in the remarks he saw fit to make before even the first witness for the defence was called to pass into the area of pre-judgment of the case or at least to give that appearance.

¹⁷⁸ *Id.*

new trial. It was quite apparent from the record that the trial judge had seen fit to read the examination for discovery of one of the parties prior to its admission into evidence.¹⁷⁹ While clearly improper, it is generally impossible to know how frequently judges indulge in this practice since it will only become apparent if he makes a comment during the trial which reveals the fact. The possibility of judges reading these documents before trial results from the general practice, at least in Ontario, of filing with the court¹⁸⁰ a copy of the examinations for discovery in addition to the pleadings and other papers in the action. There is a feeling at least among some trial counsel that some judges read the discoveries prior to the action, and perhaps it is desirable that the practice of filing these documents in advance with the court should be discontinued.¹⁸¹ Nothing of value would be lost by such a step. Counsel could come prepared with an extra copy of the examinations for discovery, and if and when any part of these were adduced in evidence, copies could then be furnished to the presiding judge.

The *Majcenic* case¹⁸² and *Bell v. Smith*,¹⁸³ which was a later case that reached the Supreme Court of Canada, pointed out a further aspect of the conduct of trials that is often overlooked. It is imperative that a record be made of all aspects of the trial including discussions that take place in the judge's chambers. In both the above cases, the trial judge had conducted discussions in his chambers in the absence of a court reporter and without recording the conclusions reached in these discussions, and in each case, on appeal, what exactly had been said or agreed to at those discussions came into issue.¹⁸⁴ As the trial record did not contain a transcript of the pro-

¹⁷⁹ [1968] 1 Ont. at 537.

¹⁸⁰ We are informed that, at least in Toronto, the examinations for discovery are not usually or automatically transmitted to the trial judge. They are sent on the eve of trial from the central office to the court clerk, and to obtain them, the judge would have to specifically request them.

¹⁸¹ Judges must face a considerable temptation to read the examinations for discovery in preparing for, at least, a personal injuries case. In such cases, the pleadings invariably include a swath of allegations and particulars of negligence or contributory negligence, only a few of which will be genuinely in issue at trial. A quick perusal of the discoveries will generally reveal which of the allegations will be seriously pursued at trial.

¹⁸² [1968] 1 Ont. 199 (1967).

¹⁸³ 68 D.L.R.2d 751 (Sup. Ct. 1968).

¹⁸⁴ *Bell v. Smith*, *id.* There was no complete record of what had transpired in open court. *See, e.g., the Bell case, id.* at 756. In addition, further confusion was created by the lack of any written reasons of the Ontario Court of Appeal.

The entire case was a "tragedy of errors." It arose out of a settlement initially agreed to by the plaintiffs and from which they shortly thereafter resiled on being told, so they alleged, by their counsel that he would be charging them a solicitor-client fee equal to ten per cent of the settlement, in addition to a similar amount of costs payable to him as part of the settlement. The defendants moved for judgment in accordance with this settlement. On the hearing of this motion, the defendants subpoenaed plaintiffs' original counsel who had negotiated the settlement (the plaintiffs had by the time of the hearing changed solicitors). This counsel proceeded to testify and to produce his complete file—all of which was privileged as against the plaintiffs—without either him or defendant's counsel or the judge obtaining the plaintiffs' waiver of the privilege. Later in the hearing, the judge requested to be allowed to (and did) speak with the

ceedings which had taken place in chambers, counsel filed affidavits concerning what had been said.¹⁸⁵ In both cases the recollections of counsel were in conflict.

The Supreme Court of Canada and the Ontario Court of Appeal each pointed out the obviously unsatisfactory position of the appellate court in such circumstances because it is invited to choose between the conflicting statements under oath of members of the bar.¹⁸⁶ Both courts recommended that to avoid this problem in the future the trial judge should either hear argument in open court in the absence of the jury or have the reporter in chambers to record the discussion.¹⁸⁷ The Ontario Court of Appeal suggested that as a minimum precaution the reporter should be called in with counsel present to record the conclusions agreed upon.¹⁸⁸

"Justice should not only be done, but should be seen to be done." While this maxim usually carries with it an almost metaphorical connotation, taken literally it aptly summarizes the ruling in *Springman v. Darragh*.¹⁸⁹ In that case, the "judicial misconduct" consisted of the judge hearing a landlord's application for a writ of possession in his private chambers with both the public and press excluded. On appeal, Mr. Justice Freedman, speaking for the Manitoba Court of Appeal, ruled that such conduct violated the fundamental principle of the administration of justice that courts must be open to the public. While accepting this basic principle, the landlord's counsel contended that the particular case fell within an exception to this rule, it being a chambers' matter. Without determining whether there was a general exception for all or any chambers' matters, Mr. Justice Freedman remitted the case for another hearing on the ground that an application for an order for a writ of possession is, in fact, a trial and not a motion in chambers and must be heard in open court.

plaintiffs personally in his chambers in the absence of their counsel. Finally the judge entered, or purported to enter, judgment for the plaintiffs on the basis of the minutes of settlement filed, though none were filed. The plaintiffs appealed, unsuccessfully, to the Ontario Court of Appeal and then to the Supreme Court of Canada, to have the judgment set aside and to have the case set down for trial. The Supreme Court of Canada condemned virtually every step in the proceeding and allowed the plaintiffs' appeal.

¹⁸⁵ See *Bell v. Smith*, 68 D.L.R.2d 751, at 756 (1968). The Supreme Court of Canada, quoting from 3 HALSBURY, LAWS OF ENGLAND 68 (3d ed. 1959) referring to the ANNUAL STATEMENT OF THE GENERAL COUNCIL OF THE BAR 7 (1937), pointed out that "[c]ounsel should not give a proof of evidence of what occurred at a hearing in which he was professionally engaged." However, under the circumstances of the case, the Supreme Court felt that counsel had not acted improperly in attempting to properly discharge their duty to their clients by submitting affidavits in evidence.

¹⁸⁶ *Majcencic v. Natale*, [1968] 1 Ont. 199, at 202 (1967). The court declined to deal with that part of the unrecorded discussions in chambers on the ground that counsel were not in agreement as to what took place.

In the *Bell* case, 68 D.L.R.2d at 756-57, the court dealt with matters that were unrecorded and to which counsel were not in agreement, e.g., as to whether plaintiffs' trial counsel had objected to plaintiffs' original counsel testifying.

¹⁸⁷ *Majcencic v. Natale*, [1968] 1 Ont. 199, at 200 (1967); *Bell v. Smith*, 68 D.L.R.2d 751, at 758 (1968).

¹⁸⁸ [1968] 1 Ont. 199, at 201 (1967).

¹⁸⁹ 1 D.L.R.3d 250 (Man. 1968).

The question of whether there is a general exception to the principle of public hearing for all or any chambers' matter was left unresolved by the Manitoba Court in *Springman v. Darragh*. This question would be a relevant factor in passing judgment on the propriety of the conduct of certain proceedings described recently in the Toronto press.¹⁹⁰ Regrettably, there appears to be no one with both the standing and the desire to question the conduct of the proceedings, and they will escape judicial review.

The proceedings arose out of the request by a shareholder, Adams, to the Clairtone Sound Corporation to sue its former president, Munk, for the recovery of stock market profits allegedly made by the use of "inside" information.¹⁹¹ Upon the corporation's refusal, Adams sought the recourse provided by section 71(e) of the Ontario Corporations Act.¹⁹² He applied to the Supreme Court for an order requiring the Ontario Securities Commission to commence an action on behalf of the corporation. According to the newspaper accounts of these proceedings,¹⁹³ it was the desire of at least several of the interested parties that the matter be kept as quiet as possible. Unfortunately, through oversight or deliberate acts, the court officials lent assistance to the parties in this plan. The papers relating to the originating motion were handled in such a way that at the time the proceedings were underway the clerks in the Supreme Court office were unable to find any records indicating that the proceedings had ever been commenced.¹⁹⁴ To compound matters, Mr. Justice Stewart held hearings on the application in his private offices rather than in open court. The proceedings only came into public view, after their termination, at a press conference called by the Chairman of the Ontario Securities Commission at which he made available to reporters duplicate copies of the court documents in the action.¹⁹⁵

Since the application terminated in a settlement acceptable to all the directly interested parties, it seems unlikely that the conduct of the proceedings will be subject to judicial review. However, the conduct of the proceedings has been roundly condemned by the Chairman of the Ontario Securities Commission¹⁹⁶ and by one Toronto newspaper.¹⁹⁷ The

¹⁹⁰ The proceedings and their conduct were the subject of a two part article by Dow, Assistant Financial Editor, in the Toronto Daily Star, June 24, 1969, at 14, cols. 1-6 and June 25, 1969, at 18, cols. 3-5.

The same newspaper ran an editorial, June 24, 1969, at 6, cols. 1-2, critical of the conduct of proceedings and calling for an "explanation . . . for this extraordinary procedure."

¹⁹¹ Such an action is specifically granted by An Act to amend The Corporations Act, Ont. Stat. 1966 c. 28, § 3, *amending* The Corporations Act, ONT. REV. STAT. c. 71, § 71 (1960).

¹⁹² *Id.*

¹⁹³ *Supra* note 190.

¹⁹⁴ During the period of the proceedings, all of the papers were evidently in Mr. Justice Stewart's office, Toronto Daily Star, June 25, at 18, cols. 3-5. The situation was exacerbated in the eyes of the press by the fact that the lawyers of the parties refused to admit that the matter was before the courts.

¹⁹⁵ Toronto Daily Star, June 24, 1969, at 6, cols. 1-2 and June 25, 1969, at 18, cols. 3-5.

¹⁹⁶ *Id.*

¹⁹⁷ *Supra* note 190.

result is that the administration of justice has been brought into disrepute. In these circumstances it is to be hoped that the Chief Justice of the High Court will see to it, through admonitions and any necessary changes in administrative practice, that such clandestine proceedings do not reoccur. The particular proceedings in *Clairtone* were ones required by the rules to be heard by a judge in chambers.¹⁹⁸ Because of the obvious public interest in the subject matter, the proceedings were ones that most certainly should have been heard in open court.¹⁹⁹ This case provides good reason for not adopting a blanket exception from the principle of public hearings for chambers' matters. In only the most exceptional cases should judicial proceedings be conducted otherwise than publicly. Quite understandably, the public is very suspicious of in camera proceedings unless a very good reason is given for such a mode of conduct. In *Clairtone* none has been forthcoming.²⁰⁰ To be seen to be done, justice must be done where it can be seen; the court papers should be a matter of public record; the public should be able to ascertain when and where a hearing will take place; and the hearing itself should be one from which the public is not excluded.

One final development in the area of judicial conduct of trials deserves brief mention. In 1967, the Ontario Court of Appeal in *Gray v. Alanco Developments Ltd.*²⁰¹ ruled that it was not permissible for a trial judge to express to the jury an opinion as to the monetary value of the plaintiff's general damages.²⁰² In so doing, the court followed *Ward v. James*,²⁰³ a 1965 English Court of Appeal decision. Recently, the Supreme Court of Canada in *Byron v. Williams*²⁰⁴ expressly reserved the decision in *Alanco Developments* "for further consideration when the occasion arises."²⁰⁵ Although the trial judge in *Byron v. Williams* had mentioned certain figures to the jury which could have been interpreted as an expression by the judge of

¹⁹⁸ ONT. R.P. 209(18).

¹⁹⁹ It is not acceptable to argue that *in camera* court proceedings are tolerable when they result in settlement, on the ground that, had the parties settled their dispute without resort to judicial intervention, nobody would or need have known of the allegations. If parties wish to keep the details of their disputes from public scrutiny, then they should stay out of the courts. The administration of justice cannot afford the injury to its reputation that clandestine legal proceedings bring.

²⁰⁰ A journalist's request of Mr. Justice Stewart for an explanation for the conduct of the proceedings met with a response from a secretary that "Mr. Justice Stewart is not available to speak to you with reference to *Clairtone*," Toronto Daily Star, June 25, 1969, at 18, cols. 3-5.

²⁰¹ [1967] 1 Ont. 597, 61 D.L.R.2d 652.

²⁰² *Id.* The Court of Appeal also ruled that it was impermissible for counsel to mention figures to the jury in an attempt to quantify general damages. Recently, that court reaffirmed its condemnation of this practice in *Allan v. Bushnell T.V. Co.*, [1969] 2 Ont. 6. For an interesting division of opinion on the question of what amounts to an attempt by counsel to quantify general damages, see *Didluck v. Evans*, 67 D.L.R.2d 411 (Sask. 1968).

²⁰³ [1965] 2 W.L.R. 455, [1965] 1 All. E.R. 563 (C.A.).

²⁰⁴ 67 D.L.R.2d 111 (Sup. Ct. 1968). *Gray Alanco Dev. Ltd.*, *supra* note 201, and *Byron v. Williams*, *supra* note 204, are discussed in Watson, Comment, 48 CAN. B. REV. 565 (1970).

²⁰⁵ *Id.* at 118-19.

his opinion as to the range of damages,²⁰⁶ the Court upheld the judgment and thus avoided consideration of *Alanco Developments*, on the ground that in all the circumstances the jury's assessment was reasonable.

It would seem then that the Supreme Court has reservations about the prohibition of the *Alanco Developments* decision. It is to be hoped that the Court will soon be presented with, and will seize, an opportunity to deal with the merits of this prohibition.

²⁰⁶ The action was one brought by a wife under the Fatal Accidents Act for damages for the death of her husband who was killed in an automobile collision with the defendant's car. The figures mentioned by the trial judge were made in the context of discussing the effect to be given to an actuary's evidence as to the husband's life expectancy and the amount necessary to purchase an annuity. In his separate concurring opinion, Mr. Justice Ritchie distinguished the *Alanco Developments* case as being restricted to forbidding judicial expressions of opinion as to damages for pain and suffering or for the loss of amenities of life, *i.e.*, those cases in which there can be no evidence as to the value in monetary terms of the loss sustained. See 67 D.L.R.2d at 112. The majority opinion by Mr. Justice Hall did not discuss the *Alanco Developments* decision at all beyond stating that the case was decided "without reference" to the *Alanco Developments* decision which he reserved for later consideration.