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THE RIGHT OF ENTRY ARBITRATION ACT—THE BOARD OF ARBITRATION—THE CLEMENT COMMISSION'S FINDINGS IN CONNECTION THEREWITH—ADEQUACY OF THE PRESENT PROCEDURE DETERMINING AWARDS

The Right of Entry Arbitration Act[1] and the Board which was brought into existence by it was perhaps the most criticized of all the boards and tribunals mentioned by those making submissions to the Clement Commission and was in turn severely taken to task in the Commission's Report. It is the purpose of this note to examine some of the findings of the Commission in this regard and to point out some of the existing problems confronting those who deal with this Board today.

Section 21 of The Right of Entry Arbitration Act provides that there is to be no appeal from the decisions of this tribunal

> . . . and it is significant that there was expressed (in the Reports to the Commission) an almost unanimous desire for the full right to appeal to the Courts.[2]

Verbal evidence is not given under oath, and the Board is not bound by the rules of common law or statutory evidence.[3] There are numerous occasions upon which the Board has made widely disparate awards of compensation, for expropriation of interest in land or rights of entry and user on lands in the immediate area of one another and in circumstances involving the same type and extention of inconvenience.[4] Moreover the Board does not publish reasons with its awards.

The Commission stressed particularly two submissions which had been brought before it. First that the Board fails to consider whether an alternative site or access roadway would serve equally as well with less inconvenience to the registered owner or occupant and secondly, that on site hearings offer little opportunity for inspection and discussion, and that it exhibits at times an arbitrariness in its procedure that leads to uncertainty, loss of time and dissatisfaction.[5] The first submission is unjustified, however, as the Board usually goes to great lengths to have the site and roadway located where the farmer requires it so far as is reasonably possible.[6] The Commission in its report stated:

> There is however one area on which there is unanimity from all sources when the interests on property of an individual are expropriated; the amount of com-

1 R.S.A. 1955, c. 290.
2 The Report Of The Special Committee On Boards and Tribunals To the Legislative Assembly of Alberta (Clement Commission) 7.
3 The Right Of Entry Arbitration Act, *Ante*, n. 1, s. 17(2).
4 *Ante*, n. 2, 28, 31.
5 *Ante*, n. 2, 54-5, for a complete list of the Commission's recommendations.
6 Perhaps this overstatement was due to a lack of participation by the Petroleum Industry at the hearings involving this tribunal.

> pensation due to him is of vital concern. The Committee is unanimously of the view that in respect of compensation an appeal to the Courts should be given as of right in every case, no matter what the amount of the award, and without the necessity for obtaining any prerequisite leave. The procedure in every case should be simple and expeditous. Provision is already made for appeals of this nature in respect of some tribunals: there is no reason why such appeals cannot be provided in all cases.[7]

This strong language need not have applied if sufficient use had been made of section 25 (b) of the Right of Entry Arbitration Act,[8] which allows for review or change of existing orders. However it is clear from *Neilsen* v. *The Board of Arbitration*[9] that in some cases the Board will refuse to re-hear an application to consider pertinent evidence obtained subsequently to the initial hearing, will not base their award on the evidence before them, will not properly consider evidence presented to them by the solicitors or others appearing before them, and will consider factors and evidence not presented to them at the hearing. It appears that Mr. Justice Milvain's decision was that the Board had not acted judicially. This was evidenced by the fact that a member who had not attended the hearing signed the order, and furthermore that the Board had not complied with the procedure (subsequently changed) set out by the Right of Entry Arbitration Act. The Commission emphasized the importance of a written reasoned decision or order of such a tribunal, called this one of the basic rights of a Democracy, and added that this insures not only that justice is done, but that it is seen to be done.[10]

The Commission cited *Re Pacific Petroleum Limited*[11] for an appreciation of the existing conditions of awards in Alberta and submitted that the awards include sums for both present and future injurious affection.[12] The writer has personally checked with the Board's secretary and has ascertained that in no case does an award include injurious affection (i.e., nothing is awarded for such nuisances as noxious fumes or great clouds of black smoke). Also by way of this case the Commission submitted that awards for pipe lines under The Pipe Lines Act,[13] The Expropriation Procedure Act[14] and The Public Utilities Board Act[15] include annual rentals, while right of way for flowlines which have been arbitrated under The Right of Entry Arbitration Act (supra) do not.[16] This statement is also inaccurate. In no case has annual rental been paid for either pipe or flow lines under any of the above mentioned statutes.

Some of the problems yet unsolved which will confront solicitors, citizens, and oil companies in their dealing under this Act include:

1. The procedure of this Board is subject to change without notice.
2. No compensation is granted for some forms of nuisance.
3. Substantial advances from the required security deposits are frequently granted to Respondents after an application has been filed but before the final order has been granted and in at least one case

7 *Ante*, n. 2, 77.
8 *Ante*, n. 1.
9 1963, unreported, Milvain, J.
10 *Ante*, n. 2, 59.
11 (1958), 24 W.W.R. 509 (B.C.C.A.).
12 *Ante*, n. 2, 29.
13 Stats. A. 1958, c. 58.
14 Stats. A. 1961, c. 30.
15 Stats. A. 1960, c. 85.
16 *Ante*, n. 2, 30.

where the application was withdrawn the applicant was unable to have this advance refunded to him! This is an area in which the Board has extended its jurisdiction beyond the terms of the Act.

4. The Board by Section 12(3)(b)(ii) of the Right of Entry Arbitration Act has the right to grant entry from an existing highway. This is in conflict with The Public Highways Development Act[17] under which the Minister, for public safety, may refuse to allow certain approaches from highways.

5. The awards of the Board have led to surface speculation (particularly in the Pembina area) whereby speculators are able to purchase whole farms for less than suspected awards for oil leases!

6. The Board lacks expertise where land expropriated has or may have value for industrial or urban development purposes.

BAILMENT—LOSS OF CHATTEL BAILED—ONUS OF PROOF—WHETHER *RES IPSA LOQUITUR* APPLIES—PLEADINGS

What degree of proof is required to be offered, and by whom, to establish the fulfillment or non-fulfillment of a bailee's common law duty to take reasonable care of the bailed goods while in his possession and to return them to the bailor?

It may be concluded from the many Canadian cases which have considered this question that most jurisdictions place the onus of disproving negligence on the bailee as a matter of law once the bailor establishes bailment and loss of or damage to the subject of the bailment. This rule is based on the proposition that the bailee is in a better position to offer an explanation because the bailor, who does not have possession of the goods, is unlikely to have an opportunity of knowing what happened to them.

Some cases have held, however, that the onus of proving negligence remains on the bailor throughout, as in the ordinary case of tort, and that this burden is not detracted from in any way unless negligence can be inferred from the fact of an accident, and *res ipsa loquitur* applies. Such a burden, it is submitted, would be particularly onerous in cases where the cause of the loss or damage is unknown.

Much of the uncertainty which has resulted from this conflict is dispelled by a recent decision of the Ontario Court of Appeal, *Wong Aviation Ltd.* v. *National Trust Co. Ltd.*[1]

The bailee in this case disappeared with an aircraft hired from the plaintiffs and was never seen again. Although weather conditions were marginal at the time of the flight, the aircraft was in sound mechanical condition and the bailee was properly licensed and medically cleared to fly it. In their action against the bailee's executor the Plaintiffs claimed the value of the aircraft, and pleaded bailment, non-return of their chattel, and negligence. They also relied on the maxim *res ipsa loquitur.*

17 Stats. A. 1966, c. 79, s. 27(2)(b).

1 (1966), 56 D.L.R. (2d) 225, reversing (1965), 51 D.L.R. (2d) 97.

At trial it was held that negligence could not be inferred from the mere fact of the disappearance of the aircraft, which could have been caused by many other factors equally consistent with no negligence as with negligence on the part of the bailee. Accordingly *res ipsa loquitur* was held not to apply. The Plaintiffs could not otherwise establish negligence; hence their action was dismissed.

On appeal, the ruling of the learned trial judge was reversed. In delivering the judgment of the Court of Appeal, Laskin, J. A. held that the common law of bailment applies without qualification to the bailment of an aircraft, and that the principles of proof do not vary where not only the bailed chattel but the bailee disappears. He discussed the question of onus and degree of proof at page 231:

> The jurisprudence of this Court has been clear, at least since *Pratt* v. *Waddington* (1911), 23 O.L.R. 178, that on a plea and proof of bailment and non-return of the bailed goods, the bailee must disprove negligence: See also *McCreary* v. *Therrien Construction Co. Ltd and Therrien* (1951) O.R. 735, (1952) I. D. L. R. 153 . . . This burden on the bailee, which demands only proof on a balance of probabilities or on a preponderance of the evidence, has nothing to do with *res ipsa loquitur* on which counsel for the defendant dwelt at great length. I am not at all impressed by the fact that many Courts in the United States, as disclosed in 8 Corp. Jur. Sec., pp. 518 ff., cited by the defendant's counsel, apply this doctrine. They do so because they place the burden of persuasion, the ultimate burden so to speak, on the bailor, and this is at variance with Ontario authority.

It is submitted that in its proper application, *res ipsa loquitur* does not operate to shift the legal or primary burden of proof to the defendant in cases where damage results from an accident or occurrence which ordinarily would not have happened without negligence on his part. Instead the accident is regarded as yet another fact from which negligence *may* be circumstantially inferred if the defendant does not give a reasonable explanation showing how the accident may have happened without his negligence. The onus which falls upon the defendant in these circumstances is not the primary burden, to which Mr. Justice Laskin refers as the "ultimate burden." Rather, it is a lesser burden requiring him to adduce further evidence only. If the defendant satisfies this burden, the plaintiff bears the onus of adducing still further evidence. Unless shifted by some other rule of law, such as the rule applied in bailment cases, the burden of proving negligence which rests on the plaintiff at the beginning of the trial in these cases remains on him throughout.

The New Brunswick Supreme Court, Appeal Division, recently held that a *prima facie* case is made out against a defendant bailee through proof of bailment and loss of or damage to the bailed goods: *Northumberland County School Finance Board* v. *Stewart*.[2] The comments of Bridges, C.J.N.B., at page 660, are relevant:

> The application of the doctrine of *res ipsa loquitor* has been given in a number of cases, where a bailment has been established, as the reason for the onus being placed on the defendant. See for instance, *Gremley* v. *Stubbs* (1908) 39 N. B. R. 21.

At this point Chief Justice Bridges held that *United Motor Service* v. *Hutson*,[3] a leading case on the subject of *res ipsa loquitor* which was referred to by the trial Court in the *Wong Aviation* case, was distinguishable on the ground that it did not concern a bailment.

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2 (1965), 540 L.R. (2d) 657.

3 (1937), 1 D.L.R. 737, [1937] S.C.R. 294.

Two other recent decisions have placed the onus of disproving negligence on the defendant bailee: *Kitchen* v. *Goodspeed & Davison Ltd.*[4] and *A.I.M. Steel Ltd.* v. *Gulf of Georgia Towing Co. Ltd.*[5] In the *Wong Aviation* case no explanation whatever was given for the disappearance of the chattel bailed. However, in each of these earlier cases where there was evidence of an accident it was held that negligence could be inferred from that and *res ipsa loquitur* applied thus fixing the liability of the bailee on an additional footing of negligence. If *res ipsa loquitur* has no place in our law of bailment, as Mr. Justice Laskin so firmly asserts in *Wong Aviation* v. *National Trust,* the discussion of the maxim in the *Kitchen* and *A.I.M. Steel Ltd.* cases might well be considered extraneous.

It is significant to note that the same lines of reasoning which have operated in other jurisdictions to place the onus on the bailor, or alternatively on the bailee, have also been applied in Alberta. A case noteworthy for its discussion of *res ipsa loquitur* is *Johnson* v. *Conrow.*[6] Mr. Mr. Justice Egbert of the Supreme Court of Alberta therein held that the plaintiff bailors must prove the negligence of the defendants by positive evidence of facts, and in the absence of such proof their action must fail. This ruling was disregarded in *Tri-City Drilling Company* v. *Velie*[7] in which Smith, J. A., held at page 716:

> We are satisfied that the appellant was a bailee for hire with the consequence that the onus of proof lay on him to show that the injury did not happen in consequence of his neglect to use such care and diligence as a prudent or careful man would exercise in relation to his own property.

The Alberta position would thus appear to be in agreement with that taken by the Ontario Court of Appeal.

A well-known pleading rule requires that facts which are not necessary to establish either a cause of action or the defence to it should be omitted from the pleadings. As it has been a common practice is bailment cases to plead negligence and *res ipsa loquitur* in addition to those facts which establish bailment and loss of or damage to the bailed goods, it is to be hoped that the *Wong Aviation* case will have the practical effect of simplifying pleadings in this area.

DOWER—SALE OF HOMESTEAD UNDER WRIT OF EXECUTION —DEBTOR'S EXEMPTION IN HOMESTEAD—WHETHER ATTACHABLE AFTER SALE

When taking proceedings to sell the homestead of an execution debtor under Writ of Execution, the question arises as to whether or not the spouse of the debtor can invoke the provisions of The Dower Act[1] to discourage the efforts of the execution creditor. At first glance, The Dower Act would seem to prohibit the sale of the homestead without the consent of the spouse which, under such circumstances, would more likely than not be withheld.

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4 (1965), 53 D.L.R. (2d) 140 (N.S.S.C.).
5 (1964), 48 D.L.R. (2d) 549 (B.C.S.C.).
6 (1951), 2 W.W.R. (NS) 230.
7 (1960), 32 W.W.R. (NS) 716 (Alberta C.A.), affirming (1959), 30 W.W.R. (NS) 61.
1 R.S.A. 1955, c. 90.

On December 6, 1965 Mr. Justice Manning, sitting in Chambers,[2] in Calgary, upheld the decision of the late Mr. Justice O'Connor, as he then was, in *Prokopchuk* v. *Mandryk and Mandryk*.[3] Although Mr. Justice O'Connor was concerned with The Dower Act of 1922,[4] the relevant provisions of the act currently in force are similar:

> 2. In this Act,
> (a) "disposition"
> (i) means a disposition by act "inter vivos" that is required to be executed by the owner of the land disposed of, and . . ."
>
> 3. (1) No married person shall by act "inter vivos make a disposition of the homestead of the married person whereby any interest of the married person will vest or may vest in any other person at any time
> (a) during the life of the married person, or
> (b) during the life of the spouse of the married person living at the date of the disposition,
> unless the spouse consents thereto in writing, or unless a judge has made an order dispensing with the consent of the spouse as provided for in section 11.

Section 3.(1) makes reference only to a "disposition" by an act "inter vivos" and such a transaction clearly requires either the consent of the spouse or a judge's order dispensing with such consent as is provided in section 11 of the Act. Mr. Justice Manning applied Mr. Justice O'Connor's reasoning that The Dower Act provides only for dispositions made by a married person by act inter vivos and because a transfer of land made by a sheriff under Writ of Execution is not a disposition made by a married person by act inter vivos vesting his interest in another person, Section 3.(1) of The Dower Act does not apply.

The Exemptions Act[5] provides for an exemption from execution of $8,000.00 in the homestead of the execution debtor and this would appear to give the debtor some protection from his creditors in maintaining a home, but close examination of section 2(k) of this legislation makes one wonder whether or not the legislature really accomplishes what it set out to do. It reads in part:

> 2(k) . . . . if the amount bid at the sale after deducting all costs and expenses exceeds eight thousand dollars the property (homestead) shall be sold and the amount received from the sale to the extent of the exemption ($8,000.00) shall be paid at once to the execution debtor and shall *until then* be exempt from seizure under any legal process, ...

An astute creditor might find garnishment proceedings rewarding should the execution debtor, after receiving his money from the sheriff, decide to deposit it with a financial institution or in his solicitor's trust account. Although the court might well be in sympathy with the debtor under such an attachment, it is submitted that the legislation seems to fall short of its objective.

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2 *Canadian Cancer Society* v. *Talbot* (unreported).
[In these proceeding the Canadian Cancer Society was taking action against its former executive director in an attempt to recover funds which he had allegedly embezzled from the Society—*Ed.*]

3 [1942] 2 W.W.R. 577.

4 R.S.A. 1922, c. 135.

5 R.S.A. 1955, c. 104.

CARELESS DRIVING—RULE IN HODGE'S CASE—WHETHER THE DOCTRINE OF *RES ISPA LOQUITUR* APPLIES

Two classical fact situations arise time and time again in traffic court cases dealing with the careless driving provisions found in most provincial motor vehicle legislation. These are, firstly, those in which the accused drives his motor vehicle into the back of a second motor vehicle legally parked parallel to the street on which the accused is driving even though there is ample space for the accused to drive by to the left of the parked motor vehicle; and, secondly, those in which the accused drives his motor vehicle into the back of another vehicle which is temporarily and properly stopped in the same traffic lane awaiting a change of traffic lights or some other traffic condition, such motor vehicle having been stopped for at least several seconds so that the accused cannot be charged with following too closely.

There has been some suggestion in certain judgments of the Ontario and British Columbia Courts that the doctrine of *res ispa loquitur* applies so as to place the onus on the accused to negative careless driving once the Crown has proven the fact of a collision having taken place under these conditions. The Editor's note found in a recent issue of the Criminal Law Quarterly[1] attempts to summarize the Ontario Court of Appeal judgment in *Regina* v. *McIver*,[2] in which the first of the above fact situations was proven by the Crown. The note reads in part as follows:

> To summarize this decision with a borrowed phrase, the doctrine of *res ipsa loquitur* now applies, in Ontario at least, to a charge of careless driving in certain circumstances. On the basis of this case, if the accused was involved in an accident which should not, *prima facie*, had occurred if he had been driving with ordinary care (e.g., a collision with a parked car in good driving conditions) then that alone is sufficient evidence to support a conviction for careless driving in the absence of a special explanation by the accused.

That this may be a correct interpretation of that judgment is perhaps borne out by the statement of Porter, CJO.:

> The juxtaposition of the two vehicles by itself would point to a lack of due care and attention on the part of the accused.

However, a more careful reading of the decision of the Court of Appeal would lead one to the conclusion that the Court has not really disregarded the time-honoured principle that the Crown must prove its case beyond a reasonable doubt, which indeed would be the case if this civil law doctrine were to apply in criminal or *quasi* criminal matters, but has merely stated that the rule in Hodge's case can apply in careless driving prosecutions where the Crown is unable to adduce direct evidence of a manner or pattern or driving.

In any event, it would appear that at least some of Alberta's District Court judges are not prepared to apply the doctrine of *res ipsa loquitur* in favor of the Crown. In *Regina v. Biamonte*,[4] an appeal by the accused to the District Court by way of trial *de novo* on a charge of careless driving, the Crown tendered evidence to the effect that in the early hours

1 8 Criminal Law Quarterly 224.
2 (1965), 45 C.R. 401.
3 *Id.*, 405.
4 Unreported, In the District Court of the District of Northern Alberta, Judicial District of Edmonton, number 89514, June 2, 1966.

of the morning, the appellant drove his motor vehicle into the rear of another motor vehicle which was legally parked on and parallel with a street in a residential district. There was further evidence that the travelled portion of the road was an icy trough and, in general, the roads were slippery. The defence put in no evidence. In allowing the appeal, Cormack, J.D.C., stated in written Supplementary Reasons for Judgment:

> In my Oral Judgment, I questioned the advisability of laying a charge of careless driving in the first instance as I found no shred of evidence of careless driving. I expressed the thought that it would almost seem that the authorities below had taken the attitude that since here was an accident, the driver of the moving car must be guilty of careless driving. I would hope that this is not the case but I am mindful of the judgment of the Ontario Court of Appeal in *Regina* v. *McIver*, 45 Criminal Reports, 401, which followed the well-known Hodge's case.

His Honour went on to apply the rule in Hodge's case and held that a rational conclusion from the facts alternative to the guilt of the appellant was that the accident could have been caused by the icy roads and not by the careless driving of the appellant.

Similarly, in another unreported District Court case of *Regina* v. *Lichte*,[5] the Crown's evidence showed that the appellant's motor vehicle collided with the rear of a motor vehicle which had been stopped for several seconds, awaiting a change of traffic lights from red to green. The accident occurred between nine and ten o'clock on a "misty" evening while the road was icy. Again, the defence tendered no evidence and the appeal was allowed by Haddad, D.C.J. for lack of evidence.

5 Unreported, In the District Court of the District of Northern Alberta, Judicial District of Edmonton, number 89273, May 13, 1966.