Retrospect on O'Hearn v. Yorkshire Insurance Company

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When a criminal act lies behind an insurance claim, public policy largely determines the issues involved. In applying these notions of public policy, the courts have often failed to draw a distinction between the effect of a criminal activity on insurance claims and the effect of a similar act upon rights to succession. As a result, courts have sometimes proceeded to resolve insurance claims using authorities concerned with the right of a criminal to succeed to the estate of his victim. At the outset it must be stated that the law of insurance and the law of succession have developed from different sources along very different lines. It is suggested, therefore, that any attempt to use authorities derived from succession cases to support decisions in the field of insurance would result in a substantial error of jurisprudence. It is in this light that the decision in *O'Hearn* v. *Yorkshire Insurance Co.*[1] will be examined.

O'Hearn was charged, convicted and sentenced to two years imprisonment under section 285 of the *Criminal Code*.[2] It was alleged that on the September 11, 1919, O'Hearn, while driving his automobile along King Street, in Toronto, in a state of intoxication and at an excessive speed, struck and injured a man named Plum who was an employee of the Toronto Railway Company, and then engaged in repairing railway lines for that Company. As a direct result of the mishap, Plum died. His dependents claimed and received payment of $6,133.51 from the Railway Company under the *Workmen's Compensation Act*.[3] Having paid the claim the Railway Company became subrogated to the rights of Plum's dependents, and successfully claimed $6,275 from O'Hearn. O'Hearn in turn claimed the sum from his insurer, the Yorkshire Insurance Company. He based his claim upon the policy of insurance under which the defendant Company had agreed to indemnify O'Hearn for all losses incurred "by reason of the liability imposed upon him by law for

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1 (1922) 67 D.L.R. 735 (S.C.C.). See *infra*, note 95.

2 R.S.C. 1906, c.146, s.285: "Everyone is guilty of an indictable offence and liable to two years' imprisonment who, having the charge of any carriage or motor vehicle, automobile or other vehicle, by wanton or furious driving, or racing or other wilful misconduct, or by wilful neglect, does or causes to be done any bodily harm to any person."

3 *Workmen's Compensation for Injuries Act*, R.S.O. 1914, c.146.

damages on account of bodily injuries accidentally sustained, including death at any time resulting therefrom".[4] The insurance company argued that it was contrary to public policy that O'Hearn "should be indemnified against his criminal act".[5] The Ontario Supreme Court (Trial Division)[6] upheld this defense and dismissed O'Hearn's action. O'Hearn then unsuccessfully appealed to the Appellate Division of the Ontario Supreme Court. In dismissing his appeal, Meredith C.J.O. wrote:

> In the case at Bar, the appellant's negligence, apart from it resulting in the death of the injured man, was a crime; and, according to the cases to which I have referred, the appellant cannot maintain an action to indemnify him against the injury caused by that act.[7]

In support of its decision the Court referred mainly to cases from the law of succession.[8] Where a felon or his heirs attempts to succeed to the estate of the victim of the felony the law of succession, as a matter of public policy, prevents such a succession from taking place. The Court made reference to the views expressed by Fry L.J. in *Cleaver* v. *Mutual Reserve Fund Life Association*, namely, that:

> ... no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person. If no action can arise from fraud, it seems impossible to suppose that it can arise from felony or misdemeanour.[9]

In deriving support from decisions from the law of succession, the Court, in my view, committed a fundamental error which has since influenced the direction taken by Canadian courts in this area of insurance law.[10]

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[4] *Supra*, note 1.

[5] *Ibid.*, 736.

[6] (1921) 64 D.L.R. 437, *per* Middleton J.

[7] *Supra*, note 4, 738.

[8] *Amicable Society* v. *Bolland* (1830) 4 Bli.N.S. 194, 5 E.R. 70; *Cleaver* v. *Mutual Reserve Fund Life Association* [1892] 1 Q.B. 147 and *Lundy* v. *Lundy* (1895) 24 S.C.R. 650.

[9] *Ibid.*, 156. The equitable origins of the idea can be traced to opinions expressed in *Villers* v. *Beaumont* (1682) 1 Vern 100, 101, and *Bridgman* v. *Green* (1755) 2 Ves.sen. 627-628.

[10] *O'Hearn* has received wide acceptance in Canadian courts. See: *Smith* v. *National Guaranty Co.* (1929) 4 D.L.R 486 (Ont. C.A.); *Re Millar* [1937] 3 D.L.R. 234 (Ont. C.A.); *La Foncière Cie* v. *Perras* [1942] 4 D.L.R. 244 (Que. C.A.); *Home Insurance Co.* v. *Lindal and Beattie* [1934] S.C.R. 33 (Alta. C.A.). Although *O'Hearn* was not expressly mentioned, its influence can be found in *Crisp* v. *Delta Tile & Terrazzo Co.* (1961) O.W.N. 278 (Ont. C.A.); *Pont* v. *Perth Mutual Insurance Co.* (1967) 59 W.W.R. 550 (B.C. Cty Ct.). Judicial ingenuity saved the plaintiff from the full rigours of the *O'Hearn* rule in *Bunting* v. *Hartford Accident Co.* (1955) 2 D.L.R. 700 (Ont. Cty Ct.).

The obvious difficulty which the Ontario Court of Appeal faced was the need to reconcile[11] its decision with *Tinline* v. *White Cross Insurance Association, Limited,*[12] a decision from the English Court of King's Bench. The English courts, in recognizing the different paths of development taken by the laws of succession and of insurance, had, in my view, correctly applied a pattern of public policy peculiar to insurance claims arising out of a criminal activity. They had not confused the public policy considerations in insurance matters with public policy considerations in matters of succession. On the other hand, the line adopted by the Ontario Court of Appeal was in direct conflict with English decisions.

In *Tinline* the plaintiff drove a motor car at an excessive speed along Shaftesbury Avenue in London. The car, having gone out of control, ran into three pedestrians who were crossing the street; two of them were injured and the third killed. Tinline was convicted of manslaughter. The insurance policy covered, *inter alia,* compensation for accidental personal injury. The injured persons and the representatives of the person who was killed claimed compensation from Tinline and he in turn sought a declaration that he was entitled to be indemnified in respect of those claims. Granting the plaintiff's claim against the insurance company, the Court observed:

> A man does not become liable to pay compensation for accidental personal injury unless the accident is due to his negligence. The policy therefore is one which insures against the consequences of negligence, including personal negligence. The defendants say however that where the negligence is so gross and excessive that as a result of it a man is killed and the crime of manslaughter is committed the assured cannot claim an indemnity, for it is said it is against public policy to indemnify a person against the civil consequences of his criminal act ... but the policy is an insurance against negligence whether slight or great, and it seems to me that it covers this case. It must of course be clearly understood that if this occurrence had been due to an intentional act on the part of the plaintiff, the policy would not protect him.[13]

The Court in *O'Hearn's case* was unwilling to draw the distinction between an intentional act and a negligent act. Meredith C.J.O. distinguished the *Tinline* case on the ground that "there was no legislation similar to that in section 285 of the *Criminal Code,* and there-

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[11] The relationship which existed between Canadian courts and English courts at the time *O'Hearn* was decided (1922) was a cordial one. The attitude of Commonwealth courts was to pay due deference to English decisions without any particular feeling of obligation. "In the end result, however, deference did not differ very much from duty." B. Laskin, *The British Tradition in Canadian Law* (1969), 61.

[12] [1921] 3 K.B. 327.

[13] *Ibid.,* 330-332.

fore the negligence of the plaintiff did not constitute a crime, although in the result it was a criminal offence — manslaugher — which was committed".[14] In a subsequent decision,[15] on similar facts, the English Court of King's Bench, in an exercise of remarkable restraint, thought that *O'Hearn* was a decision based on public policy considerations peculiar to the Province of Ontario.[16]

The line of cases,[17] in the English law, following *Tinline* is both long and impressive, as is the line of Canadian decisions following *O'Hearn.*[18] Despite the valiant effort by Meredith C.J.O. to distinguish *Tinline,*[19] it must be said at once that *O'Hearn* and *Tinline* are, in fact, irreconcilable. In order to determine the error of jurisprudence, it would be necessary to examine the development of both the law of succession and the law of insurance in the Common Law.

Succession

Up to 1857 in England,[20] testamentary matters as well as matrimonial[21] and defamatory matters,[22] were the exclusive concern of Ecclesiastical Courts. Prior to the Norman Conquest, the Church had its own courts. In England, however, these church courts exercised a shared jurisdiction with both the Shire Courts and the Hundred Courts. All three, therefore, had jurisdiction both in temporal and spiritual matters. After the conquest, the difficulties stemming from a shared jurisdiction became apparent to William I, and in 1072 A.D. he separated the jurisdiction of the spiritual courts from the temporal courts. At the same time, William I left defamation, matrimonial and testamentary matters, among others, within the exclusive jurisdiction of the spiritual courts. These matters remained within the ambit of religious influence for the next eight

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[14] *Supra,* note 4.

[15] *James* v. *British General Insurance Co.* [1927] 2 K.B. 311.

[16] *Ibid.,* 324.

[17] *Marles* v. *Philip Trant & Sons* [1954] 1 Q.B. 29; *Askey* v. *Golden Wine Co.* [1948] 2 All E.R. 35 (K.B.D.); *Haseldine* v. *Hosken* [1933] 1 K.B. 822; *Beresford* v. *Royal Insurance Co.* [1938] A.C. 586 (H.L.) and *James* v. *British General Insurance, supra,* note 15.

[18] *Supra,* note 10.

[19] *Supra,* note 7, 738.

[20] By the *Court of Probate Act, 1857,* 20-21 Vict., c.77, jurisdiction as to matters testamentary was transferred to the Common Law Courts.

[21] By the *Matrimonial Causes Act, 1857,* 20-21 Vict., c.85, jurisdiction in matrimonial matters was transferred to the Common Law Courts.

[22] By the *Ecclesiastical Courts Act, 1855,* 18-19 Vict., c.41, jurisdiction in defamation was transferred to the Common Law Courts.

centuries,[23] a fact which must not be forgotten when examining the modern law of succession.[24]

During the period between 1078 A.D. and the Reformation,[25] the Ecclesiastical Courts periodically expanded and contracted their jurisdiction, depending on the warmth of the relationship between the Pope, the head of the Church and the King, the head of State. Despite the strained nature of that relationship, the Ecclesiastical Courts hung on to their jurisdiction over defamation, matrimonial and testamentary matters throughout this period.[26] Dr. Stubbs, in 1883, catalogued the law which the English Ecclesiastical Courts used up to the time of the Reformation:

> ... the Canon Law of Rome, comprising the decretum of Gratian; the decretals of Gregory IX, published in 1230; the sext, added by Boniface VIII; the Clementines, issued in 1318; and the extravagants, or uncodified edicts, of the succeeding popes. A knowledge of these was the scientific equipment of the Ecclesiastical jurists ...[27]

The Reformation brought in the final and irrevocable break with Rome, but the spiritual courts continued to exercise equal authority in their area of jurisdictional competence with the temporal courts. This was true, not only during the reign of Henry VIII, but also throughout the post-reformation period. Although Henry VIII replaced papal supremacy with a royal supremacy, the next 150 years were used to translate gradually the personal power of the King into a power of the King-in-Parliament. Throughout these turbulent times, the sources of the Canon Law applied by the Ecclesiastical Courts in England were the general codes coming down from Rome, the Papal decretals, the ordinances of the Provinces of York, of Canterbury and of the local dioceses and, in addition, the Church's concept of the fundamental laws of God. The latter were reinterpreted according to the religious views of the new Church of England.[28] The lawyers, however, had some considerable difficulty in ascertaining the extent to which the pre-Reformation Law was abrogated in post-Reformation times.

Another difficulty was the extent to which legislation passed in Parliament could affect settled principles of the Canon Law. By 1603,

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[23] A.D. 1072 to A.D. 1855.

[24] See G. Moore, *The English Canon Law* (1967), 125-129; F.E. Maitland, *The Roman Canon Law in the Church of England* (1898), Chapter II.

[25] In 1530, Henry VIII broke with the Pope and in 1531 was recognized as the head of the Church of England.

[26] Moore, *supra,* note 24.

[27] Ecclesiastical Courts Commission of 1883, Part I, 24. See in addition F. Makower, *The Constitutional History of the Church of England* (1895), 421-425.

[28] *Moore, supra,* note 24, 5.

during the reign of James I, the state had found it expedient to refurbish the former convocations of Canterbury and of York, which indeed pre-dated the origins of Parliament in England. In the newly constituted convocations there were two tiers: the Upper House of Bishops and a Lower House of elected and ex-officio representatives. The convocation was empowered to enact canons, but they required Royal assent before they became the law in England.[29] This in effect was a device introduced to preserve the supremacy of Parliament and the King-in-Parliament, over the Church and its laws, a result of "the settlement" worked out as part of the Reformation. Parliament did restrain itself from interfering with spiritual matters,[30] and since the doctrines of the Christian Church were not amenable to outside influences, defamation,[31] matrimonial[32] and testamen-

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[29] *Ibid.*, 6-7.

[30] The relationship between Parliament and the Church during the post-Reformation period was a cordial one. Except for three major interventions, parliamentary excursions into the area left to the Church were both minimal and insignificant. In 1603, under James I, by the publication of new canons, Catholic truths were preserved and restated in terms which were acceptable to Protestant zeal. In 1662 Parliament passed the *Act of Uniformity*, 13-14 Car. II c.IV. In the schedule to that Act was the Book of Common Prayer. An attempt to replace the Book of Common Prayer in 1927 with a new version, by the then Church assembly, was prevented by Parliament. Finally, in 1919, by the *Church of England Assembly (Powers) Act*, 9-10 Geo. V, c.76, Parliament gave the Church assembly powers to pass measures concerning the Church, its officers and the law. These measures, however, required Royal Assent before they became the law of the realm. But the giving of the Royal Assent was made subject to consent of both houses of Parliament, by resolution.

[31] Until the 16th century the citizen had no remedy for defamation except the subjection of the miscreant to suffer penance. In exasperation, the Common Law, in the 16th century forged a remedy in damages, at first limiting it to imputations of an offence triable at Common Law. This was the birth of slander and such slanders were triable at Common Law without proof of damage. *Davis* v. *Gardiner* (1593) 4 Co. Rep. 16b, 76 E.R. 897, appears as the first such case. See also T.F.T. Plucknett, *A Concise History of the Common Law* 5th ed. (1956) Ch.5 and R.C. Donnelly, *History of Defamation* [1949] Wis.L.Rev. 99.

[32] The doctrine of indissolubility of marriage was accepted by the English Ecclesiastical Courts after the Reformation. The courts, therefore, were not empowered to pronounce a decree of divorce, *a vinculo matrimonii*, which would permit parties to remarry. The matrimonial remedy that was available was a divorce — *a menso et thoro* — relieving the petitioner from the duty to co-habit only, but not to remarry. The marriage was reckoned to be continuing. Until 1857, when the *Matrimonial Causes Act, 1857*, 20-21 Vict., c.85 was passed, the only matrimonial remedy available enabling the parties to remarry was by way of an Act of Parliament.

tary[33] matters have seen little or no reform since very early times. Reform, if any, needed to come from within the Church, and when it did, Parliament was not prepared to interfere in an area where the Church had jurisdiction.

Dr Moore commented on the nature of the law practised in the Ecclesiastical Courts:

> In the beginning God created the heaven and the earth. There, in the opening words of Genesis, is the root of our study of the Canon Law. In the study of Moral Theology we are concerned with the whole of God's Law in so far as it is immediately relevant to man. In the study of the Canon Law we are concerned with so much of the Moral Law as is enforced, directly or indirectly, by human sanctions. The basis of the Canon Law is theological.[34]

So long as the Ecclesiastical Courts held jurisdiction over testamentary matters, the secular legal order unhesitatingly recognized the exclusive right of Canon Law to determine rights to succession within the realm. In adjudicating in disputes arising out of a right to succession, the Canon Law's notion of "morality" or "moral theology" was the guide to a just decision. The Canon Law was not concerned with the niceties of legal culpability; its concern was merely one of moral culpability.

This notion of moral culpability appears to govern the right to succession both in the pre-1857 decisions and, surprisingly, in the modern law of succession. The influence of Canon Law on the law of succession has left a lasting impression on the testamentary laws of the countries that have inherited the Common Law tradition. Canada is one such country.

A brief survey of the law of succession in Canada should indicate the extent to which the courts have used the criterion of moral culpability in determining the rights of a felon to succeed to the estate of his victim. There is no doubt that a murderer cannot succeed to the estate of his victim[35] except where it can be established that he or she was legally insane at the time the murder was

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[33] The Canon Law received the Roman view that a bastard would become legitimate if his parents were free to marry each other at the time of the child's birth, and did in fact marry each other subsequently. This excluded the rights of an "adulterine" bastard from successding to his father's properties despite the subsequent marriage. This situation was not corrected until well into the twentieth century. See *Legitimacy Act, 1926,* 16-17 Geo. V, c.60.

[34] Moore, *supra,* note 24, 1.

[35] *Deckert* v. *The Prudential Insurance Company Of America* [1943] O.R. 448; *Re Gore* [1972] 1 O.R. 550; *Re Dreger* (1976) 12 O.R. (2d) 371. The position is the same in England. See *Cleaver* v. *Mutual Reserve Fund Life Association, supra,* note 8 and *In the Estate of Crippen* [1911] P. 108.

committed,[36] the rationale being that an insane person is not morally culpable for killing. Voluntary manslaughter[37] has clearly excluded the felon from a right to succeed to his victim's estate; the intentional act which results in the death of the victim involves a question of moral turpitude, and therefore the law will not allow him to benefit from it.

A more difficult question arises where the death is a result of involuntary manslaughter, as in *O'Hearn*. Some commentators have expressed the view that a person who causes the death of another by reckless or dangerous driving does not commit an act of such moral turpitude so as to merit exclusion from his victims' estate.[38] However, in *Caldwell* v. *Erasmus*,[39] a South African case, there are *dicta* to support the view that such claimants may suffer the same fate as those guilty of voluntary manslaughter. There, the father was arrested and charged with the murder of his son, a minor. As an indigent, and while awaiting trial, the father claimed an amount for his defense out of his deceased son's estate. The argument was made that until he was found guilty, the father should be presumed innocent, and must, therefore, be taken to have a right to succeed to his son's estate. The Transvaal Supreme Court disallowed his claim, and Blackwell J. in the course of his judgment wrote:

> But the father stands charged with having murdered his son and, if he be convicted either on this charge or even on a lesser charge of culpable homicide, or possibly even of having caused the death by negligence, it is clear that he cannot be allowed to inherit. Under our law, if we adopt the principles enunciated by the old text writers, he would be disentitled as *indignus*.[40]

Despite *dicta* to the contrary, the criterion which the courts utilize is one of moral culpability which seems justifiable when one recalls that the modern law of succession was developed in the Ecclesiastical Courts.

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[36] *Re Estate of Maude Mason* (1916) 31 D.L.R. 305 (B.C.S.C.); *Nordstrom* v. *Baumann* [1962] S.C.R. 147. The Ontario Supreme Court in *Re Charlton* (1968) 2 O.R. 96 has held that once an accused pleads guilty to the manslaughter of his testator, he cannot change his plea into one of insane automatism at the Probate hearing despite the rule in *Hollington* v. *F. Hewthorn & Co.* [1943] 2 All E.R. 35 (C.A.).

[37] *Lundy* v. *Lundy, supra*, note 8; *In Re Hall* [1914] 1 P. 1 and *In Re Giles* [1971] 3 W.L.R. 640. See also T.K. Farnshaw and P.J. Pace, *Slaying a testator* (1972) M.L.R. 426.

[38] T.K. Farnshaw and P.J. Pace, *"Let the hand receiving it be ever so chaste..."* (1974) M.L.R. 481, 493-494.

[39] [1952] 4 S.A. 43 (T).

[40] *Ibid.*, 49. See *Ex Parte Steenkamp and Steenkamp* [1952] 1 S.A. 744, 748-752 (T).

If *volens* is absent in the case of an insane killer, it is likewise absent where a driver is merely negligent. The fundamental question is one of moral culpability, and not one of legal fault. Bailhache J. in *Tinline* alluded to this issue in the following passage:

> Precisely the same negligence which injured the two persons killed the third, but to hold that there is any difference in the liability to indemnity would be to hold that the indemnity depends upon the nature and result of the injury sustained by the person who is knocked down, or, to put it another way, that it depends in some degree upon the amount of the insured's negligence. That will not do, because there is very often quite as much negligence in knocking down a person who is not killed as there is ... a person who is killed [under circumstances amounting to] manslaughter.[41]

The function of the courts here is not to determine the broad legal issue of "fault" but to see that the person receiving the estate is not tainted with moral culpability. No fine considerations of legal fault could ever achieve that result. Therefore, in my view, the question of involuntary manslaughter should be separated from voluntary manslaughter, moral innocence being the decisive factor.

Insurance

The earliest commercial transaction involving an insurance contract dates as far back as 1318 A.D.[42] and the earliest insurance policy, 1347 A.D.[43] There is abundant evidence that insurance, "considered as an arrangement whereby a person subjected to any peril may be indemnified for loss on account of such peril, was known to the ancients and was made use of by them to a very considerable extent; but that commercial insurance, as practised so extensively in modern times, was either unknown to them or was little used".[44]

The introduction of insurance law to England was the work of the Italian underwriters who, during the 12th century A.D., commenced their underwriting business on Lombard Street in London.[45] The Italian Republics of Venice, Florence and Genoa were renowned for flourishing insurance businesses during the Middle Ages. Therefore, when the Italians, mostly Lombardians, moved into London

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[41] *Supra*, note 12, 331-32.

[42] W.R. Vance, *The Early History of Insurance Law* [1908] 8 Colum.L.Rev. 1, 6-7. See also *supra*, notes 20 and 21.

[43] *Ibid.*

[44] *Ibid.*, 6.

[45] An excellent account of the early history of insurance and of the sources of insurance law may be found in the judgment of Bradley J. in *New England Marine Ins. Co.* v. *Dunham* (1870) 20 L.Ed. 90.

they brought with them an established insurance practice, a settled set of customs and a system of adjudication with a tradition and authority of some antiquity. In England, the Lombardians established merchants' courts similar to those they had had in Italy. All disputes arising out of insurance contracts were submitted to these institutions (separate and distinct from the Common Law courts), presided over by judges with specialized knowledge and experience. The obvious drawback was that their judgments had no effect unless the parties were willing to abide by them. Until the 16th century, the sheriffs of the Common Law courts were not available to enforce the judgments,[46] one of the reasons which led to legislation during the reign of Elizabeth I in 1601.[47] Although as early as 1545 the Court of Admiralty, in *Emerson* v. *De Sallanova*,[48] was prepared to hear arguments on some aspects of insurance law, the procedure was to petition the Privy Council, the Lord Mayor of London, or the Court of Admiralty for relief. Upon such a petition, the custom was to appoint a group of merchants to hear the cause as a merchants' court and report back to the court of the realm which appointed them. This circuitous approach justified the intervention of the State in enforcing the decision arrived at in the merchants' court.

Notwithstanding these improvements, by 1601 the merchants and underwriters sought relief from Parliament,[49] and the latter in 1601 enacted the first insurance legislation in England.[50] In the preamble to the Act, the draftsmen plotted the history and development of insurance law and practice, and in the three succeeding sections reorganized the administration of justice in insurance matters. The preamble to the Act recognized the merchants' courts but re-organized them in such a way that the authority was vested in the Lord Chancellor or the Lord Keeper who was empowered to constitute a Commission that would enquire into an insurance dispute. The "Commission shall be directed to the judge of the Admiralty for

[46] Vance, *supra*, note 42, 13.

[47] *An act concerning Matters of Assurances used among Merchants*, 43 Eliz. c.12. This was the first insurance statute in England. See Statutes at Large, Vol.2, pp.718-719.

[48] *Selden Soc. Pub.*, Vol.XI, p.lxvi.

[49] The need to resort to legislation resulted from a display of obvious envy by the Common Law courts at the success with which the Admiralty Courts were attracting foreign litigants. W. Holdsworth, *History of English Law* 4th ed., vol.I (1966), 554, supports this view. See also H. Potter, *Historical Introduction to English Law* 4th ed. (1962), 199-200, where he quotes from a pamphlet setting out the reasons why the Admiralty Courts suited the civilians better than the Common Law courts.

[50] *Supra*, note 47.

the time being, the Recorder of London for the time being, two Doctors of the Civil Law, and two Common Lawyers, and eight grave and discreet Merchants or to any five of them".[51] By section 2, the Commission was given the power "to examine upon oath any witness — and to commit to prison without bail — any person that shall wilfully condemn or disobey their final orders or decrees".[52] Section 3 gave a right of appeal to the Lord Chancellor or the Lord Keeper who "shall have full power and authority by virtue of this Act — to reverse or affirm every such sentence or decree, according to equity and conscience".[53]

These provisions achieved two important results. First, while maintaining the separate development of insurance law both from the Common Law and from Canon Law, its administration was brought under the umbrella of the courts of the realm. Secondly, the litigants in insurance matters were given a right of appeal from the decisions of the Court of the Commissioners to the Lord Chancellor or the Lord Keeper for the time being. These, admittedly, were signifiant improvements, but the failure of the Common Law courts to absorb into their jurisdiction the Law Merchant seems to have reduced the effect of the new legislation on insurance matters. Between 1601 and the appointment of Lord Mansfield in 1756, a period of 145 years, Park observes that no more than sixty cases reached the law reports.[54] This does not in any way indicate the precise number of insurance cases which went before the Court of Commissioners, but the view generally held is that the non-participation of the Common Law courts in insurance matters disadvantaged the workings of the 1601 legislation.[55]

The role played by Lord Mansfield in incorporating the Law Merchant into the Common Law has been well documented.[56] The commencement of Lord Mansfield's tenure as the Chief Justice of

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[51] *Ibid.*, preamble.

[52] *Ibid.*

[53] *Ibid.*

[54] See Vance, *supra*, note 42, 16, fn.49.

[55] Potter, *supra*, note 49, 198-203, fns.82, 89, 91.

[56] Potter, *ibid.*, 477-478, 595-596, 208-209, 279-280. Plucknett, *supra*, note 31, 248-251, 653-656; Holdsworth, *supra*, note 49, vol.xii, 464-560 and C. Fifoot, *Lord Mansfield* (1936). Vance, *supra*, note 42, 16-17, wrote with reference to Mansfield:

> "This great judge, thanks to his more liberal Scottish training, was not so slavishly attached to common law precedents as to be unable to perceive the necessity of recognizing merchants' customs in determining rights under merchants' contracts, not so bigoted as to be unwilling to seek light from foreign sources."

the King's Bench marks the beginning of the development of the modern law of insurance as a part of the Common Law system. In *Luke* v. *Lyde*,[57] Lord Mansfield laid down the sources of the law of insurance in the Common Law. Having prefaced his judgment with an allusion to the universality of the Law Merchant "— *non erit alia lex Romae, alia Athenis; alia nunc, alia posthoc; sed et apud omnes gentes et omni tempore, une aedemque lex obtinebit* —"[58] Lord Mansfield continued that "... the ancientest laws in the world (the Rhodian Laws) ... *consolato del mare*, a Spanish book, ... the laws of Oleron, ... the Usages and the Customs of the Sea, (a French book) ... and the Ordinances of Lewis the 14th, established in 1681, (collected and compiled under the authority of M. Colbert),"[59] are the sources to which the insurance law could be traced. These sources continued to guide the development of insurance law in the Common Law courts during the next two centuries.

Quod Erat Demonstrandum

The Ecclesiastical Courts and the Canon Law did not participate in the development of insurance law in England. The law of succession and the law of insurance have evolved independently from separate and distinct sources along equally separate and distinct paths. The notions of public policy applicable are equally distinct; public policy fashions its content and sets its direction with reference to the legal system within which it evolves. The peculiar considerations that lie behind a "rule-system" which is traceable to the Ecclesiastical jurisdiction and the Canon Law are not suited to resolving disputes in insurance questions. The courts have ignored the historical evolution of insurance law and have been led astray. *O'Hearn*[60] and the cases that follow are clear examples of the resulting confusion.

Much of the damage done by the *O'Hearn* decision has now been repaired by statute,[61] but the *O'Hearn* syndrome appears to pervade the Canadian courts, notwithstanding the legislative intervention. *Co-operative Fire & Casualty Co.* v. *Saindon et al.*[62] in the Supreme

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[57] (1759) 2 Burr. 882; 97 E.R. 614.

[58] *Ibid.*, 617.

[59] *Ibid.*, 619.

[60] *Supra*, note 4.

[61] Ontario: *Insurance Act*, S.O. 1970, c.224, s.92; British Columbia: *Insurance Act*, S.B.C. 1960, c.197, s.100. New Brunswick: *Insurance Act*, S.N.B. 1968, c.6, s.2.

[62] (1975) 56 D.L.R. (3d) 556 (S.C.C.).

Court of Canada is a recent instance. There the respondent, Saindon, was insured by the appellant insurance company. The insurance policy included a comprehensive personal liability clause:

> To pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed by law upon the Insured, or the liability of others, assumed by the Insured under any written agreement relating to the premises, for damages, including damages of care and loss of services, because of bodily injury or property damage.[63]

On the afternoon of July 22 1972, while Saindon was using a gasoline-driven power lawnmower, he saw his neighbour Armand Sirois, whom he accused of cutting the cherry branches on his property. During the ensuing argument, Saindon walked across to Sirois' property and thrust the lawnmower, still running, at Sirois' face. Sirois, in a fright, involuntarily shielded his face with his hands. The revolving blades of the lawnmower cut off the fingers of his left hand and injured his right wrist. Saindon is then said to have walked back to his premises and continued to mow the lawn. In an action for damages in tort, Sirois was awarded $39,942 by way of special and general damages against Saindon. Saindon brought in his insurance company as a third party. Against the third party Saindon claimed an indemnity under the Comprehensive Personal Liability Policy covering his premises in the Village of Claire.

At first instance,[64] Pichette J. of the New Brunswick Supreme Court gave judgment for the third party based on the public policy rule found in section 6 of the New Brunswick *Insurance Act*:[65]

> Unless the contract otherwise provides, a violation of any criminal or other law in force in the Province or elsewhere shall not, ipso facto, render unenforceable a claim for indemnity under a contract of insurance except where the violation is committed by the insured, or by another person with the consent of the insured, with intent to bring about loss or damage, provided that in the case of a contract of life insurance this section shall apply only to disability insurance under and akin as part of the contract.[66]

After quoting with approval a passage from a judgment of Middleton J.A.,[67] Pichette J. concluded:

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[63] *Ibid.*, 563.

[64] [1974] 7 N.B.R. (2d) 285.

[65] S.N.B. 1968, c.5.

[66] *Supra*, note 64, 287.

[67] *Lang Shirt Co.'s Trustee* v. *London Life Insurance Company* [1928] 2 D.L.R. 449 (Ont.C.A.). Middleton J.A. wrote at p.467:

> "... while the rule is not so strict in civil cases as in criminal, I think that when a right or defence rests upon the suggestion that conduct is criminal or quasi-criminal the court should be satisfied not only that the circumstances proved are consistent with the commission of the suggested

> In this case, the defendant admits that the raising by him of the lawnmower in motion in the face of the plaintiff was a deliberate intentional act. True it is he said he did so to scare the plaintiff but the fact remains that the defendant knew or ought to have known that this act on his part was a very dangerous one. In my opinion his conduct was criminal. The proper interpretation of this section of our 'Insurance Act' has always been to the effect that where injuries are caused to a Third Party by a deliberate calculated act, the assured cannot recover indemnity from his insurer. On this ground of its defence, the Third Party is, in my opinion entitled to succeed.[68]

The result, therefore, equates Saindon's activity with "intent" to bring about the loss or damage insured against. Saindon appealed to the New Brunswick Court of Appeal.[69] The appeal was allowed on the grounds that "the injury to the plaintiff was not intentionally inflicted, but was the unforeseen result of a criminal act".[70] The insurance company appealed the decision to the Supreme Court of Canada.[71] The Supreme Court allowed the appeal by a majority,[72] with Laskin C.J.C. dissenting.[73] Ritchie J., who gave the majority decision, drew heavily from *Gray* v. *Barr*,[74] a decision from the English Court of Appeal. Although recognizing the fact that the English Court was deciding the question of "accident" rather than "intent", Ritchie J. proceeded to write:

> It is true that in *Gray's* case the liability of the insurance company depended on whether or not the fatal shot was fired by "accident" within the meaning of its policy, whereas the liability of the appellant in this case depends on whether the damage sustained by Sirois was "caused intentionally by or at the direction of the insured", but in my view the issue must be determined on the ground that under the circumstances of this case, the intentional act of the respondent in raising the lawnmower as he did was the "cause" of the accident as that word is generally understood in the interpretation of policies of insurance.[75]

Laskin C.J.C. distinguished *Gray* v. *Barr*:

> There is another, a more cogent ground for rejecting the relevance of *Gray* v. *Barr* to the present case, and especially in so far as *Gray* v. *Barr* excludes acts with foreseeable consequences from the category of accidents ....

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act but that the facts are such as to be inconsistent ... with any other rational conclusion than that the evil act was in fact committed."

[68] *Supra*, note 64, 288.

[69] [1974] 44 D.L.R. (3d) 469.

[70] *Ibid.*, 472.

[71] *Supra*, note 62.

[72] Spence, Dickson and de Grandpré JJ. concurred with Ritchie J.

[73] Pigeon and Beetz JJ. concurred with Laskin J.

[74] [1971] 2 All E.R. 949 (C.A.).

[75] *Supra*, note 62, 566.

> ... It follows, so far as this Court is concerned, that an act or omission which involves a calculated risk or amounts to a dangerous operation from which injury or damage results cannot be said to be done or omitted with intent to cause the injury or damage in the absence of a specific finding that there was such intent.[76]

There being no such "specific intent", Laskin C.J.C. concluded, that the risk fell within the policy of insurance and outside the Public Policy Section of the New Brunswick *Insurance Act*.[77] He therefore allowed the appeal.

At no stage in these proceedings did any court refer to *O'Hearn* although the end result of this dispute appears to bear the stamp of *O'Hearn*. One way of explaining the decision of the Supreme Court of Canada is to equate the moral turpitude displayed by Saindon in his activities on that day in July 1972 with the turpitude he would have displayed had he intented to injure Sirois in the way he did.

This would certainly justify Ritchie J.'s adherence to *Gray* v. *Barr*[78] where the Court derived authority from two lines of cases. Barr's activity was termed "criminal" and supported by criminal case law[79] despite the fact that he was acquitted, not only of murder but also of manslaughter, at a trial held at the Central Criminal Court in London.[80] Notwithstanding this acquittal, Geoffrey Lane J. at first instance said:

> He broke almost every rule there is as to the safe handling of guns. Any reasonable man would have foreseen, and the defendant doubtless did foresee, that what he was doing was likely to cause injury to the deceased.[81]

Having first borrowed the reasonable man test from the law of torts to fix Mr Barr with foresight, the Court then proceeded to attach a criminal culpability in the face of his acquittal (admittedly against a much higher burden of proof).[82]

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[76] *Ibid.*, 559.

[77] *Supra*, note 61, s.6.

[78] [1971] 2 All E.R. 949, aff'g. [1970] 2 All E.R. 702, *per* Geoffrey Lane J.

[79] See [1971] 2 All E.R. 949, 954-955, *per* Denning L.J., 960-961 *per* Salmon L.J., 968 *per* Phillimore L.J. and [1970] 2 All E.R. 702, 707-708 *per* Geoffrey Lane J.

[80] [1970] 2 All E.R. 702, 706 *per* Geoffrey Lane J. This view could be explained according to the decision of the Court of Appeal in *Hollington* v. *F. Hewthorn & Co. Ltd* [1943] 1 K.B. 587. See J.A. Coutts, *The Effect of a Criminal Judgment on a Civil Action* (1955) 18 M.L.R. 231, 242.

[81] [1970] 2 All E.R. 706.

[82] While in criminal matters the standard of proof is beyond reasonable doubt, the test used in England in civil (non-criminal) matters is the "Carr-Briant rule", *i.e.*, one of balance of probabilities: [1943] K.B. 607.

The first line of cases succeeded in imputing a moral culpability which allowed a second line of cases to apply: *Cleaver,*[83] *Crippen,*[84] and *Beresford,*[85] all succession cases. At first instance Geoffrey Lane J. stated the principle as "the obvious one, that no man should be allowed to profit at another person's expense from his own conscious and deliberate crime".[86] In the Court of Appeal, Lord Denning decided that:

> ... Mr. Barr cannot recover on the policy. It was not an "accident", and also he is defeated by "public policy". It will be noticed by the observant that the two questions raise one and the same point of "causation". If the death of Mr. Gray was *caused* by the deliberate act of Mr. Barr in going up the stairs with a loaded gun, it was no accident, and it would, in any case, be against public policy to allow him to recover indemnity for the consequences of it.[87]

In the Court of Appeal, Salmon L.J. based his judgment on the "criminal" element of the act:

> Manslaughter is a crime which varies infinitely in its seriousness. It may come very near to murder or amount to little more than inadvertence, although in the latter class of case the jury only rarely convicts. *In the Estate of Hall, Hall* v. *Knight and Baxter* ... may seem to be an authority for the proposition that anyone who has committed manslaughter, in any circumstances, is necessarily under the same disability as if he had committed murder.[88]

Phillimore L.J.,[89] however, based his decision on policy. The judgment as a whole brings out three propositions. First, if the act amounts to a crime, then the moral culpability which attaches to a conviction for that offence attaches to the insured's rights under his policy. Secondly, where such a moral culpability exists, then as in succession, the insured cannot claim under the insurance contract. It is against

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[83] *Supra,* note 8. See [1970] 2 All E.R. 702, 711 *per* Geoffrey Lane J.

[84] *Supra,* note 35. See [1970] 2 All E.R. 702, 711 *per* Geoffrey Lane J. [1971] 2 All E.R. 949, 964 *per* Salmon L.J.

[85] *Supra,* note 17: See [1970] 2 All E.R. 702, 711 *per* Geoffrey Lane J.; [1971] 2 All E.R. 949, 964 *per* Salmon L.J.; *ibid.,* 969 *per* Phillimore L.J.

[86] [1970] 2 All E.R. 702, 709.

[87] [1971] 2 All E.R. 949, 957.

[88] *Ibid.,* 964.

[89] *Ibid.,* 970:

> "It is wiser I think to confine my decision to the facts in this case. In an age of violence — an age where the use of firearms is all too frequent — it would I think be very odd if a man who had had in his hands a loaded shotgun from which a shot had been fired and had killed another at a time when he had just assaulted that other with the gun could recover on an insurance policy which protected him from liability if he was negligent in the use of the shotgun. This was in fact a grave case of manslaughter and in my judgement the learned judge was right in saying that the defendant could not recover...".

public policy to do so. Thirdly, by resting the decision to deny indemnity upon cases drawn from the law of succession, the court endorsed the (erroneous in my opinion) view that the public policy considerations for succession purposes are identical to those for insurance purposes.

Ritchie J. in *Saindon* links "culpability" to non-recovery and omits, as did the Court in *Gray* v. *Barr*, the element of "intent", which is fundamental to the "public policy" rule in the New Brunswick *Insurance Act*. This is the crucial passage:

> The respondent's action did indeed have the result of "scaring" Sirois to such extent that he raised his hands in an automatic gesture to shield his face. The fact that the lawn-mower tipped when put to such an unnatural use was an eminently foreseeable development and one which the respondent ought to have known to be a part of the danger to which he was exposing his neighbour. The immediate cause of Sirois' injury was a combination of his gesture of self-protection and the tipping of the lawn-mower but, in my opinion, these two circumstances flowed directly from the respondent's deliberate act in raising the lawn-mower as he did, which was the dominant cause of the occurrence. I agree with the learned trial Judge that this constituted criminal conduct which caused damage and the fact that the "scare" intended by the respondent had more serious consequences than he may have anticipated does not alter the fact that it was his threatening gesture which caused the damage. I am accordingly of the opinion that the respondent's actions were in breach of the public policy rule as expressed in s.2 of the New Brunswick Insurance Act.[90]

The judgment of Laskin C.J.C. is to be preferred. It is clearly in line with principle. The error that underlies Ritchie J.'s judgment is a basic misunderstanding of the separate development of the law of insurance and the law of succession. Insofar as the law of insurance is concerned, where "intent" is required to be proven, it must be "actual intent". *Uberrimae fides*,[91] the form of "commercial morality", is a far cry from the moral principles that evolved from administration of the Canon Law by the Ecclesiastical Courts in England.

Insurance law developed in a completely different ideological setting. At the base of the Law Merchant are the economic realities of the time, not traditional Christian morality. Doctrines such as "abandonnent" in insurance law, "stoppage-in-transitu" in sales and the anomalous endorser or the "Aval" in negotiable instruments

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[90] *Supra*, note 62, 564.

[91] *Carter* v. *Boehm* (1776) 97 E.R. 1162; *De Hahn* v. *Hartley* (1786) 99 E.R. 1130. For a more modern example of *Uberrimae fides* see *Dawson Ltd* v. *Bonnin* [1922] 2 A.C. 413; *Sleigh* v. *Stevenson* [1943] 4 D.L.R. 433 (Ont.C.A.); *Taylor* v. *London Assurance Co.* [1935] 3 D.L.R. 129 (S.C.C.).

were developments protecting the economic interests of the one whose money has contributed towards the acquisition of capital by another. Morality here is the economic morality which arises out of a notion of fair business practice. The requirement of *bona fides* in all contractual relationships (except in insurance contracts) was a morality generated by the laws and customs prevailing among men of commerce. In insurance contracts the requirement of good faith was even more stringent; it was termed *"Uberrimae fides"*.[92] The commercial world had its own code of ethics, particular to it, drawn largely from the customs of its own trades but which had no relationship to the idea of 'moral culpability' used by the Ecclesiastical Courts.

Until the mid-eighteenth century the Law Merchant was administered by a group of specialists guided by ideological and policy considerations different from those present in both the Ecclesiastical and Common Law systems in England. It is this fact which compels us to conclude that it is a basic error of jurisprudence to justify insurance decisions by resorting to principles derived from the law of succession, or *vice versa.* It must, therefore, be submitted that the decision in *O'Hearn* v. *Yorkshire Insurance Co.*[93] was wrong. The decision was wholly based on principles derived from succession cases. Had the Ontario Court looked into insurance authorities, as did the English Court in *Tinline* v. *White Cross Insurance Association, Limited,*[94] it would surely have reached a different conclusion in *O'Hearn.* This same criticism applies to the recent Supreme Court decision in *Saindon,* which was decided in the same spirit as *O'Hearn.*[95] It is unfortunate that the Court did not keep in mind

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[92] In *Carter* v. *Boehm, supra,* note 91, 1164, Lord Mansfield C.J. explained the doctrine of *Uberrimae fides* in the following passage:

"Aliud est celare; aliud, tacere; neque enim id est celare quicquid reticeas; sed cum quod tuscias, id ignorare emolumenti tui causa velis eos, quarum intersit id scire."

(It is one thing to conceal; another to keep silent; for it is not concealment in every case when you are silent about something; but when you keep quiet about a fact and wish for your own advantage that these people be ignorant of it who profit by knowing it — that is concealment.)

[93] *Supra,* note 4.

[94] *Supra,* note 12.

[95] Under statutory condition 2(1) of *An Act to Amend The Insurance Act,* S.O. 1972, c.66, s.8, five prohibited uses of an automobile by an insured are detailed. This set of conditions does not include driving "while under the influence of intoxicating liquor or drugs to such an extent as to be for the time being incapable of the proper control of the automobile". That quote was found in *The Insurance Act* of Ontario, R.S.O. 1970, c.224, s.205, statutory conditions 2(1)(a). It is arguable that this omission could now amount to taking away

the *obiter* of Pigeon J. in *Canadian Indemnity Co.* v. *Walkem Machinery & Equipment*[96] decided not long before *Saindon.*[97] There Pigeon J. wrote:

> In my view, the test laid down by the statute, namely, whether or not something was done by or for the insured "with intent to bring about loss or damage" is the very same test which must be applied to decide whether the occurrence is an accident or whether it is a crime barring recovery.[98]

Saindon could have been the beginning of a new line of reasoning in cases where an insured claims an indemnity for a loss arising out of an act which is arguably criminal.

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from the insurer the right to refuse payment in a fact situation like in *O'Hearn.* On the other hand it may be suggested that this amounts to an exclusive submission to s.92, in all cases where a criminal act is involved. For one clearly commits a crime by driving under the influence of drugs or intoxicating liquor. It is the latter suggestion which is preferred here. In my view, *O'Hearn* would still fall under s.92 and it will be necessary to establish that the insured intended "to bring about the loss or damage" for which the indemnity is sought, before his right to indemnity is denied. To that extent the views expressed here on the assessment of *O'Hearn* remain unaffected. In any case the Act applies only to Ontario.

[96] (1975) 53 D.L.R. (3d) 1 (S.C.C.).

[97] *Walkem* was decided on January 28, 1975. *Saindon* was decided on March 26, 1975. Laskin C.J.C. alone cited *Walkem* in his judgment in *Saindon.* Ritchie J. made no reference to *Walkem.*

[98] *Supra,* note 96, 7.