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The Parole Board: What Liability to Victims?

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I. *Introduction*

What is the legal position of a victim of crime who is assaulted and severely injured by a person on parole release? The victim, of course, has a right to sue his or her assailant personally in tort for damages, but does the victim have a right to sue the prison and parole agencies for negligence in releasing or in supervising the offender? The victim's right to recovery against the authorities requires an examination of the right to damages in an action in negligence under the common law, as well as consideration of a possible remedy under the Charter of Rights.¹ Both a private law remedy in negligence and a possible public law remedy under the Charter require a preliminary examination of the purposes of the Parole Act² in conferring upon prison and parole officials powers of release and supervision of prisoners, and an understanding of the nature of parole decision-making and the procedures involved. A knowledge of these purposes, powers, and procedures will have a bearing on whether official actions are (a) *ultra vires* the powers of the board and, therefore, actionable; (b) *intra vires* but "discretionary" and, therefore, immune from liability even though negligent; (c) *intra vires* and "operationally" negligent, so as to support an action in damages;³ or (d) a breach of the requirements of

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1. The Canada Act, 1982, Stats. U.K. 1982, c. 11, Schedule B, The Constitution Act, 1982.

2. Parole Act, R.S.C. 1970, c. P-2.

3. For an analysis of various proceedings to review acts of officials: Hogg, Peter W., *Liability of the Crown* (Sydney: Law Book Co., 1971); Goldenberg, Sidney L., "Tort Actions Against the Crown in Ontario", in *Special Lectures, Law Society of Upper Canada*, 1973, 341-412; Molot, Henry L., "Tort Remedies Against Administrative Tribunals for Economic Loss", in *Special Lectures, Law Society of Upper Canada*, 1973, 413-447; Molot, Henry L., *Administrative Discretion and Current Judicial Activism* (1979) 11 Ottawa L. Rev. 337-370; Craig, P.P., *Negligence in the Exercise of a Statutory Power* (1978) 94 Law Q. Rev. 428-456; Gould, B.C., *Damages as a Remedy in Administrative Law* (1972-73) 5 N.Z. Univ. L. Rev. 105-122; Harlow, C., *Fault Liability in French and English Public Law* (1976) 39 Mod. L. Rev. 516-541; Bridge, M.G.,

“fundamental justice” under section 7 of the Charter, so as to support a section 24 Charter remedy.

The victim’s claim to a remedy against prison and parole officials is complicated by the fact that the Parole Act is obsolescent, posing a set of statutory objectives which, with the passage of time, are seen to be impossible to achieve. The statute contemplates parole release in the interest of the rehabilitation of offenders, but contemporary knowledge shows that prison policies and programs cannot, at present, and are unlikely in the foreseeable future to achieve such a goal. In addition, the Parole Act states that the Parole Board must not release a person in the face of an “undue risk” to the public safety, but experts are agreed that risk cannot be assessed with reliability.⁴ If the agency cannot possibly meet its statutory objectives, are its actions ultra vires the statute in attempting the impossible, or contrary to the Charter, in that the state has exposed citizens to grave risks in the name of an illusory objective, there being no rational means of achieving that objective? The victim’s claim to justice in the face of an obsolescent statute is also complicated by the fact that common law courts have historically been reluctant to grant a remedy in negligence against public officials whose actions have occasioned loss or injury.⁵

This paper takes an overview of the victim’s position when faced with an injury inflicted by a person on parole release. The nature of the parole release decision, the attitude of the courts when called upon for a private law remedy in negligence, and the possibility of a public law remedy under the Canadian Charter of Rights are reviewed, so as to identify the main legal problems and to suggest that the courts must be invited to take a more active approach to problems of official accountability, thereby developing a uniquely

Governmental Liability, the Tort of Negligence and the House of Lords Decision in Anns. v. Merton London Borough Council (1978) 24 McGill L.J. 277-302.

4. Monahan, J., “The Prediction of Violent Criminal Behaviour: A Methodological Critique and Perspectus”, in A. Blumstein et al, eds., *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* (Washington D.C.: National Academy of Sciences, 1978) 244-269; Monahan, J., *Predicting Violent Behaviour* (Beverly Hills: Sage Publications, 1981); Webster, C.D., Menzies, R.J., and Jackson, M.A., *Clinical Assessment Before Trial, Legal Issues and Mental Disorder* (Toronto: Butterworths, 1982); Nuffield, J., *Parole Decision-making in Canada* (Ottawa: Ministry of the Solicitor General, 1982) pp. 12-17.

5. *Toews v. MacKenzie* (1980) 109 D.L.R. (3d) 473 (B.C.C.A.).

Canadian approach in order that victims of the prison system receive justice under the law.

II. *The Purposes of Parole*

The Parole Act came into force in 1959,⁶ following a Royal Commission report which recommended that the then existing law permitting the release of selected offenders on a Ticket of Leave be abolished and the new system of parole be introduced.⁷ The act confers a discretion on the Parole Board or its agents to release prisoners under supervision where the board considers that (a) the prisoner has derived maximum benefit from imprisonment, (b) the reform and rehabilitation of the prisoner will be aided by a grant of parole, and (c) the release will not constitute an undue risk to society.⁸ While the first two criteria speak to the rehabilitation of the prisoner, the third speaks to a second objective, namely, the protection of society through risk avoidance. Although the statute does not specify the relative priority of rehabilitation and protection, it is reasonable to think that Parliament intended that, in cases of conflict, public protection shall come first.

It is worth noting that the act does not justify parole release as an economy measure — for example, as a means of reducing the costs of operating prisons; nor does the act justify parole as a humanitarian gesture, granted in order to relieve the person of the miseries of imprisonment. Rather, the statutory criteria justify parole release only on the two grounds of the rehabilitation of the offender and the protection of the public. The victim's claim is that the assumptions of rehabilitation and prediction of risk are out-of-date, given present knowledge, and are demonstrably false. This obsolescence imparts an arbitrary aura to the actions of officials striving vainly to meet statutory objectives.

During the 1950s, rehabilitation was widely accepted as a legitimate goal of prison policy; it was assumed that official action and therapeutic programs could change prisoners so as to reduce recidivism.⁹ In the past ten years, significant research shows that

6. Parole Act, S.C., 1958, c. 38.

7. *Report of a Committee Appointed to Inquire into the Principles and Procedures Followed in the Remission Service of the Department of Justice of Canada* (Ottawa: Queen's Printer, 1956) at 51.

8. Parole Act, *supra*, fn. 2, s. 10.

9. The assumptions are well-illustrated in the *Report of the Canadian Committee*

assumption to be false.¹⁰ Moreover, the second statutory objective, which assumes that officials are competent to predict risk with a workable degree of accuracy, has also been shown to be false.¹¹

The risk of violence to people on the street cannot be controlled through parole prediction. While the evidence in support of these propositions will be examined shortly, the following questions must be asked: are parole officials acting *ultra vires* the act in making releases that cannot be shown to be in accordance with the stated objectives of the act? How can officials “consider”, in the words of the act, that a given prisoner is fit for release and that his or her release does not represent an undue risk when research shows that the decision will be wrong at least fifty percent of the time?¹² The board would no doubt argue that the court should read into the act an implied qualification that the board should simply do its best to meet the objectives of the act. Such a qualification, however, should be rejected, considering the importance of the values imperilled by the board’s actions. The right to life and freedom from assault, and the privacy and integrity of the person, are not to be easily displaced on the scales of social utility. Moreover, when the act requires officials to “consider” that a prisoner does not represent an undue risk, it imports an assumption of rational risk calculation. Indeed, as will be argued later,¹³ such a test of rationality is implicitly required by the rule of law, as well as by the Charter. If the board’s approach to risk calculation is so unreliable as to be no better than chance, how can the board’s actions be rationally related to its statutory mandate? Is the board not caught in the position of being directed to do something that it cannot do? In this sense, the Parole Act itself does not pass the test of rationality; the board’s actions under the act likewise fail to meet the test. One way in which the board could operate rationally within the confines of the act would be to decide in each case that it is unable to determine the question of risk, and that it is, therefore, unable to grant parole. The simple honesty of such an exercise would be immensely preferable to the present

on *Corrections* (Ottawa: Queen’s Printer, 1969) at 277-278 (hereafter referred to as the “Ouimet Report”).

10. Wenk, E., Robison, J., and Smith, G., *Can Violence be Predicted?* (1972) 18 *Crime & Delinq.* at 393-402.

11. *Supra*, fn. 4.

12. Robison, J., “The California Prison, Parole and Probation System, Technical Supplement No. 2, It’s Time to Stop Counting”, California Assembly, 1969.

13. *Infra*, fn. 114.

practice of knowingly going through an intensely bureaucratic attempt at the impossible.

Since the objectives of the act are impossible to achieve except by change or accident, the board's assessments of rehabilitation or risk must appear to be arbitrary and nonrational in a legal sense. The rehabilitation of prisoners takes place, if at all, by chance or in ways that cannot be shown to be linked in any causal sense to what the board or prison officials do. Overall, the board's predictions as to risk would not be worse if it simply flipped a coin. Although the research data supporting the victim's claim in these respects is well known, the importance of the data merits a summary at this point.

III. *The State of the Art*

As early as 1968, Bill Outerbridge, current chairman of the Parole Board, warned of the failures of rehabilitation.¹⁴ Later, in 1974, Waller¹⁵ compared inmates released on parole with penitentiary inmates released at the expiration of their sentences in order to determine whether prison programs or parole supervision could be said to be effective in rehabilitating inmates, as measured by their success at staying free of further crime. With respect to recidivism, he found no significant differences between men released on supervision and those released without parole or supervision, and such differences as existed in favour of the parole group were thought by Waller to be attributable not to the supervision, but to the fact that the parole group had, in general, fewer previous convictions and stronger ties with family, employment projects, and the community. Prison programs and parole as such were not found to be associated positively with rehabilitation.

Much of the research on these issues has been done in the United States, where rehabilitation as a penal objective has been assiduously pursued in various states for over fifty years. In the same year that Waller published his research, Robert Martinson, having done an exhaustive review of all published research on rehabilitation, concluded that "nothing works".¹⁶ This conclusion,

14. Outerbridge, W. *The Tyranny of Treatment* (1968) Can. Jo. Corr. 378-387.

15. Waller, I., *Men Released from Prison* (Toronto: U. Tor. Press, 1974).

16. Robert Martinson, *What Works? Questions and Answers About Prison Reform* (1974) 35 *The Public Interest*, Spring Issue, 22-54; also Lipton, D., Martinson, R., and Wilks, J., *The Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies* (N.Y.: Praeger, 1975).

though at first disputed, has since been largely accepted and corroborated by subsequent research, including the report of a prestigious panel of experts working under the flagship of the National Academy of Sciences, Washington, D.C. After reviewing the research, including Martinson's earlier work, the panel reported that:

. . . there is not now in the scientific literature any basis for any policy or recommendations regarding rehabilitation of criminal offenders. The data available do not present any consistent evidence of efficacy that would lead to such recommendations, but the quality of the work that has been done and the narrow range of options explored militate against any policy reflecting a final pessimism. On the basis of its review, the panel believes that the magnitude of the task of reforming criminal offenders has been consistently underestimated. It is clear that far more intensive and extensive interventions will be required if rehabilitation is to be possible; even then, there is no guarantee of success.¹⁷

While the research literature, including that relating to parole, provides no basis for recommending parole or any other program as a means of rehabilitating offenders, the panel duly noted "occasional hints of interventions that may have promise", but emphasized the need for caution at the policy level, saying that ". . . to recommend widespread implementation of the measures would be irresponsible."¹⁸ It is worth emphasizing that the deliberate conclusion of the above report states that, under present circumstances, effecting rehabilitation is not even possible, let alone probable. However, the Parole Act, relying on assumptions current thirty years ago, continues to assume that rehabilitation is a rational, attainable objective.

The lack of effectiveness of parole supervision is probably not surprising in light of the fact that parole officers spend, on the average, less than three hours per month on each file,¹⁹ and only a small proportion of this time, presumably, is spent in direct contact with the parolee. Moreover, it is illusory to think that tax dollars spent on increased supervision would reduce crime. For fifteen years, California was involved in a carefully monitored program of

17. Sechrest, L. et al, eds., *The Rehabilitation of Criminal Offenders: Problems and Prospects* (Washington, D.C.: National Academy of Sciences, 1979) at 34.

18. *Ibid.*, at 102.

19. *Parole In Canada, Report of the Standing Senate Committee on Justice and Constitutional Affairs* (Ottawa: Information Canada, 1974) at 98.

the manipulation of parole supervision caseloads. Yet lighter caseloads and more intensive supervision had no impact on recidivism rates.²⁰ Despite this lack of evidence in support of parole, researchers found value in parole release because it was more “humanitarian”, in that early release on parole tended to be used as an instrument to level out overly harsh sentences among basically similar cases. In commenting on these studies in his report to the California Assembly, Robison noted that prisoners released without any supervision on expiration of sentence had a *lower* recidivism rate than persons released on parole. Robison accounted for this by surmising that the parolees, being under supervision, could be returned to prison for “technical breaches” of parole — for example, failing to report — whereas those not under supervision would only be recorded as a failure if arrested for further offences.

The same phenomenon has been noted in Canada. In 1961, the *Solicitor General's Study of Conditional Release*²¹ found no significant difference in recidivism rates between prisoners released on parole or temporary absences and those who were not. Indeed, the evidence reported in that study suggested that even men released on mandatory supervision do not have a significantly higher recidivism rate than those released on parole: the Solicitor General's study gives the recidivism rate, based on a 1980 survey, as thirteen percent for parole prisoners and twenty-eight percent for those under mandatory supervision, and, based on a 1974 survey, as twenty-seven and thirty-seven percent, respectively.²² As noted above, Waller suggested in his study that such differences could be accounted for not by supervision, but by the selection process itself. It is widely stated in the press that the recidivism rate for mandatory supervision is fifty percent, but according to parole staff, half of the failure rate is accounted for by “technical violations”. Regardless of the differences in recidivism rates between the two groups, however, the point remains that even increased resources would not materially improve parole or mandatory supervision success rates.²³

20. Robison, *supra*, fn. 12.

21. *Solicitor General's Study on Conditional Release* (Ottawa: Ministry of the Solicitor General, 1981).

22. *Ibid.*, at 18, 23, 26.

23. Bill Outerbridge, Chairman of the National Parole Board, in addressing a group of citizens at Duncan, B.C., shocked his audience with the following understatement in relation to mandatory supervision cases: “The level of

During the decade of the seventies, the impact of this social science research began to be felt in government policy and planning departments, and even at the legislative level. In Canada, the penitentiaries underwent an official change of policy, abandoning the goal of rehabilitation of inmates and replacing it with the "opportunities" model.²⁴ Under this approach, the penitentiary no longer holds out rehabilitation of inmates as an objective of imprisonment, but, in recognition that rehabilitation, where it occurs at all, is a little-understood, personal mystery, aims instead at providing opportunities for prisoners to engage in programs that should assist them in developing work skills, and in acquiring education and social responsibility. In keeping with the view that the state does not have the knowledge or capacity to reform and change prisoners willy-nilly, attendance in prison programs is voluntary. Moreover, provincial departments of correction, including that of British Columbia, have, for similar reasons, abandoned the rehabilitative ideal.²⁵ At the legislative level in Canada, indeterminate sentences were abolished to the extent that they could be applied in Ontario and British Columbia under the provisions of the Prisons and Reformatory Act.²⁶ Yet, for various reasons, the obsolescent Parole Act escaped the move to reform, notwithstanding public criticism of board practices.²⁷

In the United States, the impact of social science research findings has also been felt at the legislative level. California abandoned the rehabilitative approach, including indeterminate sentencing laws,²⁸ which were once the most successful offspring of that state's belief in its capacity to reform human character. Some

supervision — the intensity — is not very high. The actual face-to-face contact may be once a week." See also the editorial, "Where Supervision is Meaningless", *Times Colonist*, Victoria, B.C., March 3, 1983.

24. *The Role of Federal Corrections in Canada* (Ottawa: Ministry of the Solicitor General, 1977); see also *The Criminal Law in Canadian Society* (Ottawa: Government of Canada, 1982) at 62-63.

25. *Programs of the Corrections Branch*, Ministry of the Attorney General, Victoria, at 21-22.

26. Prisons and Reformatory Act, R.S.C. 1970, c. p-21, ss. 44, 55, and 150; as am. by Criminal Law Amendment Act, 1977, S.C. 1976-1977, c. 53, s. 46.

27. *McLean's Magazine*, Dec. 7, 1981, at 10.

28. Lagoy, Stephen et al, *A Comparative Assessment of Determinate Sentencing in the Four Pioneer States* [1978] *Crime & Delinq.* at 385, 400.

states, including California²⁹ and Maine,³⁰ abolished parole release with its discretionary timing geared to alleged predictions of "readiness" for release and a low risk of recidivism. At the same time, the implications of the social science data referred to above continue to focus critical debate on pressing concerns for equality in sentencing and protection of the public from undue risk.³¹

The fallacy of rehabilitation is but one problem in considering the obsolescence of the Parole Act. The second major problem is the act's reliance on the assumption that, through prediction, risk of future crime can be controlled and, by this means, the public can be protected by parole not being granted or, once it is granted, through revocation of parole. Within the last decade, it has become abundantly clear that such predictions are fraught with error and are unreliable.³² The best prediction is the prisoner's prior record, a piece of information which the judge has before him at the time of sentencing. Where there is an absence of a prior record or a very limited history of previous crimes, predictions are notoriously wide of the mark. As can be expected, most of the reported research has been in respect of crimes of violence. After reviewing the reported research, Monahan stated that "... the conclusion to emerge most strikingly from these studies is the great degree to which violence is over-predicted. Of those predicted to be dangerous, between 54 and 99 percent will be false." "False positives" in this context are predictions of dangerousness that turn out to be false. "False negatives" are predictions that the offender will not commit a crime of violence if released, but, in fact, he does so. The frequency of error in respect of false negatives, an error of particular interest to the potential victim, can be gauged from the percentage of failures on parole, that is, those cases which the board predicted would pose no undue risk. According to the government's study on parole

29. Tonry, Michael, *More Sentencing Reform in America* (1982) Crim. L.R. at 157-167.

30. Zarr, M., *Sentencing* (1976) 28 Maine L.R. 117.

31. Flowd, Jean and Young, Warren, *Dangerousness and Criminal Justice* (London: Heinemann, 1981); Tonry, Michael, *Real Offence Sentencing: The Model Sentencing and Corrections Act* (1981) 72 Jo. Crim. Law and Crim. 1550.

32. Monahan, J., "The Prediction of Violent Criminal Behavior: A Methodological Critique and Perspectives", in A. Blumstein et al, eds., *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* (Washington D.C.: National Academy of Sciences, 1978) at 244-269.

releases, the failure rate on parole ranges from thirteen to twenty-seven percent.³³

The American Psychological Association's Task Force, reporting in 1978, found that the validity of psychologically-based predictions of dangerous behaviour, made during sentencing and release decision-making, was "extremely poor, so poor that one could oppose their use on the strictly empirical grounds that psychologists are not professionally competent to make such judgments."³⁴ Earlier, in 1974, Diamond reached similar conclusions:

Neither psychiatrists nor other behavioral scientists are able to predict the occurrence of violent behavior with sufficient reliability to justify the restriction of freedom of persons on the basis of the label of potential dangerousness. Accordingly, it is recommended that courts no longer ask such experts to give their opinion of the potential dangerousness of any person, and that psychiatrists and other behavioral scientists acknowledge their inability to make such predictions when called upon to do so by courts and other legal agencies.³⁵

The above statements rest on a large number of research reports which are critical of risk prediction. Wenk, Robison, and Smith, for example, reported in 1972³⁶ on three large studies which were undertaken for the California Department of Corrections. The research in one study showed that eighty-six percent of those predicted to commit a crime of violence while on parole did not do so. In the second study, it was shown that for every correct identification of a potentially aggressive individual, 326 persons were incorrectly identified. In the third study, involving over 4,000 youths, the researchers concluded that the parole decision-maker who used a history of actual violence as the sole predictor of future violence would make nineteen false predictions of violence out of every twenty predictions, yet "there is no other form of simple classification available thus far that would enable him to improve on this level of efficiency."³⁷ After reviewing the research and the

33. *Solicitor General's Study*, *supra*, fn. 21 at 23.

34. American Psychological Association, Report of the Task Force on the Role of Psychology in the Criminal Justice System (1978); 33 *American Psychologist*, 1099, at 1110.

35. Diamond, B., *The Psychiatric Prediction of Dangerousness* (1974) 123 Univ. Pa. L. Rev. 439-452.

36. Wenk, E., Robison, J., and Smith, G., *Can Violence be Predicted* (1972) 18 *Crime & Delinq.* at 393-420.

37. *Ibid.*, at 400.

problems of false positives and false negatives, Monahan, writing in 1979,³⁸ was struck by the almost insurmountable barriers to improving prediction. He stated that improvements to the prediction of risk can "inform but not determine such public policy. The risks must be borne by the false positives who languish in institutions and the victims of false negatives who lie in the streets."³⁹ In a more recent publication, Monahan,⁴⁰ while still acknowledging that psychiatric predictions of dangerousness appear to be wrong two times out of three, emphasizes that making the assessment is one issue and acting on it is another. He underlines the fact that it is not the role of clinicians and doctors to make "sociopolitical" decisions affecting liberty; rather, it is up to courts and legislatures to decide whether the clinician's prediction is reliable enough to justify action affecting potential victims' rights to be secure in their persons.

One of the latest reports showing clear and convincing evidence that predictions of dangerousness are highly inaccurate comes from an analysis of felony defendants in New York, who were found incompetent to stand trial and were judged by the courts, on the basis of psychiatric reports, to be dangerous.⁴¹ As measured by subsequent behaviour upon release, those predicted to be dangerous were virtually indistinguishable from those judged by the court not to be dangerous. Fourteen percent (thirteen out of ninety-six) of those released to the community by the courts were subsequently arrested for committing violent crimes, while sixteen percent of those found to be non-dangerous (eleven out of seventy) were similarly arrested for violent crimes. The authors conclude that:

With few exceptions . . . there is no empirical evidence to support the position that psychiatrists have any special expertise in predicting dangerousness . . . It in fact appears that psychiatrists cannot even predict accurately enough to be more often right than they are wrong.⁴²

A somewhat more optimistic report of success in predictions of violence comes from the Department of Corrections in the state of

38. Monaghan, J., *supra*, fn. 32.

39. *Ibid.*, at 265.

40. Monahan, J., *Predicting Violent Behaviour* (Beverly Hills: Sage Publications, 1981).

41. Cocozza, Joseph J. and Steadman, Henry J., *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence* (1976) 29 Rutgers L.R. at 1084-1101.

42. *Ibid.*, at 1101.

Michigan.⁴³ In that report, persons who were convicted of robbery, sexual assault, or murder, who were first arrested before their fifteenth birthdays, and who were found to be involved in serious institutional misconduct while in prison were predicted to pose a high risk of further assaults. These predictions turned out to be wrong only sixty percent of the time, an improvement on other reported research.

To conclude, the research strongly suggests that, insofar as the parole-granting decision involves a prediction about risk, the decisions are fraught with error and one would do equally well by flipping coins. The Solicitor General's Release Study, referred to earlier, points out that out of a possible 999 cases considered for parole, the Parole Board will correctly identify as "safe risks" only 491, or less than half. The study concludes that if paroles were simply granted at random, regardless of the factors involved, there would be no significant difference in actual outcomes.⁴⁴

The failure to predict with accuracy or to prevent crime through treatment or supervision undermines the statutory assumptions that parole rehabilitates and is a controlled risk. It is noteworthy that earlier reports upon which the government drew to enact parole legislation and policy simply assumed, without examination, that parole could protect and that predictive decisions could be made.⁴⁵ The closest those reports came to examining the predictive question was to state that there comes a time in almost every inmate's life when he is "ready" for release, the assumption being that he has benefited as much as he is going to from the experience of imprisonment, and that if he is released at the critical moment, he will be likely to "make good" on the outside. The readiness myth has been recognized for what it is, and was abandoned by the United States Parole Board over twenty years ago. As Robison states: " 'Optimum time for release' is a phrase which seems to presume both knowledge of a specific point in time when recidivism is unlikely and a readiness to act on that knowledge. There is no evidence that either is present in today's system of processing offenders."⁴⁶ "Readiness for release" is a telling phrase, indicative

43. Monahan, *supra*, fn. 39 at 103.

44. *Solicitor General's Study*, *supra*, fn. 21 at 19.

45. *Supra*, fn. 7; see also the same generalized approach in *Report of the Canadian Committee on Corrections*, *supra*, fn. 9.

46. Robison, *supra*, fn. 12 at 63.

of the style of correctional reasoning in use twenty years ago. The style of reasoning in the Fauteux Report in 1952, and even in the Ouimet Report in 1969, made it natural simply to rely on the received wisdom and ethical values of the day, without inquiry into the empirical validity of proposed rules. It was a style of reasoning that can best be characterized as charismatic,⁴⁷ in that it drew strength primarily from the pronouncements of respected leaders, and it is to be contrasted with a style of reasoning more prevalent in the last forty years, a style that prefers empirical verification of hypotheses and derives its legitimacy not so much from unquestioned assumptions or political pronouncements, but from the operational rationality of policy and law. This shift towards legal rationality, apparent everywhere in an increasingly bureaucratic state, is given dramatic visibility in the enactment of the Charter of Rights and in its demands in section 1 that infringements of rights are not legitimate unless "demonstrably justified".⁴⁸ Surely, the imperatives of the Charter forbid curtailment of rights of life or personal security through state action that cannot be shown to be rationally related to statutory objectives. The Ouimet Committee's statement of faith, as follows, will not stand up against present-day knowledge, nor will it satisfy modern criteria for valid curtailment

47. This analysis of the growth of law and types of legal decision-making borrows from the analysis of Max Weber and his observation that rational law was a peculiar rationalism of western culture that arises in part because of the characteristics of western states, including their demand and need for a professional administration, a specialized officialdom, and a rational law made by lawyers and judges, professionally trained to interpret and apply law in rational processes. Weber, J., *Law in Economy and Society* (Cambridge, Mass.: Harvard University Press, 1954) at 26.

48. The courts' continuing concern for legal rationality finds expression in the Supreme Court of Canada decision relating to the validity of mandatory retirement in light of the Human Rights Code prohibition against age discrimination. In justifying the discrimination, McIntyre J. stated that the defendant must establish that the discrimination is bona fide, thus involving not only an honestly held belief as to the validity of the discrimination, but, in addition, an inquiry based on an objective test establishing that the discrimination is reasonably necessary in order to assure efficient job performance. The kind of evidence required for proper decision-making at this level of the inquiry cannot be simply "impressionistic" or anecdotal, as Weber would have put it, but objective in the sense of medical or statistical evidence based upon observation and research: *Ontario Human Rights Commission, Dunlop, Hall and Gray v. Borough of Etobicoke* (1982), 40 N.R. 159, (S.C.C.). Note the role of rationality under the Charter in *R. v. Oakes* (Feb. 2/83) Ont. C.A., unreported.

of individual rights: "... the short term risks of parole are calculated risks and in the opinion of this Committee are less than the risks in the alternative of sudden and dramatic contrast between incarceration and total freedom."⁴⁹

As indicated above, parole supervision cannot be shown to be effective in preventing further crimes. The Parole Act's statutory means of attempting to control risk through prediction and revocation (which also assumes valid prediction) have no empirical foundation which can establish a rational connection between these means and the statutory ends, namely, rehabilitation and protection against undue risk. Neither the Parole Board nor reported research shows that prediction or revocation materially prevents the commission of crimes. Nor are the earlier correctional assumptions correct that a policy of outright release from prison with no supervision would result in more recidivism than would release under supervision. The research shows little difference in recidivism rates between the two forms of release. It is for these reasons that victims may justifiably assert that the Parole Act is obsolescent and, in its obsolescence, poses a grave peril to personal security and individual rights.

IV. *Parole Practice*

Given research studies pointing to the inability to accomplish reform as a penal objective or to predict the risk of recidivism with reliability, what is the state of parole release practices? Who makes the decisions to release, upon what information are the decisions made, and upon what procedures are they designed to reduce the risk of error?

While all releases from penitentiaries made prior to expiration of sentence are within the sole discretion of the Parole Board,⁵⁰ the board has delegated much of its authority to prison officials or, by agreement, to provincial parole boards which have authority in Ontario, Quebec, and British Columbia to release prisoners in provincial prisons.⁵¹ The board itself, consisting of twenty-six members, retains a modified central control over the release of only those prisoners designated as dangerous, high risk, or notorious. All

49. The Ouimet Report, *supra*, fn. 9 at 331.

50. Parole Act, *supra*, fn. 2, s. 8.

51. Prisons and Reformatories Act, as amended, *supra*, fn. 26 at s. 151, and see also Corrections Act, R.S.B.C. 1979, c. 70, ss. 24-31, 47.

offenders not so designated and serving terms of five years or less (these constitute approximately sixty percent of the penitentiary population)⁵² may be released on "temporary absence" by their respective penitentiary wardens, while "day parole" or full parole releases for these prisoners are within the sole discretion of regional parole panels, consisting of at least two members. The panels visit each penitentiary regularly to hold hearings on those cases where prisoners, eligible under the regulations, have applied for some form of parole release. Panel members hear an average of "8 to 10 [cases] a day, three weeks out of every four."⁵³ Understandably, in a government enterprise as large as the penitentiary system, the decision-making is bureaucratic in the sense that decisions must be made not only within the framework of regulations governing eligibility, but in accordance with a comprehensive and extensive Policy and Procedures Manual which lays down guidelines for the preparation of reports and for factors and criteria to be considered in the decision to release, as well as procedures to be followed.

With respect to sentences of two years less a day, which are served in provincial jails, the release decision may be delegated to a provincial parole board or to wardens of the local prison. In Ontario, Quebec, and British Columbia, the National Parole Board has delegated power to provincially constituted parole boards. In the other provinces, prison officials may release such prisoners, at their discretion, intermittently on temporary absences. In such cases, a prisoner credited with full remission of sentence would be released outright after having served two-thirds of his sentence. Parole and parole supervision do not restrict him unless he voluntarily applies to the Parole Board to be released and is released prior to the two-thirds mark. Because of the time necessary to complete the paper work on a parole release application, prisoners with sentences of three months or less are, for all practical purposes, exempt from the parole process. It is also helpful to understand that parole decision-making is decentralized on a regional basis. While certain cases involving allegedly high risk require some decision-making at both regional and national levels of the parole bureaucracy, in the ordinary case the decision to release or not to release is made at a

52. *Basic Facts About Corrections in Canada* (Ottawa: Ministry of the Solicitor General, 1982) p. 16.

53. *Couperthwaite v. National Parole Board* Fed. Ct. Can. (Trial Div.), Wnpg., June 30/82, T-3763-81.

relatively low level of the prison and parole hierarchy. As outlined in *Couperthwaite v. National Parole Board*,⁵⁴ the preparation for a parole hearing commences several months prior to the hearing date through preparation of reports at the local prison level. These relate to health, institutional behaviour, educational or other diagnostic reports, police and community assessment reports, comments from the sentencing judge, if any, and psychological and psychiatric reports, if any.⁵⁵ All information relevant to the release decision is reviewed in advance by two members of the penitentiary service, namely, the prisoner's parole service officer and a prison officer known as a Living Unit Development Officer (LUDO). In reliance on these reports, these officials prepare summaries on prescribed forms, which, together with written material upon which they are based, are given to the members of the Parole Board a week or two in advance of the hearing at the prison. Upon completion of the hearing, these parole board members may recommend that parole be granted or denied.

Considering the critical nature of the parole release decision in the context of risk assessment, it is useful to consider the conclusions drawn by the Law Reform Commission of Canada on the quality of the information in parole files. After summarizing the types of reports compiled, the type of information collected, and the summaries used to enable more efficient assimilation of data, Carriere and Silverstone commented upon the duplication of information and the apparent cumbersome and complex nature of the process. They observed that Parole Board members were not able to read all of the material on file, but instead relied heavily on the summary reports. These summaries themselves, however, were found all too frequently to show statements of belief that were unsupported by fact or which betrayed a lack of a clear understanding as to what facts were relevant to the parole decision, including, for example, whether factors relevant to prison discipline or severity of offence should be relevant to rehabilitation and risk.⁵⁶ After noting "inadequate, inconsistent and late preparation", the authors clearly felt that release decisions based on such case preparations were not acceptable.

54. *Ibid.*

55. Carriere, Pierre, and Silverstone, S., *The Parole Process* (Ottawa: Law Reform Commission of Canada, 1976) at 45-50.

56. *Ibid.*, at 57-58; 75-76; 121-143.

Psychiatric reports themselves, although generally accorded considered weight in risk assessment, were also found to be faulty and incomplete. The Law Reform Commission's study of the parole process found some psychiatric reports to contain opinion that was unsupported by statements of fact and recommendations that were couched in obscure terminology, and, all too frequently, the reports failed to address themselves to specific facts required for a rational discrimination between the violent and the nonviolent.⁵⁷ Monahan has commented at length on the incomplete, inadequate, and misleading quality of psychiatric reports, in general, for predicting violence:

There are many mistakes that a psychiatrist or psychologist can make in predicting violent behaviour. He or she can mis-score a test, forget to ascertain a relevant fact, or simply be unaware of the research findings in the area. Several sources of error, however, appear to occur so routinely in the prediction of violent behaviour, even by generally competent clinicians, that it is worthwhile to single them out for special attention. The four most common "blind spots" in the clinical prediction of violent behavior appear to be: (1) lack of specificity in defining the criterion; (2) ignoring statistical base rates; (3) relying on illusory co-relations; and (4) failing to incorporate situational or environmental information.⁵⁸

Monahan concludes by suggesting some practical questions which clinicians should address if predictions about violence are to gain reliability. He includes the following checklist among the factors to be addressed:

1. Is it a prediction of violent behavior that is being requested?
2. Am I professionally competent to offer an estimate of the probability of future violence?
3. Are any issues of personal or professional ethics involved in this case?
4. Given my answers to the above questions, is this case an appropriate one in which to offer a prediction?
5. What events precipitated the question of the person's potential for violence being raised, and in what context did these events take place?
6. What are the person's relevant demographic characteristics?
7. What is the person's history of violent behavior?

57. *Ibid.*, at 51, 53.

58. Monahan, *supra*, fn. 39 at 57-58.

8. What is the base rate of violent behavior among individuals of this person's background?
9. What are the sources of stress in the person's current environment?
10. What cognitive and affective factors indicate that the person may be predisposed to cope with stress in a nonviolent manner?
11. How similar are the contexts in which the person has used violent coping mechanisms in the past to the contexts in which the person likely will function in the future?
12. In particular, who are the likely victims of the persons' violent behavior, and how available are they?
13. What means does the person possess to commit violence?⁵⁹

Based on these criteria of professional standards in risk assessment, present procedures appear to be inadequate.

There is no reason to believe that reliability and consistency of information is a problem peculiar to Canadian parole boards. Gottfredson and Wilkins noted the problem of information overload and unreliability in American agencies as well.⁶⁰ The problem of consistency and accuracy in the use of relevant facts warrants serious attention and has led to suggestions for written guidelines to parole decision-making.⁶¹ The movement towards parole guidelines⁶² is part of the movement towards greater rationality in decision-making. Under an earlier model of decision-making, for example, the United States Parole Board would meet with the applicant in order to gain some intuitive feel for the applicant's rehabilitation, repentance, willingness to accept responsibility, or self-understanding. The decision to release or to refuse parole under such a model was said to be entirely discretionary — that is, based on the judgments of individual men and women. Formally articulated criteria, such as are contained in parole guidelines, were used infrequently.⁶³ Under this traditional approach, the release

59. *Ibid.*, at 160.

60. Gottfredson, D.M., Wilkins, L., and Hoffman, P., *Guidelines for Parole and Sentencing* (Lexington, Mass.: Lexington Books, 1978).

61. *Ibid.*; see also Nuffield, *supra*, fn. 4.

62. Kress, Jack M., "Reforming Sentencing Laws: An American Perspective", in E. Grosman, ed., *New Directions in Sentencing* (Toronto: Butterworths, 1980) 97-116.

63. This description represents the approach formerly taken by the National Parole Board, Ottawa; see the Ouimet Report, *supra*, fn. 9 at 339-343; see also F. P. Miller, "Parole", in W.T. McGrath, ed., *Crime and Its Treatment in Canada* (2d.

decision was not always measurably related to rehabilitation; it could be related to the risk of committing a further offence on release, or to the amount of time the offender had served and the severity of the offence.⁶⁴ Hawkins' study of the New York Parole Board showed decision-making to be the result of a wide array of factors, including factors predictive of risk, punitive factors, prison-related considerations, and personal impressions.⁶⁵ What Parole Board members said they used as criteria, however, could not be shown to be statistically correlated with criteria associated by the members of the board with specific decisions. In other words, there appeared to be a gap between what board members did, what they said they did, and what the statute directed them to do.

As was already noted, there is some evidence that Canadian parole boards may also consider nonstatutory criteria in making parole release decisions. Carriere and Silverstone concluded that cases that attracted a substantial amount of publicity or were a cause celebre for various reasons were decided by factors other than risk or rehabilitation. "Allowing different and more onerous treatment for reasons unrelated to an inmate's assessed capacity for a successful parole creates the impression that the voting procedures were designed to protect the Parole Board rather than to help the inmate."⁶⁶ It might be thought that greater consistency in application or use of parole criteria could be achieved by requiring board members to give reasons for decisions. While National Parole Board procedures require that oral reasons for decisions be given, the above-mentioned study found that such reasons tended to be general, and sometimes were not reasons at all. In commenting on written reasons, the authors concluded that reasons tended to be comments on the case, rather than reasons in relation to the criteria upon which parole grants or denials are supposed to be based.⁶⁷

The inadequacy of this type of decision-making for a system of law purporting to adhere to principled decision-making, rationality, and equality under the law has encouraged the movement toward

ed., Toronto: MacMillan, 1976) 376, 442, at 394-399; for a description of the approach of the U.S. Board of Parole, see *Payton v. U.S.* (1981) 636 F. 2d. 132, (U.S. Ct. of Appeals, 5th Cir.) at 139.

64. Stanley, David T., *Prisoners Among Us, The Problems of Parole* (Washington D.C.: Brookings Institution, 1976).

65. For a summary, see Stanley, *ibid.*, at 61.

66. Carriere and Silverstone, *supra*, fn. 55 at 97.

67. *Ibid.*, at 100.

parole guidelines. However, these too have their problems, and may not entirely meet the victim's concern that official decision-making violates his common law or constitutional rights.⁶⁸ The victim asserts not only that the Parole Act is obsolescent and in violation of his constitutionally protected right to life and personal security, but that the nature of the parole decision-making process is so fraught with considerations of faulty, erroneous, or irrelevant matter, with respect to risk prediction, that the board's actions are capricious or amount to an error in law and a loss of jurisdiction. Where the prediction process is professionally suspect, the parole release decision may be without jurisdiction. That is to say, if the fact-gathering and risk-assessing process is unacceptably riddled with error, omission, and reference to irrelevant facts, should not the court be invited to find that the board made an error in law or, alternatively, made a capricious decision and, therefore, acted without jurisdiction? Admittedly, a finding that the act is obsolescent or that the board acted without jurisdiction does not lead to a common law remedy of damages, but it may ground an application under the Charter for a section 24 remedy for unconstitutional deprivation of life or security of person.⁶⁹ More will be said of this later.

V. *The Victim and the Courts*

Before considering what practical remedy, based on any constitutional or Charter violation, might be sought in the courts, it will be instructive to see whether the common law provides the victim with an effective remedy. What is the victim's position where he or she has been assaulted by a person on parole or on another form of supervised release from prison? Let us assume that the victim is not interested in getting a declaration that the parole authorities acted unfairly or otherwise, nor that the victim is interested in other procedural remedies; assume, for the moment, that what the victim wants is damages.

There is no question that the victim can proceed directly against

68. Genego, W.J., Goldberger, P.D., and Mackson, V.C., *Parole Release Decision-Making and the Sentencing Process* (1975) 84 Yale L.J. 810-902; Alschuler, Albert W., *Sentencing Reform and Parole Release Guidelines* (1980) 51 U. Colo. L. Rev. 237-245.

69. Under s. 52(1) of the Constitution Act, any law that is inconsistent with the Charter is of no force or effect.

the wrongdoer in a tort action for damages and that he may recover; the defendant, however, is unlikely to have substantial resources and is unlikely to be able to pay any judgment recovered against him. Can the victim sue the federal parole or correctional officials for negligence in releasing or in supervising the offender?⁷⁰ By virtue of federal legislation,⁷¹ the federal Crown can, with some exceptions,⁷² be sued in tort, thus removing a former immunity conferred by the common law.⁷³ The victim who sues the parole board or correctional officers, however, is not going to have clear sailing. It is true that tribunals and agencies such as the Parole Board and the Correctional Service of Canada may be held vicariously liable for the acts of their employees.⁷⁴ The problems arise out of the reluctance of the courts to hold officials liable in damages for negligent acts and the failure of the courts to develop a clear theory of why or how this should be done.

The problems are illustrated by the decision of the British Columbia Court of Appeal in *Toews v. MacKenzie*.⁷⁵ In that case, the plaintiff sued the warden of a Canadian penitentiary in negligence for damages arising out of injuries she suffered as a passenger in a car driven by a prison inmate who was on a temporary absence pass, issued by the warden. It appeared that the plaintiff, who had met the prisoner while he was out on an earlier temporary absence, had taken up a close relationship with the prisoner and was claimed by him as his "old lady". There was evidence that she was intimidated by his over-bearing manner, and she said that, on the day in question, she felt she had no option but to go with him in the car as he directed. The prisoner had what was described as a long, if somewhat petty, criminal record, including narcotics convictions. He had a drinking problem, but in preparation for his parole release plans, he formed an Alcoholics Anonymous group in the prison and was serving as president of the

70. *Supra*, fn. 3.

71. Crown Liability Act, R.S.C. 1970, c-38 and Federal Court Act, R.S.C. 1970 (2d Supp.) c. 10. The Crown in the right of the province may also be sued under relevant provincial legislation. See, for example, Crown Proceeding Act, R.S.B.C. 1979, c. 86.

72. Generally, see Goldenberg, *supra*, fn. 3.

73. Hogg, *supra*, fn. 3. See also Judson, John, and Laidlaw, Donald, *The Legal Liability of the Constitutional System* (1971) *Queens Law Jo.* 127-166.

74. *Ibid.*

75. *Supra*, fn. 5.

group when he was granted the temporary absence passes. He had also been cleared, by the Parole Board, to be released on a day parole, and this fact, combined with favourable pre-release reports from the warden's staff, was relied on by the warden in the granting of temporary absence passes to the prisoner in order that the prisoner might seek employment in his trade as a mechanic prior to his day parole release date.

The plaintiff sued both the warden and the prisoner, and recovered a large judgment against the prisoner, but he had disappeared and the judgment was worthless. As against the warden, the plaintiff argued that there was negligence in the decision to release the prisoner and negligence in his supervision. She relied on facts which showed that, upon release on the temporary absences, the prisoner was frequently late in returning to the prison at night and, in so doing, was in violation of a condition of his pass. In addition, instead of being steadily employed as a mechanic, as was required, he did some body work on an old car with a friend, but also left this work from time to time to drive to neighbouring communities, contrary to the conditions of the pass; he also drank during the day, sold narcotics, and visited with his friends, including the plaintiff, at various motels. On the day in question, he was drunk and driving, and in breach of the conditions of his release. The prisoner drove the car off the road and caused the plaintiff grave injuries, resulting in her becoming a paraplegic.

First, it was clear that the warden was acting within his powers and duties under the Parole Act; therefore, he could not be said to be acting *ultra vires*. Since his actions were *intra vires*, the plaintiff then argued that the warden should be liable in negligence if the release or supervision decisions fell into a class of "operational", rather than "discretionary", matters. The court ruled that no liability could attach to public officials in the making of discretionary or policy decisions unless there was evidence of bad faith or improper purpose, but in this case there was none. The court was willing to consider liability if the release and supervision were merely "operational", that is, if it consisted of the carrying out of policy and required no exercise of discretion. Relying on English cases, the court ruled that the release and the supervision were both "discretionary"; thus, even if the warden had been careless in failing to make proper inquiries before release or in failing to ensure adequate supervision, he had acted "in good faith" in a discretionary matter and could not be held liable.

The court went on to say that even if it were wrong and the warden had exercised “operational” powers in releasing or supervising the prisoner, the plaintiff had failed in the second part of her argument to show that there was a sufficiently proximate relationship between the warden and the plaintiff so as to require the warden to owe a duty of care. This is the foundation of an action in negligence, in accordance with the law as set out in the leading English case of *Anns*.⁷⁶ To establish a “proximate” relationship between herself and the warden, the plaintiff would have to show herself to be a person who might be a “neighbor”, in the sense that the relationship was such that it was reasonably foreseeable by the warden that, unless he took reasonable care in release and supervision, his action would likely cause injury to the plaintiff or to a class of persons of which she was a member. Whether any person fell within the ambit of this “eye of vigilance” would depend upon all the circumstances. In refusing to find a duty of care, the court, in *Toews*, followed the conservative approach of the House of Lords in *Dorset Yacht*.⁷⁷

In *Dorset Yacht*, the plaintiff’s yachts had been damaged by some Borstal boys escaping from an island while under the supervision of prison officers. Knowing that several of the boys had a history of escape and knowing of the yachts anchored off the island, the prison officers had, nevertheless, failed to keep watch at night, thus allowing the escape to materialize. Under those circumstances, the House of Lords was asked to consider whether a duty of care was owed to the yacht owners. Lord Diplock focussed on the narrow circumstances of damage done in the course of an escape. He said that, under the circumstances, it was reasonably foreseeable that, unless reasonable care was taken, the boys would attempt escape and, since they were on an island, it was reasonably foreseeable that they would board the yachts in attempting to do so. The injury to the plaintiff’s property was, therefore, foreseeable, and a duty of care was owed. But the House of Lords emphasized that a duty of care would not be owed to all the world and that each case must be carefully considered on its facts.

In *Toews*, the court said, “In the case at bar, I do not think, by the widest stretch of the imagination, it could be said that the respondent Stanowski ought reasonably to have foreseen that if he

76. *Anns. v. London Borough of Merton*, [1977] 2 All E.R. 492 (H.L.) 498.

77. *Home Office v. Dorset Yacht Co. Ltd.*, [1970] 2 All E.R. 294 (H.L.) at 334.

granted Warren temporary absence permits Warren would, by his negligent driving, injure the appellant who had placed herself in a relationship to Warren which because of her fear of him denied her the opportunity to avoid his negligent conduct.’’⁷⁸ The reasoning of the court, in focussing narrowly on the peculiar circumstances or manner in which the injury arose, was foreshadowed, as we have seen, by Lord Diplock’s emphasis on escape. In *Toews*, however, the court carries the approach to an unsatisfactory extreme. First, the court appears to suggest that the risk must be foreseeable with respect to the actual victim, but this cannot be the implication, for the cases are replete with examples showing that it is enough if there is foreseeable injury to a class of persons of which the plaintiff is one, such as a class of yacht owners, consumers, or, for example, passengers or users of highways. Second, the court suggests that the very manner of the injury must be foreseeable in order to recover: could the warden have foreseen that the plaintiff would have placed herself in such a relationship to the prisoner that she could not exercise normal prudence in refusing to go for a ride in a car with him? This is an extreme view of what the law requires. The writers and the case law generally establish that it is not necessary to show that this particular accident and this particular damage were probable; it is sufficient to show that the accident is of a class that might well be anticipated as one of the reasonable and probable results of the wrongful act.⁷⁹ Foresight of ulterior harm is not to be judged by a narrow test of what the reasonable man would foresee in precise detail.

The *Toews* case, in erring in this regard, is in the same class as *Mauney v. Gulf Refining Co.*⁸⁰ In that case, the defendant allowed a fire to start at a filling station in a small town. Alarmed at the shouts of panic and disaster, the female proprietor of a cafe across the street rushed to save her two-year old child, and, in so doing, tripped over a chair and suffered a miscarriage. She sued the defendant company in negligence, but the court held that the company could not have foreseen that she would trip over a chair. On this approach, recovery for ulterior harm would hardly ever be allowed; that the

78. *Toews*, *supra*, fn. 5 at 494.

79. Hart, H.L.A. and Honore, A.M., *Causation in the Law* (Oxford: Clarendon Press, 1959) 233 quoting *Haynes v. Harwood*, [1935] 1 K.B. 146, at 156, per Greer L.J.

80. *Mauney v. Gulf Refining* (1942), 9 So. 2d. 780 (Sup. Ct. Miss., *in banc*).

case is an exception is shown by the generality of the cases where recovery is allowed if injury is foreseeable, although the particular details are not. The peculiar reasoning in *Toews* does appear to be open to criticism on grounds of inconsistency with general principles. The result, however, may be understandable, considering that the defendant was a prison official, and that the plaintiff was a simple volunteer and was opposing counsel's argument (which was rejected) that she consented to the risk.

From what has already been said, it is clear that apparently simple words, such as "duty" and "foreseeability", mask a host of conflicting value and policy considerations which the court may or may not openly take into account. Cases decided on the basis of "no duty" or "no causal connection" are particularly open to this criticism.⁸¹ More recently, the courts have acknowledged the need to frankly weigh factors and values of a policy nature. In *Anns*, Lord Wilberforce suggested a useful approach. First, the court should determine whether there was a prima facie duty, and then, if such a duty is found, the court should address policy or other reasons as to why the duty should be negated or restricted or why damages should be limited. Lord Wilberforce stated this as follows:

First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.⁸²

Although the court in *Toews* made reference to *Anns*, it adopted such a narrowly practical test of foresight as to reduce "reasonable foreseeability" to an arbitrary absurdity, for in one sense, everything is foreseeable, but on the approach adopted in *Toews*, almost nothing would be.⁸³ Furthermore, the *Toews* case is less than compelling and is positively discouraging in the way it classified the warden's acts as "discretionary". The distinction between

81. See Epstein, R.A., *A Theory of Strict Liability* (San Francisco: Cato Institute, 1980).

82. *Anns*, *supra*, fn. 76 at 498.

83. Hart and Honore discuss this problem, *supra*, fn. 79 at 232-33.

“discretionary” and “operational” is fairly recent in Canadian law; in fairness, courts have had but few opportunities to clarify the dividing line between the two.⁸⁴ What is regrettable is that *Toews* adds nothing to that needed clarification. “Discretionary” and “operational” are but conclusions, and even “operational” matters, that is, matters involving the application of policy, may, in many instances, involve choice and discretion. For example, they may involve a doctor’s report on the fitness of a patient in a hearing to commit under the Mental Health Act,⁸⁵ or the carrying out of an inspection of building foundations by a building inspector.⁸⁶

The court in *Toews* appeared content to accept Lord Diplock’s conclusion, in *Dorset Yacht*, that release and supervision are discretionary matters. With respect, Lord Diplock himself is not compelling in his analysis and gives undue weight to government interests at the expense of individual rights. As Lord Diplock noted, the setting up of a Borstal system including a scheme of supervised release is provided for by statute in England in the interest of the rehabilitation of offenders. Permitting actions in negligence against the prison service, he observed, brings into operation the consideration and balancing of many factors and conflicting sets of interests, including the interest in release, held by the Borstal boys, the interest in rehabilitation, held by the public, and the interests of persons likely to be harmed by such releases. The court, said Lord Diplock, was not equipped to make such policy decisions involving, as they must, prison programs, supervision, and possible resultant injury to private persons:⁸⁷

These interests, unlike those of a person who sustains damage to his property or person by the tortious act or omission of another, do not fall within any category of property or rights recognized in English law as entitled to protection by a civil action for damages. The conflicting interests of the various categories of persons likely to be affected by an act or omission of the custodian of a Borstal trainee which has as its consequence his release or his escape are thus of different kinds for which in law

84. *Bona fide* legislative action, at common law, is beyond the reach of the courts; *Welbridge Holdings Ltd. v. Winnipeg* (1971) S.C.R. 957. A decision by the Fish and Wildlife Branch to feed elk in winter was characterized as discretionary and not operational: *Diversified Holdings Ltd. v. British Columbia* (1981) 35 B.C.L.R. 349 (B.C.S.C.); also *Nielsen v. Kamloops* (1982) 31 B.C.L.R. 311 (B.C.C.A.).

85. *Everett v. Griffiths*, [1921] 1 A.C. 631 (H.L.).

86. *Anns, supra*, fn. 76.

87. *Dorset Yacht, supra*, fn. 77, at 331-32.

there is no common basis for comparison. If the reasonable man when directing his mind to the act or omission which has this consequence ought to have in contemplation persons in all the categories directly affected and also the general public interest in the reformation of young offenders, there is no criterion by which a court can assess where the balance lies between the weight to be given to one interest and that to be given to another. The material relevant to the assessment of the reformatory effect upon trainees of release under supervision or of any relaxation of control while still under detention is not of a kind which can be satisfactorily elicited by the adversary procedure and rules of evidence adopted in English courts of law or of which judges (and juries) are suited by their training and experience to assess the probative value.

These considerations lead me to the conclusion that neither the intentional release of a Borstal trainee under supervision, nor the unintended escape of a Borstal trainee still under detention which was the consequence of the application of a system of relaxed control intentionally adopted by the Home Office as conducive to the reformation of trainees, can have been intended by Parliament to give rise to any cause of action on the part of any private citizen unless the system adopted was so unrelated to any purpose of reformation that no reasonable person could have reached a bona fide conclusion that it was conducive to that purpose. Only then would the decision to adopt it be *ultra vires* in public law.

Lord Diplock's protest that the court is not competent to balance conflicting values or interests in such matters as the decision to release a parolee or to impose conditions of his supervision is not convincing. Because of a lack of judicial competence in these matters, he says, such issues must remain behind the "discretionary" veil. First, as was already noted,⁸⁸ the decision to grant or deny parole in the ordinary case is made at a relatively low level of the agency bureaucracy, in accordance with well-defined procedures and following criteria for decision-making which are spelled out in advance by the higher administration in policy manuals. The factual basis for the decision is open to inspection on the file. In reviewing such a decision, the court is not being cast adrift on an uncharted sea, but is being asked to review well-marked channels of agency decision-making. Nor is the nature of the process markedly different in more serious cases of risk, where board procedure changes only to the extent of requiring an additional two votes on the decision to release, votes that are obtained from board members at the Ottawa office upon perusal of the paper file alone. The criteria

88. Carriere and Silverstone, *supra*, fn. 55.

for this type of case, as in cases of lesser risk, are laid down in advance, the procedure for file preparation also remains the same,⁸⁹ and again, the factual foundations for the decision are available to the prisoner or his counsel for inspection. Faced with this type of detailed agency procedure and documentation, it does not seem credible to argue that a court is incompetent to assess whether, in any given case, the agency took reasonable care in assessing the issue of risk.

Lord Diplock's reasoning is open to question on a second ground. He states that "there is no criterion by which a court can assess where the balance lies. . .", yet he immediately acknowledges that there is such a criterion, saying, "the system adopted was so unrelated to any statutory purpose that no reasonable person could believe that the means were conducive to that purpose." In such cases, Lord Diplock states, the agency's action is *ultra vires*. Another line of cases illustrates the courts' willingness and competence to reach behind the discretionary veil to decide, for example, whether discretion has been exercised *bona fide* or in accordance with the terms of the statute. Thus, a minister's decision to close certain hospitals for budgetary reasons was ruled invalid, since the statute conferring the powers on him did not permit closures for budgetary reasons.⁹⁰ So, too, a court will look into discretionary matters to see if they have been carried out in compliance with the law, including regulations, directives, or policy guidelines.⁹¹ If the courts have at hand a workable criterion of reasonableness to determine whether the means chosen are conducive to the statutory purposes, do they not equally have at hand a standard of reasonableness to determine whether or not the assessment of risk was made negligently? As Monahan has pointed out, there are criteria of competence in these matters to which the courts might look;⁹² in addition, there are agency guidelines, procedures, and criteria for assessment, all of which should be of help to the court in determining whether or not there was negligence or incompetence in assessing risk. Thus, the issue is not whether the

89. *Ibid.*, at 96-97. The authors note that, in practice, board members take a further factor into account in causes celebre, namely, the adverse impact of publicity.

90. *Re Doctors Hospital and Minister of Health* (1976) 68 D.L.R. (3d) 220 (Ont. Div. Ct.).

91. *Capital Cities Communication Inc. v. C.R.T.C.*, [1978] 2 S.C.R. 141, 81 D.L.R. (3d) 609; Molot, *Administrative Discretion*, *supra*, fn. 3 at 360-70.

92. Monahan, *supra*, fn. 39.

court will substitute its decision for that of the agency, but whether the agency has complied with minimal standards of reasonableness and competence in assessing risk.

In *Toews*, the evidence showed that the warden addressed his mind to the statutory purposes of rehabilitation and risk, and, on the basis of reports compiled in the usual course by prison and parole service officers, concluded that the prisoner should be released. Surely, however, a standard of reasonableness or competence cannot be justified on the bald assertion that reports were considered and followed. Suppose the reports themselves never addressed the question of the prisoner's likely return to drinking and the risk of highway accidents? If the reports or the supervision were so riddled with error that no reasonable person could have confidence in them, should the courts continue to erect a protective shield of immunity, barring the victim from his remedy?

While official immunity is in the process of being whittled away by the notion of operational matters, the courts have not made clear what criteria are to be used in drawing the line between an immune discretionary wrong and a tortious operational wrong. The evolution of the distinction has not been without its difficulties; it was first clearly established in the Anglo-Canadian world in the *Anns* case,⁹³ decided by the House of Lords three years prior to *Toews*. In *Anns*, the city was held liable for the negligence of a building inspector who failed to properly inspect the foundations of a house under construction. The result was that, when the house was completed, a purchaser suffered loss in having to make repairs arising from the faulty foundations. The court stated that they would not review the decision of whether or not to inspect, as that was a discretionary matter, but once a decision to inspect was made, matters would become operational and the court would review matters to see if there was negligence in the inspection. The case has subsequently been applied in similar contexts in British Columbia,⁹⁴ but in *Toews*, while accepting *Anns*, the court found that the decision to release and the supervision itself were discretionary matters.

What, then, is the dividing line between discretionary and operational issues? Clearly, the courts do not want to get involved in issues calling for a balancing of legislative facts, such as budgetary

93. *Anns*, *supra*, fn. 76.

94. *Barratt v. North Vancouver* (1978) 89 D.L.R. (3d) 473 (B.C.C.A.); *Neilsen v. Kamloops* (1981) 19 C.C.L.T. 146 (B.C.C.A.).

allocations and priorities in accomplishing statutory objectives. Although it is rarely articulated, there is a sense of a separation of the powers at work here; it is not simply that the court lacks a workable criterion for balancing conflicting factors and values. Speaking generally and from a functional point of view, the higher up the administrative ladder a decision is made, the more reluctant courts will be to intervene; the lower down the ladder, the more likely the court will be to find the agency decision to be operational. Baldly put, discretionary matters involve discretion in the decision-making and in the making of policy, while operational matters involve merely the execution of policy.

The distinction has been recognized in the United States for somewhat longer than it has in Canada; there, too, the distinction is used to mark the boundary between official immunity and accountability in the common law courts. A recent United States case that clarifies the line between discretionary and operational matters and illuminates some of the policy considerations is *Payton v. U.S.*⁹⁵ The plaintiff in that case sued in negligence under the Federal Tort Claims Act, an act permitting citizens to claim damages for the unlawful deprivation of life or personal security, or of other rights, suffered at the hands of federal officials. The act gives an immunity to all actions of a "discretionary nature". Suffice it to say that the discretionary/operational distinction appears to be made on lines parallel to that discussed above in the English and Canadian cases. In *Payton*, the husband and children, as survivors, brought the action for the wrongful death of the mother who had been brutally raped and murdered by a man released on parole. It was found that the prisoner had a history of violent sexual offences; medical reports on file showed him to be a homicidal psychotic. A prison psychiatric report on file stated that the prisoner was in need of long-term psychiatric care, care he did not receive. He was released two years after the medical reports in question. The plaintiff alleged that the release had been made negligently in disregarding or in failing to note the medical reports, and that there was negligence in the supervision of the prisoner. The defendants claimed that the release and supervision were discretionary matters and within the statutory immunity.

The United States Court of Appeals, faced with ample authority favouring the defendants, proceeded to construct a framework of

95. *Payton v. U.S.* (1981), 636 F. 2d 132 (U.S. Ct. of Appeals, 5th Cir.).

analysis to assist in characterizing actions as discretionary or operational. It was unwilling simply to look at the level at which the action or decision was made and to conclude, on that basis alone, that if the decision was made high up in the administration, it must be discretionary, but it must be operational if it was made at the "action line", or in the day-to-day administration of the agency's work. The nature of the decision-making in question had to be understood, and to this end, the court examined the parole release process inside the Board of Parole and found it to be based on policies and express guidelines, such that decisions in actual cases were largely a matter of applying written directives and criteria:

The present system has been said to "structure discretion" and to reflect a change in the system's goals away from individualization toward equality of treatment under generalized rules. This appears to be a valid characterization. As a result of this standardization the process certainly takes on a fixed and mechanical flavor, with the rendering of determinations made in a somewhat ministerial manner and at a lower administrative level than previously. Yet this characterization is merely the starting point for our analysis, not the denouement.⁹⁶

According to the court, it was also necessary to consider and analyze the different interests involved, namely, those of the injured party, the government's interest in a parole release program, and finally, the courts' capacity for deciding the case.

As for the plaintiff's claim, the court stated that the more serious and isolated the nature of the loss, the more difficult it was to assert that the individual alone should be expected to bear that loss as an incidental cost of acceptable social or governmental action. The government's action, on the other hand, was to be assessed, in part, by determining at what level of the administrative hierarchy the injury took place. This would assist the court in determining whether the rules of the agency were themselves under attack, or merely their application. Sensitive as well to the value of the separation of powers implicit in this characterization process, the court stated that in assessing the agency's claim, it may be necessary to consider whether the "activity is one traditionally or constitutionally exercised by a coordinate branch of government or one fraught with political or policy overtones such as the feasibility or practicality of a program, or prosecutorial discretion, or foreign affairs. Further, a careful assessment of the actual burden, in both

96. *Ibid.*, at 142.

the long and short run, on governmental activities and the alternatives available ought to be made.”⁹⁷

In considering the courts’ capacity to decide such cases, the 5th Circuit identified the following factors: (1) whether a tort suit provides a relevant standard of care for evaluating the impugned action, based on standards of professional care, reasonableness, or otherwise; and (2) whether the factors for decision are primarily of such a political, social, or economic nature as the court has had previous experience in dealing with, as, for example, in cases relating to human rights or anti-trust litigation. Complexity of evidence, issues, or values was not a reason in itself for finding that the court was not competent to deal with the claim.⁹⁸ The court then applied this analytical framework, finding that the plaintiff’s injury was “severe and isolated” and difficult to justify as a risk of “any” governmental activity. As to the parole agency’s interests, the court noted that the board was under a statutory duty not to release, unless (a) there was a “reasonable probability that such prisoner will live and remain at liberty without violating the law” and (b) the board was of the opinion that “such release is not incompatible with the welfare of society.” Noting that the decision to release took place at a fairly low position in the board’s hierarchy and noting the above statutory duties, the court was ready to find that a release in “total disregard of known propensities for repetitive brutal behaviour is not simply an abuse of discretion but rather an act completely outside of the statutory limitations.”⁹⁹

The board’s discretion, said the court, lay in the power to make rules and guidelines; the application of the guidelines was an operational matter. On this basis, the court refused to find that the release and supervision decisions were within the statutory immunity.¹⁰⁰ This reasoning is in line with another American case,¹⁰¹ wherein a police officer was slain by a person awaiting trial but under supervised release as part of a special government program for the protection and supervision of potential government witnesses. The wife of the deceased proceeded under the Federal Tort Claims Act, alleging negligence in the release and supervision of the wrongdoer and negligence in the failure to warn the local

97. *Ibid.*, at 144-145.

98. *Ibid.*, at 145.

99. *Ibid.*, at 146.

100. *Ibid.*, at 146-47.

101. *Bergman v. U.S.* (1981) 526 F. Supp. 443 (Dis. Missouri, Bunge J.).

police of the transfer and location of the government witness to the area in question or to warn of the witness' known potential for violence. In rejecting the defendants' claim to statutory immunity for discretionary actions and decisions, the court stated that, in selecting the witness for supervised release, the United States marshals were not formulating policy; "their actions were not meant to guide the actions of other government officials faced with similar situations."¹⁰² They were simply applying policy and rules that were already formulated.

Needless to say, not all American cases follow the *Payton* approach. In stark contrast is the decision of the Supreme Court of California in *Thompson*.¹⁰³ In that case, the parents sued the county for the wrongful death of their five year old son. They alleged that the county was negligent in releasing an eighteen year old delinquent into the custody of his mother while knowing that the delinquent had a record of sexual violence towards young children, that it had been predicted that he would make an attack on young children if released, and that the delinquent, prior to release, had stated that upon release he would kill some child in the neighbourhood. The delinquent was released to the mother, although no warning of these threats was given to her; nor were any warnings given to the neighbourhood parents or to the police. The defendants claimed the benefit of the California statutory immunity for actions of a discretionary nature, and the court ruled that the immunity applied to the decision to release, as well as to the supervision of the delinquent:

Choosing a proper custodian to direct the attempted rehabilitation of a minor with a prior history of anti-social behavior is a complex task The determination involves a careful consideration and balancing of such factors as the protection of the public, the physical and psychological needs of the minor, the relative suitability of the home environment, the availability of other resources such as halfway houses and community centers, and the need to reintegrate the minor into the community. The decision, requiring as it does, comparisons, choices, judgments, and evaluations, comprises the very essence of the exercise of "discretion" and we conclude that such decisions are immunized under section 820.2.¹⁰⁴

102. *Ibid*, at 451.

103. *Thompson v. County of Alameda* (1980) 614 P. 2d 728 (Calif. Sup. Ct., *in banc*).

104. *Ibid*, at 732.

It should be noted that the majority's decision does not take the same carefully analytic approach as was outlined in *Payton*. Its level of generality is similar to that of *Dorset Yacht*, where the decision to release was also declared to be a matter of discretion.

In *Thompson*, having failed to establish a duty of care in granting release, the plaintiffs argued that there was a specific duty of care to warn that fell outside the sweep of the statutory immunity. The court rejected this claim also, stating that no duty to warn arose in the absence of a "special relationship" linking the defendant and the plaintiffs so as to distinguish the plaintiffs from the general community.¹⁰⁵ The defendants, said the court, did not owe a duty to the world at large. The court distinguished its own earlier decision in *Tarasoff*.¹⁰⁶ In that case, the court imposed a duty to warn where a psychotherapist became privy to a death threat uttered by his patient in the course of a therapy session. Five months later, the patient killed the victim, as he had threatened to do. The court held in that case that the injury was foreseeable, the victim had been specifically identified in the death threat, and a duty to warn arose upon the special relationship between the client, the therapist, and the identified victim. In *Thompson*, the court said, a specific victim had not been identified beforehand, so no duty arose. The strongly worded dissent disagreed with this approach, stating that "[o]ur decision rested upon the basic tenet of tort law that a defendant owes a duty of care to all persons who are foreseeably endangered by his conduct."¹⁰⁷

From what has been said, it would appear that "duty" is less a matter of law and more a matter of values, policy, and factors relating to broad economic and political considerations. The *Thompson* court adverts to the broad policy issues, as follows:

It is a fundamental proposition of tort law that one is liable for injuries caused by a failure to exercise reasonable care. We have said, however, that in considering the existence of "duty" in a given case several factors require consideration including the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of

105. *Ibid.*, at 734-35.

106. *Tarasoff v. The Regents of the University of California* (1976) 551 P. 2d 334 (Calif. Sup. Ct., *in banc*).

107. *Thompson*, *supra*, fn. 103 at 739.

preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability cost, and prevalence of insurance for the risk involved. . . . When public agencies are involved, additional elements include the extent of [the agency's] powers, the role imposed upon it by law and the limitations imposed upon it by budget.¹⁰⁸

Notwithstanding the difficulties inherent in deciding whether a duty should be imposed, the *Thompson* approach can only leave the ordinary person shaking his head in disbelief. What compelling reasons lead the court to insist that no duty is owed except to a particular foreseeable victim? Everyone knows that drivers of cars owe a duty of care to all users of the highway, whether they know them or not, and manufacturers owe a duty of care to the consumers of their products. The courts do not require a "special relationship" beyond foresight that members of a class are likely to be injured. Where the injury arises out of the actions of public officials in the exercise of their powers, the courts ought to recognize, as they did in *Payton*, "a recognized public duty or individualized special duty based on the circumstances of the case to protect society from harm in the execution of policy once it has been formulated."¹⁰⁹ Having found such a duty, the court in *Payton* found no reasons arising from policy which compelled it to exempt the defendants from liability.

To summarize, "special relationship", "proximate relationship", and other euphemisms reflect the courts' attempts to bridge the gap between the concept of duty in private tort law and a duty in negligence imposed on public officials. As both *Anns* and *Payton* show, even once a duty is found, there may be policy reasons for not holding the defendants liable. In this respect, the approach taken in *Payton* suggests a rational and pressing analysis of the interests and factors involved. One of these factors is the nature of the plaintiff's injury. Loss of life or limb is a grievous loss of the highest order, difficult to justify as the risk of any government activity. Such loss resulting from parole board action is even more difficult to justify, since the agency is under a statutory obligation to act consistently with the public welfare and the protection of the

108. *Ibid.*, at 732-33.

109. *Payton*, *supra*, fn. 95 at 147-148.

public. As to the government's interest, pursuance of which results in injury, attention should be paid to the nature and quality of that interest, to the nature of the decision-making involved, and to its adequacy in terms of thoroughness and competence, including reference to the agency's guidelines or procedures. The nature of the government's interest may also be assessed in part by noting the administrative level at which the injurious decisions or action took place and by determining whether the plaintiff's claim attacks the agency's policy or merely its application. Fundamental to this concern is the underlying need to respect separation of powers and to avoid judicial second-guessing of legislative or top-level executive decision-making.¹¹⁰

Earlier in this paper, reference was made to the nature of the parole process in Canada.¹¹¹ Parole decision-making is structured by express policy, specific procedures, and specific criteria. Usually, the decision to release is made at the lowest level of the hierarchy; even in cases requiring "special votes", the statutory criteria for release and the nature of risk assessment remain unchanged. The decision to release does not involve weighty issues of politics, as in foreign affairs, or a balancing of prosecutorial resources involved in laying down prosecutorial guidelines. With all due respect to Lord Diplock, it surely is wrong to say that courts have no competence to assess administrative decisions in releasing a prisoner on parole. In committing persons to mental hospitals or on hearing applications for their release, the court has traditionally dealt with much the same issues as it faces in parole release. The standard of competence used in assessing physicians' performances or those of solicitors or engineers surely provides workable criteria for making the issues amenable to the judicial process. It seems unpersuasive to say that a court has no competence to assess whether or not an official acted reasonably in selecting a given person for release, given certain information and certain statutory criteria, when the court will, at the same time, engage in complex and intangible issues involving medical malpractice, anticombines practices, human rights violations, and jurisdiction over offshore resources. In any event, as is suggested below, the Charter demands

110. This concern is reflected throughout *Dorset Yacht*: the executive and the legislative functions cannot be taken over by the courts. So, too, in *Payton*, *supra*, fn. 95, 143. See also *Hogg*, *supra*, fn. 73.

111. *Carriere and Silverstone*, *supra*, fn. 55.

that the courts get involved in the very assessments of policy from which Lord Diplock shrank in *Dorset Yacht*.

VI. *The Charter*

The reluctance of the common law courts to impose liability in cases where victims claim damages against public officials is depressing. The doctrine of ultra vires, "discretionary" powers, and the various elements of "duty", "special relationship", "proximity", or "causation" have been used to avoid redress to the victim. Often the courts' reasoning is not compelling, perhaps because it is presented in terms of private law litigation concepts, rather than those of public law liability. The courts, it would appear, have surrendered too easily in the face of "policy", unwilling to admit that, whichever way they decide the case, they are involved in policy issues, whether or not they are acknowledged. Will the victim then be better off pursuing a remedy under the Charter of Rights?

At this point, it will be advantageous to analyze the victim's claim to justice, as such, before inquiring into whether he or she may have any right to redress under the Charter. Take, as a starting point, John Rawls' first and second principles of justice. Rawls' influential work constructs a theory of justice which, though not free from academic criticism, offers a rights-oriented starting point for analysis. His approach will not be comforting to those who believe that utility and the greater happiness principle should be dispositive of claims made by victims. Rawls rejects bare utility as the final arbiter of rights, and asserts instead a principle of liberty and equality. Each person in society, he asserts, has an equal right to liberty and any inequalities are arbitrary unless they can be shown to be to everyone's advantage:

First, each person participating in a practice, or affected by it, has an equal right to the most extensive liberty compatible with a like liberty for all; and second, inequalities are arbitrary unless it is reasonable to expect that they will work out for everyone's advantage, and provided the positions and offices to which they attach, or from which they may be gained, are open to all. These principles express justice as a complex of three ideas: liberty, equality, and reward for services contributing to the common good.¹¹²

112. John Rawls, "Justice as Fairness", in J. Feinberg and H. Gross, eds., *Justice* (Encino, Calif.: Dickenson Publishing, 1977) 101-15, at 102.

The victim's claim is that a government practice of releasing prisoners before expiration of sentence increases the level of risk during any given period of time, a risk that materializes and falls not upon society as a whole, but upon the individual victim.

For the victim, the costs of government parole practices grievously exceed the intended benefits. On this basis, Rawls' second principle has not been met and parole practices must be regarded as the infliction of an arbitrary inequality. To test this conclusion, Rawls would have us imagine rational men sitting around together and planning the rules and practices with which to run a cooperative venture of mutual benefit. In considering a proposed parole program as part of that venture, the risk of the parolee assaulting some individual while on release must be taken into account, along with the benefits to the community as a whole. Would those imagined rational men shrug off the potential harm to victims as an inevitable consequence of the parole program — that is, as a consequence which raised no real questions of justice? Or would rational men in such circumstances be driven to the conclusion that the proposed parole practice, lacking in demonstrable benefits, was inherently unjust, especially as the burden of loss would fall unequally on a few victims and would prejudice their equal right to life, liberty, and security of person? Rawls insists that acceptance of an inequality is allowable “only if there is reason to believe that the practice with the inequality, or resulting in it, will work for the advantage of *every* party engaging in it.”¹¹³ Furthermore, Rawls suggests that a government program or practice is itself arbitrary and suspect where it creates a disadvantage or increased burden for the least advantaged class in society, even though it purports to bring a benefit to society as a whole. A parole release policy or program, in casting an inevitable disadvantage onto victims, would therefore be unjust.

Does the Charter of Rights provide any scope for redress to victims of such an injustice? Does the Charter invite the courts to look behind the “discretionary” shield that has given government officials immunity in other contexts? Section 7 of the Charter guarantees the right to life, liberty, and security of the person, as follows: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” This provision must be

113. *Ibid.*

read in the light of the guarantee provided in section 7 and the preceding preamble: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of Law . . . *The Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Where the right to life or security has been unlawfully denied or abrogated, the Charter permits an applicant to seek a remedy in the court under Section 24(1),¹¹⁴ which states that "[a]nyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances." It should be noted that the Charter applies as against governments and public officials, not against private individuals. Accordingly, a victim of a crime committed by a person on a conditional release from prison would have to apply the Charter provisions against the actions of the correctional service involved.

The rights to life, liberty, and security of person, set out in section 7 of the Charter, do not carry an absolute guarantee. This is apparent from the limiting words of section 7 itself, which read, "except in accordance with the principles of fundamental justice", and from the limiting words in section 1, which read, "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." It is not absolutely clear whether the effect of these two limitations is to erect two hurdles in the path of the victim alleging a constitutional infringement or whether the limitations are to be read as alternative hurdles, so that proof of violation of one or another of the sections would be sufficient. Common sense and logic suggest that proof of a violation of section 7, namely, that the government action is in violation of the principles of "fundamental justice", necessarily entails an infringement under section 1, in that an action which is a violation of "fundamental justice" could hardly be "reasonable" or "demonstrably justified". It should be noted that, under either section 7 or section 1, the onus of proving a valid limitation would likely fall upon the party attempting to seek its protection, namely, the government agency.¹¹⁵

114. S. 52(1) of the Constitution Act should also be kept in mind.

115. As of the time of writing, there are relatively few significant cases decided under the Charter.

Rawls' notion of justice will now be helpful in understanding the scope of the limiting words of section 7 of the Charter. As indicated, the rights to life, liberty, and personal security set out in that section are not absolute, but may be limited "in accordance with the principles of fundamental justice." This limiting phrase, to begin with, is capable of sustaining various meanings. It can be said, first, to carry a guarantee of procedural fairness. But second, it can be said to import the standard of an equal right to liberty — that is to say, a standard of fairness governing the equal distribution of burdens and benefits as allocated through law in accordance with Rawls' first principle.

Some hint as to the meaning of the phrase "fundamental justice" may be gained by examining its appearance in other contexts, for example, in section 2(e) of the Canadian Bill of Rights, as follows:

Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to . . . (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.

As it appears in that section, the phrase "fundamental justice" was commented on, as follows, by Fauteaux J., speaking for the Supreme Court of Canada in *Duke v. The Queen*: "Without attempting to formulate any final definition of those words, I would take them to mean, generally, that the tribunal which adjudicates upon his rights must act fairly, in good faith, without bias and in a judicial temper, and must give him the opportunity to adequately state his case."¹¹⁶

As a minimum, therefore, it seems beyond question that a requirement of procedural fairness is imported by the limiting words of section 7 and that the scope of such fairness includes at least the requirements of the rules of natural justice so familiar to established law. As can be seen in the Canadian Bill of Rights, the phrase "fundamental justice" is coloured by its context, namely, a requirement that a right may not be abridged without a hearing in accordance with the principles of fundamental justice. In this context, there is a temptation to limit the phrase to "fundamental

116. *Duke v. The Queen* (1972) 18 C.R.N.S. 302 (S.C.C.).

fairness'', a phrase that has received considerable judicial elaboration, in recent years, within the context of procedural fairness.

Under section 7 of the Charter, however, it would be incongruous to limit "fundamental justice" to a procedural fairness standard, for section 7 is not concerned only with tribunals and hearings, but with any limitation of the rights to life, liberty, and personal security, whether such limitation be imposed by a tribunal, by an official acting in the course of his duties, or by other governmental action. Logically, and as a matter of justice, section 7 applies to statutory enactments, executive regulations, and government policies and programs. It would be shocking if section 7 were to be read by the courts as permitting, for example, legislative or executive orders depriving Jewish Canadians of their liberty for two weeks each year or permitting arbitrary police searches of all residents, in say, Crocus, Saskatchewan. To limit "fundamental justice" to procedural fairness only would be tantamount to giving judicial blessing to arbitrary treatment, or even persecution, of minorities; yet it was just such unfairness that the Charter was enacted to prevent. While it may be argued that these specific examples are already covered by specific sections of the Charter, such as ss. 8 and 2, respectively, it is not compelling to argue that section 7 has no enduring force in its own right but is swallowed up in other specific sections of the Charter. The words of Parliament in section 7 must be given meaning, and those very words, namely, "fundamental justice", permit and suggest a substantive fairness requirement where life, liberty, and personal security are imperilled by government action.¹¹⁷

As outlined above, Rawls' two principles of justice suggest a starting point for the consideration of substantive fairness. A justification must always be required for a departure from the original position of equal liberty. Such a justification can be made in accordance with Rawls' second principle, namely, that there is reason to believe that a given practice, with its resulting inequality, will work for the advantage of every person engaging in it, so that

117. *Contra*, Hogg, Peter, *Canada Act, 1982, Annotated* (Toronto: Carswell (student ed.), 1982) at 27; see also McDonald, David, *Legal Rights in the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1982) 17, 24. However, the British Columbia Court of Appeal, in *Reference Re s. 94(2) of the Motor Vehicle Act* (Feb. 3/83), states that section 7 does not confer a power of substantive review.

even the person who is disadvantaged by the practice would prefer to maintain it, considering the overall benefit conferred by it.¹¹⁸

This second principle does not permit the exploitation of a minority for the benefit of the majority, a position well-taken, not only by Rawls, but by the utilitarian, David Hume.¹¹⁹ Thus, it is apparent that the Charter raises an external standard against which official action must be judged wherever fundamental rights are infringed. The Charter suggests a standard of “fundamental justice”. From a Rawlsian viewpoint, as we have noted, justice is premised on an imperative of equal liberty. It connotes, as well, a system of law governed by the rule of law, in the sense that laws must be assumed to be enacted for the purpose of enhancing or protecting liberty. It follows that the risks associated with a parole release program would not be justifiable merely on economic or humanitarian grounds, but only as a means of ensuring basic equal liberty for the representative citizen.

Government programs or actions that appear to throw disproportionate risk or loss upon a minority — for example, the victims of a parole release policy — would not be in accordance with principles of fundamental justice unless, as in the case of conscription, the burden can be seen as a fair way of sharing a national burden.¹²⁰ Conscription is generally believed to be a rational response to a valid state objective, namely, national defence, and although the risks associated with the program may fall calamitously upon specific individuals, there appears to be no known way of eliminating such loss entirely. In the pursuit of liberty, conscription may be the lesser of two evils. Thus, it could not be said that the burden of the program falls unequally on members of a class in violation of Rawls’ second principle of justice unless the conscription program was so badly conceived and executed that its burdens were not evenly shared by all members of society or it suffered from class bias in its call-up procedures.

The requirements of fundamental justice in a society under rule of law demand not only that government action meet the imperative of equal liberty; they demand as a corollary that state law be rationally designed to guide rational men and women in the pursuit of liberty.

118. Rawls, John, *A Theory of Justice* (Cambridge, Mass.: Belknap Press, 1971).

119. Hume, D., *A Treatise of Human Nature*, Bk. III, Pt. II., A.D. Lindsay, ed. (London: Everymans Library, Dent, 1966), vol. 2, 202.

120. Rawls, *supra*, fn. 112 at 379-382.

However, parole release programs, unlike national defence programs, are no longer perceived as being causally connected to the enhancement of liberty. As was indicated earlier, there is no evidence to show that parole release reduces recidivism. Parole release, unlike conscription, does not meet the justice and rule of law requirements that legal rules be rationally related to ends capable of being achieved by rational men.¹²¹

The linkage in the Charter of principles of fundamental justice and the rule of law forces the common law lawyer to look again at the context of the rule of law. There can be no doubt that the rule of law provides an external standard of procedural fairness. What has been sometimes overlooked is its implicit standard of fairness with respect to substantive law. The rule of law is implanted in the Canadian Constitution not only through the Charter, but through the preamble to the Constitutional Act, which states that Canada is to have a constitution "similar in principle to that of the United Kingdom." Professor Dicey, in his classic statement about the rule of law, identified its three constituent elements, as follows:¹²²

- (1) The supremacy of regular law as opposed to the influence of arbitrary power, excluding the existence of arbitrariness, prerogative, or even wide discretionary authority on the part of the government;
- (2) Equality before the law, excluding the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens;
- (3) The law of the Constitution is not the source but the consequence of the rights of individuals as defined and enforced by the courts.

With the passage of time, Dicey's analysis must be read in the light of changed conditions; the modern import of Dicey's statement is captured by Professor H.W. Jones, writing in the *Columbia Law Review*:¹²³

- (1) In a decent society it is unthinkable that government, or any officer of government, possesses arbitrary power over the person or interests of the individual;

121. *Ibid.*, at 236-237.

122. Dicey, A.V. *Introduction to the Study of the Law of the Constitution* (10th ed., London: MacMillan, 1959) at 202-203.

123. Jones, H.W., "The Rule of Law and the Welfare State", in *Essays on Jurisprudence from the Columbia Law Review* (N.Y.: Columbia University Press, 1963) 400-414, at 406-407.

- (2) All members of society, private persons and government officials alike, must be equally responsible before the law; and
- (3) Effective judicial remedies are more important than abstract constitutional declarations in securing the rights of the individual against encroachment by the state.

Dicey's protest against arbitrary power was asserted in the face of a trend towards executive agencies acting with ill-defined powers and procedures. There is in this concern a protest against illegality of all forms, although Dicey had in mind, no doubt, discretionary power and the need for what today we call procedural fairness. Yet, the ideal of the rule of law in a just society cannot turn a blind eye to arbitrary power, whether it be found in procedural or substantive law. Governments are, in either case, judged by this external standard. Further light was thrown on the content of the rule of law by Professor C. J. Hamson, in his identification of the independence of the judiciary as an aspect of the rule of law. He linked the rule of law with the principle of legality and its insistence on certainty of law, public trials, a precise charge, and redress against the state for wrongs committed.¹²⁴

H. Malcolm MacDonald, writing in an American context, states that the absence of arbitrariness is the essence of the rule of law. He identifies the separation of powers as an important element of the rule of law and judicial review as a means of securing fundamental freedoms. "Equal protection of laws," he writes, "is an important standard through which rule of law prevails." In addition, he goes on to identify various procedural protections associated with the rule of law.¹²⁵

The International Commission of Jurists has made an important contribution to the rule of law in the post-World War II world. Their reports identify the rule of law as aiming at the protection of the dignity of the individual through the articulation of human and procedural rights. The reports state that "[t]he function of the legislature in a free society under the Rule of Law is to create and maintain the conditions which will uphold the dignity of man as an individual."¹²⁶ This entails, among other things, that a legislature

124. Hamson, C.J., "The Essence of Law", in *Report of the International Commission of Jurists*, The Hague, 1956, 25-27.

125. MacDonald, Malcolm H., "Government Under Law", in A.H. Harding, ed., *The Rule of Law* (Dallas: Southern Methodist U. Press, 1961) 3-21 at 6-7.

126. *The Rule of Law and Human Rights: Principles and Definitions* (Geneva: International Commission of Jurists, 1966) at 9.

must observe limitations on its power and, in particular, the legislature must, according to the commission, "not impair the exercise of fundamental rights and freedom of the individual," and it must "provide procedural machinery and safeguards whereby the above-mentioned freedoms are given effect and protected."¹²⁷

In speaking of a country under the rule of law where fundamental freedoms are protected by principles of fundamental justice, it is surely to those substantive issues that the Charter directs our minds, not merely to procedural regularity. Enacted law is subject to a substantive review in order to ensure that fundamental freedoms are not abrogated arbitrarily, but only in accordance with rational law, and that they are regularly enacted and rationally justifiable in the name of equal liberty. The rule of law, as articulated by the International Commission of Jurists in their report of 1955, calls upon the state to abide by the principles of fundamental justice and specifically demands that the state be subject to law, for men are to be ruled by law and not simply by the will of those in power.

The International Covenant on Civil and Political Rights, to which Canada and the provinces adhered, reflects these aspirations of the rule of law. The covenant articulates, as follows, human rights that cannot be abridged without a properly constituted review of such abrogation:

PREAMBLE

The States Parties to the present Covenant!,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

Recognizing that these rights derive from the inherent dignity of the human person, Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms.

Realizing that the individual, having duties to other individuals

127. *Ibid.*, at 10.

and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles. . .

PART II

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted. . .

Article 6

1. Every human being has the inherent right to life. This life shall be protected by law. No one shall be arbitrarily deprived of his life.

Article 9

1. Everyone has the right to liberty and security of person No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.¹²⁸

128. United Nations International Covenant on Civil and Political Rights as reproduced in Leech, N.E. et al, *Documentary Supplement to Cases and Materials*

It would appear, then, that the rule of law, as the International Commission of Jurists stated, springs from the rights of individuals as developed in the age-old struggle for freedom. The rule itself, says the commission, is consistent with "fundamental principles of justice"¹²⁹ and includes not only rules of natural justice and fundamental fairness, as specified in case law and the Canadian Bill of Rights, for example, but also guarantees against arbitrary law or other abrogation of fundamental rights without check or review.

It would seem, then, that Parole Board decisions respecting releases and supervision are subject to a Charter review to ensure that they are not arbitrary. At a minimum, therefore, the courts must ignore the discretionary veil at this level of decision-making, and must critically assess professional competence, the standards and procedures used in collecting and assessing information, and, in particular, must assess and interpret the agency's competence in the determination of undue risk. At a minimum within the context of parole decision-making, the rule of law suggests a rational assessment of risk. It should be noted that the Parole Act does not specify what type of risk is to be considered, yet specificity as to the type of risk is essential in order to avoid gross error in the assessment. As indicated earlier, predictions as to risks of violence are, in general, fraught with error, but the error can be reduced by taking account of "base rates", that is, the proportion of people in a given population and during a specified period of time who are known, for example, to commit acts of violence. Base rates have been developed in the health and insurance industries, as well as in others; there is no good reason why they should not be employed by parole boards. As suggested above, specific content must be given to the statutory criterion of undue risk. Does it mean risk to persons, does it include risk to property, or does it simply apply to disturbances of public peace or, perhaps, state security? Does the prediction mean a mere possibility of risk or does it mandate a likelihood of risk, say, at least a fifty-fifty chance? Over what period of time is the prediction based? Unless the agency has specific criteria and guidelines in relation to these matters, each decision-maker will be free to make his or her own conscious or unconscious assessment on differing criteria; in short, the

on the *International Legal System* (Mineola, N.Y.: Foundation Press, 1973) 46-62; 63-66.

129. Act of Athens, June 1955, in *The Rule of Law in a Free Society*, International Commission of Jurists, 1959.

decision-making becomes arbitrary, not rational or principled. Fairness and the rule of law, being concerned that decision-makers address the issues before them, require explicit formulation of the questions to be answered, advertence to essential and available knowledge in order to answer the questions, and exclusion of irrelevant or extraneous considerations. The United States Court of Appeals expressed some of these concerns in *Millard v. Harris*, as follows:¹³⁰

Predictions of dangerousness . . . require determinations of several sorts: the type of conduct in which the individual may engage; the likelihood or probability that he will in fact engage in that conduct; and the effect such conduct if engaged in will have on others. Depending on the sort of conduct and effect feared, these variables may also require further refinement.

Were a parolee released in the absence of such careful assessment, conducted in accordance with such standards, how can it be said that the risks were unavoidable and that release was simply the lesser of two evils? Where agency decisions work a manifest injustice and where the unreliability of the agency decision-making renders it arbitrary, rather than principled and rational, it is difficult to see how such executive processes, carrying as they do such dramatic potential for cutting short individual rights of the highest order, can be consistent with the aspirations implicit in the rule of law or the “principles of fundamental justice” set out in section 7 of the Charter. In a democratic society, such as that envisaged by the International Commission of Jurists and the International Covenant on Civil and Political Rights, the legislature and the executive are bound to jealously guard the individual’s right to life and not subject it to the vagaries of social experiment.

Considerations of substantive fairness, as Rawls suggests, inevitably compel the conclusion that it is manifestly unjust to barter away an individual’s claim to equal protection and equal benefit of the law in the name of an elusive overall public benefit. Given the above premises, the victim of a crime of violence committed by a person released on parole would be expected to allege a substantive violation of constitutionally protected rights under section 7 of the Charter. Such an assertion may be regarded by some people as rank heresay, since it has been rumoured in the dovecotes that the courts

130. *Millard v. Harris* (1968) 406 F. 2d 964 at 973 (U.S. Court of Appeals, Dis. Col. Cir.).

will never permit a substantive review of the legislation for violation of Charter rights. It is said that section 7 is confined to a procedural fairness review. It is said that the departmental drafters of the Charter deliberately omitted the phrase "due process" from section 7 in order to preclude the courts from engaging in a judicial review of the substance of the impugned legislative or of executive action. Instead, the phrase "except in accordance with the principles of fundamental justice" was used, in the hope of constraining judicial review to matters of procedure only. Whether the purported aims of the drafters will be met, only time can tell, but it is certain that a plain reading of section 7 does mandate a judicial review of governmental action which threatens or places in jeopardy an individual's right to life, liberty, or security of the person.

Indeed, there is no particular magic in the phrase "due process", for it is but a "summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo said, are 'so rooted in the traditions and conscience of our people as to be ranked fundamental'."¹³¹ This view would seem to be consistent with the purpose of the Charter, for it would be a mockery of Canada's ideals and her obligations under the International Covenant on Civil and Political Rights, and a violation of the concept of the rule of law itself, to say that legislative or executive action may practise the most vile deprivations of rights, yet the only recourse is the ballot box. It would be incongruous for the courts to turn a blind eye to torture, gross human indecencies, and practices akin to the rack and the screw, blinking only if authorization be not duly enacted or objecting only should there be some procedural irregularity.¹³²

While space does not permit a detailed review of how the courts in the United States have approached substantive review, one or two points of departure may be identified. The courts there have taken the moderate position that they will not rush to undertake a substantive review; they will not review unless the impugned state action runs afoul of a specific constitutional provision affecting fundamental rights. Where a fundamental right, such as the right to life and liberty, is at issue, the courts have required the government to show that the impugned law is necessary to promote a compelling

131. *Rochin v. California* (1952) 342 U.S. 165; 73 S. Ct. 205; 96 L. Ed. 183, at 188, per Frankfurter J.

132. See Reference Re s. 96(2) of the Motor Vehicle Act, *supra*, fn. 117.

or overriding state interest. Where no "fundamental" right is at stake, the courts merely require that the impugned law relate to a legitimate end of government; in these cases, as long as there is some basis for finding such a rational relationship, the courts will not intervene. The minimal standard in cases affecting lower order rights appears to be "total arbitrary deprivation of liberty".¹³³

Prime facie, proof of breach of a constitutionally protected claim should establish a right to a remedy, for rights without remedies are nullities. The International Commission of Jurists asserts that, in a free and democratic society, the rule of law requires that citizens ought to have a right of redress against the state for violations of fundamental rights. The International Covenant on Civil and Political Rights, to which Canada and the provinces are signatories, as well as to Optional Protocol,¹³⁴ states that a violation of Covenant rights imposes an obligation on the state to provide a remedy.¹³⁵ Moreover, in ordinary thinking and, indeed, in the tradition of legal rationality, compensation is the surrogate of the individual's right: it flows as a matter of course from Rawls' first principle of justice. The Charter itself, in s. 24(1), states that a violation of a Charter right entitles the individual whose right was violated to apply to the court for a remedy. However, the Charter leaves it within the discretion of the court to provide a remedy and, if so, what type.

Once a deprivation of a guaranteed liberty has been found, based either on a lack of rationality in the statute or in the decision-making, or on a failure to meet professional work standards, the liability of public officials should follow as a matter of course from the "deep sense of common law morality that one

133. *Roe v. Wade* (1973) 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147; Tribe, Laurence H., *American Constitutional Law* (Mineola N.Y.: Foundation Press, 1978) c. 1.

134. Canada and the provinces adhered to the Charter on the 19th of May, 1976, effective as of the 19th of August, 1976: Ryan, H.R.S., *Seeking Relief Under the United Nations International Covenant on Civil and Political Rights* (1981), 6 Queen's Law Jo., 389-407, at 390. Limitations of time and space do not permit a perusal of the question of to what extent the Canadian courts are likely to integrate the provisions of the covenant with domestic Canadian law.

135. The Covenant, Pt. II, Art. 3, *supra*, fn. 120. While the Protocol provides for a procedure for hearing a complaint, there is no provision for having any remedy enforced.

who hurts another should compensate him''.¹³⁶ This is particularly so in an age where the potential for harmful governmental action is on the increase. It is unfair that an exercise of governmental powers, having been found to be unjustifiable and unconstitutional, should nevertheless escape accountability. Excuses such as good faith, due care, honest ignorance, and the like should not be used as swords to defeat the victim's claim for loss. Where the defendant creates rationally unjustifiable risks which result in harm to the plaintiff, the defendant should *prima facie* be held liable. This resort to strict liability for the breach of fundamental rights does not mean that the defendant is to be held for all and every loss flowing from his wrongful act, for losses are limited by a valid theory of causation. So, too, it would be a defence to a *prima facie* case if the plaintiff voluntarily agreed to run the risk of the injury.¹³⁷ Whether the courts adopt strict liability as the basis for responsibility, based as it is on notions of corrective justice, or whether they fall back upon that more familiar but wretchedly unsatisfactory product of utility, namely, negligence, it should be manifestly clear that the plaintiff should not be left to bear alone the risk of governmental action, a risk that materializes in a crushing burden on his shoulders alone. Even utility demands that governmental operations be accountable and bear the inevitable costs of their operations.

If the strict liability approach is applied to the case of *Toews*, for example, then recovery should not be denied unless it can be shown that the plaintiff took upon herself the risk of the harm, that is, that she assumed the risk or inflicted it on herself. Did Ms. Toews unilaterally, voluntarily, consciously, and deliberately decide to run the risk of becoming a paraplegic? The answer should not turn upon the application of a reasonable man test, for "[t]he prudence of the plaintiff's decision to assume the risk is his own affair, not that of the courts."¹³⁸ Nor should compulsion, in the context of *Toews*, be rejected by the court as a counter-argument to voluntary assumption of risk.¹³⁹ Moreover, it would be ludicrous to assert that Ms. Toews had agreed to run the risk of harm by a parolee simply by virtue of

136. Green, Leon, *Foreseeability in Negligence Law* (1961) 61 Col L. Rev. 1401-1424 at 1412.

137. Epstein, *supra*, fn. 81, 34-47, and chapters 6 and 7. By analogy to trespass, private necessity, reasonable care, cost, and compulsion would not be defences in a *prima facie* case: see 44-47.

138. *Ibid.*, at 101-03; 105-06.

139. *Ibid.*, at 105-06.

being a citizen in a democratic country that enacted legislation making such risks possible. There also is not substantial merit to the objection that the plaintiff should not recover because that would give her an advantage over victims of crime generally. Lord Diplock was troubled by this apparent inequality and stated that injuries arising from crime were one of the ordinary risks of social living.¹⁴⁰ And so they are. Yet the minute the government sets in motion machinery to release persons who would otherwise be detained, the government's volitional act¹⁴¹ constitutes a key element that distinguishes this type of case from the ordinary case.

Equally irrelevant is the consideration of whether the plaintiff's claim should be defeated because there are alternative means of compensation available, such as the current schemes permitting compensation to victims of crime, upon application, and in certain instances. Victim compensation schemes of the type currently in operation are not responsive to the victims' legal right and claim to corrective justice. Crime compensation schemes appear not to be based on victim or individual rights at all, but on public beneficence: charity for the unfortunate. For this reason, perhaps, they are not advertised, and compensation may be made only upon application. To deny a valid legal claim on the basis that the plaintiff can apply for charity is ludicrous. As indicated above, the victim of an injury inflicted by a person on early release from prison has a right, grounded in corrective justice, to compensation. To deny his right and force the plaintiff to apply for a handout in such circumstances is to belittle the importance of the right that is violated.

Nor should applicants for a remedy under s. 24(1) of the Charter, having established an unjustifiable deprivation, be hampered by arguments from the defendant that to allow a remedy would jeopardize or have an inhibiting effect upon the willingness of government officials to make decisions, thus undermining the agency's mandate. Lord Morris was particularly sensitive to this issue¹⁴² in *Dorset Yacht*, but Lord Reid¹⁴³ was sceptical, saying "my experience leads me to believe that Her Majesty's servants are made of sterner stuff." Various other courts have considered what

140. *Dorset Yacht*, *supra*, fn. 77 at 333-34.

141. *Epstein*, *supra*, fn. 81 at 22-23.

142. *Dorset Yacht*, *supra*, fn. 77 at 309.

143. *Ibid*, at 302.

weight should be attached to such an alleged inhibiting effect on the robust discharge of public duties. In *Payton*, the court noted, in considering whether liability would unduly inhibit officials in the exercise of discretion, that the financial burden fell upon the government and not the individual officers, and concluded that potential liability would not have a significant inhibiting effect on the exercise of discretion.¹⁴⁴ Nor did the court feel that the financial burden on the government in the case of damages in actions against the Parole Board would prove to be embarrassing or even significant.

Finally, it may be anticipated that, in attempting to thwart an award of damages under s. 24(1), the defendant may once again raise the issue of immunity, presumably on some theory of separation of powers or discretionary action. For the reasons given earlier, it is suggested that the argument is misplaced with respect to parole release and supervision. In Canada and England, only judges and legislators have been given an immunity by the courts, yet even in the case of judges, it is not absolute.¹⁴⁵ Certain qualified statutory immunities, such as those conferred upon peace officers under the Criminal Code,¹⁴⁶ or under various provincial Corrections Acts¹⁴⁷ or other statutes,¹⁴⁸ must be read in light of the guarantees in the Charter. It is ridiculous to suggest that stupidity or incompetence are such an integral part of the principles of fundamental justice as to defeat a victim's otherwise justifiable claim to damages. In short, the old common law statutory immunity may not be a barrier to a victim's Charter claim.

If the victim is to avoid the above-mentioned perils, courts must develop a workable theory of the liability of public officials. To date, such attempts, as witnessed above, have been virtually hamstrung by private law concerns. Now, however, the Charter provides an opportunity for the courts to develop a simple duty to administer the law competently. Whether claims are pressed forward independently of the Charter or not, proof of failure to meet

144. *Payton*, *supra*, fn. 95 at 148.

145. *Sirros v. Moore*, [1974] 3 All E.R. 776 (C.A.), holding that a judge has a limited immunity. He cannot be held liable in damages for errors made in good faith and while acting judicially.

146. Criminal Code, R.S.C. 1970, c. 34, s. 450(3) as amended, for example.

147. Correction Act, R.S.B.C. 1979, c. 70, s. 23, for example.

148. Goldenberg, *supra*, fn. 3.

simple, ordinary standards of competence should give rise to liability.

Courts in non-common law jurisdictions have made more progress in developing a theory of the liability of public officials than have courts in Anglo-Canadian jurisdictions. In France, the courts hold government agents to a duty to administer the law competently.¹⁴⁹ The rule does not result in government liability for all damages flowing from the breach, for liability is limited by a secondary rule of causal connection, somewhat akin to the common law concept of "remoteness". This duty of competence may, in fact, be too restrictive an approach in cases where a governmental action gives rise to an abnormal risk. In such cases, the court should impose a duty to see that the risk does not fall disproportionately on any particular part of the population. Breach of the duty in such cases, even in the absence of carelessness, should give rise to compensation for the affected individual. The common law rule in *Bylands v. Fletcher*¹⁵⁰ is, in part, responsive to this concern, but it is restricted to compensating persons injured through the defendant's abnormal use of land. The *Bylands* rule has not been given a wide application by the courts, having been largely confined to actions against private occupiers of land who make an "unusual" use of the land by bringing on to it substances which would be of a potentially dangerous nature should they escape from the land. Although the rule has not been free of difficulty in application, it would seem clear that the release of prisoners from a prison does not fit neatly into the common law concept of unusual use of land.

Other illustrations of the prevalence of strict liability as a basis of recovery at common law can be found in trespass and products liability. More fruitful for present purposes, however, is the formulation, by the American Restatement of Torts, of recovery without regard to negligence where individuals suffer loss as a consequence of the defendant's dangerous actions.¹⁵¹ The restatement, premised on the assumption of strict liability where the activity carried on is abnormally risky, provides several criteria for assessing liability, including: (1) the high degree of risk of harm, (2) the likelihood that the harm will be great, (3) the feasibility of

149. Harlow, *supra*, fn. 3.

150. (1868) L.R. 3 H.L. 330.

151. American Law Institute, *Restatement (Second) of Torts* (St. Paul, Minn., 1975) p. 519 and Comment.

eliminating the risk through the exercise of reasonable care, (4) the extent to which the activity is a matter of common usage, (5) the inappropriateness of the activity to its surroundings, and (6) the value of the activity to the community, relative to its inherent danger. While not all of these criteria appear relevant to governmental activity, particularly the fourth factor, these criteria and the concept of strict liability do offer an historical connection between current law and legal traditions, and the social imperative for a theory of liability of public officials, through s. 24(1) of the Charter or otherwise. Factors one to three of the restatement, when read against the earlier empirical research on parole, suggest that parole board activities clearly meet the restatement's requirements of serious risk with little feasibility of controlling or reducing the risk. Moreover, parole release is not a matter of "common usage", and offers only problematic benefits to the community as a whole. Parole release would seem to be a case where, in the words of Prosser, it is a question of allocating a more or less inevitable loss in a complex and dangerous civilization to the party best able to shoulder the cost.¹⁵²

Fletcher, arguing in favor of greater use of strict liability, states that it is more responsive to claims made by individuals for corrective justice than negligence is, for it does not presume to barter away the victim's injury in the name of a greater public good.¹⁵³ The relevant inquiry is not "Is the public agency at fault?", but "Has the activity (however laudable and well-conducted) caused an improper or disproportionate burden to fall upon that individual?" Under s. 24(1) of the Charter, it is suggested that proof of a violation of the Charter is proof of fault, if fault be needed, and no higher standard should be raised to bar redress. The search under the Charter should not be directed towards the question "Was the government agency negligent?", but towards the question "What socially fair standard meets the costs of providing a government service which is presumed to be of benefit to all, but which inevitably imposes grievous burdens on a few?" Where the presumption of benefit is not made out, as in parole, the court

152. Prosser, W.L., *Handbook of the Law of Torts* (4th ed. St. Paul, Minn.: West Publishing, 1971) section 75 at 495.

153. Fletcher, George P., *Fairness and Utility in Tort Theory* (1972) 85 H.L.R. 537.

should consider other remedies as well, such as declaring the statute void.¹⁵⁴

There is increasing recognition of the need for greater public accountability in the area of individual rights. It would be unfortunate were the courts, given the opportunity of a fresh start, to return to the thorny thickets of common law negligence, complete with "outrageous claims"¹⁵⁵ to official immunity. If justice is to be done at the end of the day, the court must seriously consider strict liability as the basis of compensation for victims whose constitutional rights have been violated.¹⁵⁶

VII. Conclusion

While the emphasis in this paper has been on damages as an appropriate remedy on a s. 24(1) application, it can be assumed that equitable remedies, such as injunction or declaration, may also be available. It is worth noting, while not developing them, other possible remedies against the Parole Board or other government agencies under s. 24(1). Prospective rulings may be in order, as, for example, threatening an injunction or other restriction of agency operations, unless there is a timely reform of procedures or decision-making processes; trusteeship orders are not inconceivable, nor even is judicial abolition of obsolescent statutes.¹⁵⁷

As outlined earlier, there is evidence to show that the Parole Act is lacking an essential element of rational law in a just society: its objectives are incapable of being achieved and, thus, its directions to agency officials are essentially non-rational and arbitrary. It follows that decisions of agency officials, not having the means to assess "undue risk" and reduced to making decisions that turn out to be no better than chance, act arbitrarily. No doubt governments must experiment, to some extent, in coping with complex economic, social, and political problems. It is not acceptable in a free and democratic society, however, for the government to

154. Constitution Act, s. 51(2).

155. See Hamson C.J., *Escaping Borstal Boys and Immunity of Office* (1969) *Camb. Law Jo.* 273-83.

156. Schoenholz, Kenneth, *Holding Governments Strictly Liable for the Release of Dangerous Parolees* (1980) 55 N.Y.U.I. Rev. 907-40; Craig, *supra*, fn. 3; Gould *supra*, fn. 3.

157. Calabresi, G., *A Common Law for the Age of Statutes* (Cambridge, Mass.: Bar. U. Press, 1982). He suggests that the courts have a role to play in saving the beleaguered citizen from a plethora of obsolescent and "uncommonly silly" laws.

introduce social programs that, in effect, gamble with citizens' lives. When faced with that type of legislation, the court should exercise its powers under section 7 of the Charter to find that the statute lacks rationality and infringes upon the concept of the rule of law and upon principles of fundamental justice, as outlined earlier. In such cases, the court, under s. 24 of the Charter and s. 51(2) of the Constitution Act, should either declare the statute void, in whole or in part, or give notice that it will do so within a reasonable period of time unless the legislature corrects the deficiency. In a day when the parliamentary process can hardly be said to be responsive to calls for legislative reform at the behest of individual citizens, this court power of review may prove to be a salutary means of restoring public confidence in democratic institutions. If an agency cannot meet standards of competent administration, as evidenced by a finding of a violation of a constitutional right, the agency should not only be liable in damages, but it should also be subject to a prospective "sunset order" of such a nature that the agency would be required either to set its house in order or to close up shop.

To summarize, it is suggested that the common law has not been responsive to victims' claims against prison and parole officials. This stems, in part, from the courts working from private law concepts of negligence, including duty, reasonable care, and proximity. Moreover, the courts have continued to extend an immunity to public officials, even in the face of proven negligence, on some perceived need to protect the public service from the unnerving threat of lawsuits. It is suggested that the courts have not been sufficiently attuned to the victims' claims to justice and that, under the Charter, the courts have an opportunity to develop for Canadians a workable theory of public liability, freed from the perils of common law negligence. The Charter requires, it is suggested, not only a traditional judicial review to ensure procedural fairness in protection of fundamental rights, but a substantive review to ensure that legislative or executive action meets the test of the rule of law and fundamental justice. Arbitrary rules — rules that set out irrational mandates, in the sense that rational men could not reasonably adapt their behaviour to meet the mandate — are not in accord with the rule of law and principles of fundamental justice. Such rules, which threaten fundamental rights, should be found void, and citizens whose fundamental rights are abridged by the operation of such rules should have a claim to compensation under the Charter.

I. Introduction

International adoption of the Hague Rules marked the onset of a new era in sea carriage law. Prior to that event, national regulation was the order of the day. Ever since the adoption of those rules, however, international trade has been subject to a more or less uniform regime of carriage by sea. The Hague Rules were brought into being by the Brussels Convention¹ in 1924 and remained unchanged until modified by the Visby protocol² in 1968. Even as these amendments were being made, a fresh movement for a wholly new set of international rules was gathering force. It produced the Hamburg Rules³ of 1978, as a replacement for both the Hague and Hague/Visby Rules.

So far, most countries still apply the Hague Rules in some version, but in international practice, five years is an insufficient amount of time for the global introduction and enforcement of a law-making treaty. Part of the delay is due to bureaucratic obstacles, but much more is due to uncertainty about the consequences of implementation for national law and policy. Many and varied are the reasons why a country may agree to a treaty, yet subsequently fail to ratify and enforce it. In the case of the Hamburg Rules, the major maritime nation states appear hesitant to adopt the

*Faculty of Law, Dalhousie University. The ideas expressed here have grown from the author's involvement in the Dalhousie Ocean Studies Programme, *The Future of Canadian Carriage of Goods By Water Law*, a Study for Transport Canada, 1982. He alone is responsible for these ideas.

1. The International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (hereafter the "Hague Rules"). They are given force in Canada by the Carriage of Goods by Water Act, R.S.C. 1970, c. C-15, enacted in 1936 (hereafter "COGWA").

2. Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, in force in 1977, except in Canada (hereafter the "Hague/Visby Rules").

3. United Nations Convention on the Carriage of Goods by Sea, 1978 (hereafter the "Hamburg Rules"). For their background, see Shah, "The Revision of the Hague Rules on Bills of Lading Within the UN System - Key Issues", in Mankabady, ed., *The Hamburg Rules on the Carriage of Goods by Sea* (1978) p. 1.

new principles.⁴ Much of their equivocation is undoubtedly about the commercial impact of the rules. However, some of their uncertainty concerns the legal aspects of the Hamburg Rules as compared with those of the Hague Rules.

This article will review the legal merits of replacing the Hague Rules, almost sixty years after their adoption, with the Hamburg Rules. In order to do so, some perspective on the Hague Rules is first necessary before a comparison of their legal competence and that of the Hamburg Rules can be made.

II. *Significance of the Hague Rules*

Shortly before the creation of the Hague Rules, a number of countries had passed national legislation regulating carriage by sea. The United States Harter Act was the first, in 1893.⁵ Australia⁶ and Canada followed, but Great Britain noticeably refrained until just before the signing of the Hague Rules.⁷ In fact, the Canadian Water Carriage of Goods Act of 1910⁸ became the model for the Hague Rules.⁹ But apart from these latter day enactments, carriage by sea had traditionally been governed by the common law.

Common carriers of goods were generally considered to be insurers of their cargoes.¹⁰ The only excuses for their otherwise absolute responsibility for the goods they carried were that the loss was caused by an act of God, an act of the Queen's enemies, inherent vice, or a general average sacrifice.¹¹ This quaint language sufficiently demonstrates the antiquity of the law, but also demands an explanation in more modern terms.

An act of God is "any accident as to which he (the carrier) can show that it is due to natural causes, directly and exclusively, without human intervention, and that it could not have been

4. As of 7 April 1983, the Hamburg Convention had been ratified or acceded to by nine states and signed by twenty-five countries (UN doc. A/CN.9/237/Add.2). Canada has not accepted the Hamburg Rules.

5. 46 U.S.C. 190.

6. Sea Carriage of Goods Act, 1904.

7. The Carriage of Goods By Sea Act, 1924, Stats. U.K. 1924, c. 22.

8. Stats. Can. 1909-10, c. 61.

9. *Scrutton on Charterparties and Bills of Lading* (18 ed., Mocatta, Mustill, Boyd, 1974), p. 403.

10. *Paterson Steamships Ltd. v. Canadian Cooperative Wheat Producers Ltd.*, [1934] A.C. 538 at 544 (P.C.).

11. *Scrutton, supra*, n. 9, p. 198; Payne and Ivamy, *Carriage of Goods by Sea* (11 ed. 1979) p. 154.

prevented by any amount of foresight and pains and care reasonably to be expected from him.”¹² The Queen’s enemies probably include only the subjects and public forces of a warring foreign state, and not pirates, robbers or traitors.¹³ “By ‘inherent vice’ is meant the unfitness of the goods to withstand the ordinary incidents of the voyage. . .”,¹⁴ such as the natural deterioration of fruit in transit. General average loss “means a partial loss which is shared generally by the parties to the common venture.”¹⁵ Thus, “all loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo comes within the general average, and must be borne proportionately by all who are interested.”¹⁶

While the common law imposed strict liability, it also recognized freedom of contract. Parties to a carriage contract were able to reduce the carrier’s legal liability by expressly excepting named causes of loss. The excepted perils typically included, in addition to the common law, restraint by executive authorities, seizure under legal process, piracy, robbery, theft, barratry or deliberate wrongdoing by the crew, strikes and lockouts, perils of the sea, jettison, fire, collision, negligence of the crew, insufficiency of marks and packing, and negligence of the cargo owner.¹⁷ The carriers were able to impose ever lengthening disclaimers of responsibility in their standard form documents and the courts were prepared to enforce them.

One may question the wisdom, let alone the logic, of law that straddles the twin principles of strict liability and freedom of contract. Presumably, the courts had the power to control the situation which they had allowed to develop. They could have found the means of regulation, even though they did not yet have such interpretive tools as the doctrine of fundamental breach. In fact, the courts did not take control of the situation before the legislatures began to make changes. Their motivations were as mixed as their constituents: the considerable shipping interests of the maritime nations favoured the status quo, while cargo owners in trade-

12. *Nugent v. Smith* (1876), 1 C.P.D. 423 at 444; *Turgel Fur Co. Ltd. v. Northumberland Ferries Ltd.* (1966), 59 D.L.R. (2d) 1 (N.S.S.C.).

13. Scrutton, *supra*, n. 9, p. 220; *Carver’s Carriage by Sea* (13 ed. Colinvaux 1982) para. 14.

14. Scrutton, *supra*, n. 9, p. 224.

15. Tetley, *Marine Cargo Claims* (2d ed., 1978) p. 274.

16. *Birkley v. Presgrave* (1801), 1 East 220 at 228.

17. Ivamy, *supra*, n. 11 at 155-163.

dependent states sought reforms and protection. The divergent tensions meant that when the legislatures became involved, they acted in only broadly similar ways.

Sea carriage is preeminently an international matter, for foreign trade is dependent on it. Furthermore, foreign trade is hindered by a confusion of national laws and legislation. Uniform international regulation was, and is, the sensible approach to sea carriage law. These facts were first acted on by groups and interests outside of government. A nongovernmental organization, the International Law Association, promoted the series of meetings that culminated in the conference of governmental plenipotentiaries who signed the Brussels Convention and so adopted the Hague Rules.

The uniformity of law which this convention sought to establish has two aspects. First, the conference delegates strove for uniformity in the traditional sense between nation states: all adherents would apply the same rules to contracts of carriage by sea. Second, the convention asserted uniformity in a novel way by actually fixing the terms and conditions of each contract of carriage. Even today, there are very few areas of human transactions in which the contents of contracts are set by legislation, yet the Brussels convention accomplished this on an international plane. In achieving both aspects of uniformity, the Hague Rules were remarkably successful. However, the very act of fixing the rules at an international level provided the source of their weakness and growing inadequacy as time has passed and the shipping industry has changed.

The Hague Rules, like the national legislation before them, had to settle the carriage contract if they were to accommodate the interests and concerns of both carriers and cargo owners. So long as freedom of contract remained the guiding principle, no great change was foreseen in the relations between these parties. To afford cargo owners a measure of protection, the construction of a mandatory contract seemed the most sensible way to proceed.

What the Hague Rules required primarily, and attained, was an acceptable distribution of commercial risks and legal responsibilities between carriers and cargo owners. The distribution that was achieved should not necessarily be assumed to have been the most fair distribution possible, for it was not a balance of risks and responsibilities that came about as a result of an objective assessment of the circumstances of world trade and sea transport in 1924. Rather, it was a reasonable balance, in the sense that a

distribution of risks was made by an agreement which proved acceptable to the states that were party to the Brussels Convention and it was adhered to by most governments of the world thereafter. The chief feature of the concluded agreement was a compromise between the legal principles of strict liability and freedom of contract, which had opposed each other in the traditional common law of carriage. Cargo owners were required to forgo their claims on carriers as insurers of their goods in return for a limitation on the carriers' freedom to disclaim both cargo responsibility and monetary liability. Under the Hague Rules, a carrier of goods upon a bill of lading is bound to exercise due diligence in providing a ship, caring for the cargo, and otherwise executing his agreement of carriage.¹⁸ If he does so, yet the goods in his charge are still lost or damaged, he may excuse himself of responsibility on one of a number of predetermined grounds¹⁹ or he may limit his liability for each item of cargo according to a prescribed formula.²⁰ The Hague Rules ensure that the cargo owner will never receive less care or compensation from the carrier than this minimum amount, yet they leave him free to bargain for better treatment if he desires.²¹

The Hague Rules altered the law only for the carriage of general cargo. Because bulk goods typically take up the entire carrying space of a vessel, they are usually carried in tramp ships under charter parties. They were not included in the Hague Rules because it was supposed that their owners could bargain adequately with the carriers for protection under the regime of freedom of contract.²² By distinction, items of general cargo, such as sacks, boxes, and crates of goods capable of being manhandled, are typically carried under bills of lading on scheduled liner services. Each individual cargo owner cannot possibly negotiate the terms of carriage, nor can the carrier tolerate individual agreements with hundreds of different shippers. Printed form documents imposing the carrier's standard conditions were, and still are, the only practical way to conduct business. Hence, the Hague Rules control the standard terms of carriage under bills of lading.²³

18. Hague Art. I(b), (e), III (1), (2), (3), IV (1).

19. Hague Art. IV (2).

20. Hague Art. IV (5).

21. Hague Arts. II, III (8), IV (5), V.

22. Hague Art. V.

23. Hague Art. I(b).

After the Hague Rules were adopted, much of carriage law devolved into a matter of the enforcement of local legislation. The only way to give force and effect to international rules aimed at the conduct of individuals is through the agency of national governments. Thus, the national governments had to pass implementing legislation to give the rules domestic effect before the courts would apply them. This two-step process of application inevitably weakens the measure of international uniformity of law. States were able to enact the rules with slight, but significant, variations, especially over limits of liability, and some states did so.²⁴ Furthermore, national courts, though apprised of the need for international uniformity of interpretation, are apt to follow their own views and precedents in applying the local statute. These divergencies inevitably encouraged forum shopping amongst disputing carriers and cargo owners.

A more significant effect of enforcing the statutory Hague Rules of carriage was the change in the nature of litigation. Proof of fact remained essential and often determinative, but the litigated issues of law changed in character. Construction of the terms of contract was largely replaced by interpretation of the statute, and two kinds of enquiry ensued. Sometimes the dispute fell clearly within the ambit of the Hague Rules and the court was called upon to interpret their application to the particular situation. An enormous volume of such interpretive jurisprudence has been amassed over the past fifty years, and a wealth of detailed meaning and commercial consequence has, to date, been ascribed to the rules. At other times, the question was whether the defaults and damage that occurred were covered by the Hague Rules. If not, the events in dispute were once more subject to whatever contractual provision had been made, usually a broad liberty or exculpatory clause. Consequently, these cases were hard fought and have given rise to another huge and technical body of jurisprudence regarding the geographic, temporal, and physical scope of the Hague Rules. Their borders of application have now been drawn clearly, though not wholly efficaciously from a commercial point of view. The stressing of the border and its technical configuration was, perhaps, the inevitable result of implanting a statutory regime within the broader flow of

24. For example: UK, £100; Australia, \$200; Canada, \$500; New Zealand, \$200; USA, \$500.

negotiated commercial contracts. Sellers, buyers, shippers, consignees, and carriers of goods are not only concerned with the carriage of goods by sea, but must also agree to and arrange many other incidents in international trade. This jurisprudence demonstrates one of the difficult consequences of attempting to apply a legislative solution to problematic contractual practices.

On the whole, the drafting of the Hague Rules has proved remarkably successful. It is, in general, short and simple. The terms have not been difficult to understand; it is their application that has proved increasingly troublesome. In some respects, either sufficient wisdom or enough political will must have been lacking at the time that the Hague Rules were drafted. As a result, the rules show, in some places, limitations of conception or solution that have since bedevilled their application. The case law concerning the scope of the rules has been principally caused by this deficiency. Even more troubling has been the need to change the legal standards of responsibility demanded of carriers and cargo owners by the Hague Rules in order to keep them up-to-date with developments in the shipping industry. This need is partly the result of the conclusionary language of the legislative obligations. The carrier's duty to exercise "due diligence" is an apt expression of an idea in outline, but leaves the courts the task of providing it with content. This kind of statutory standard poses the same task for the courts as any judge-made tests of reasonableness. Because the courts are forever determining what is or is not acceptable conduct in infinitely variable sets of circumstances, they thereby develop detailed applications of the legal duty which give it concrete meaning for the time being.

The wealth of interpretive case law on the Hague Rules has been directed precisely to this task. However, it is unending. Oblique standards, like "due diligence", are not static, but are relative to time and events. As commercial life moves on, so must our conception of diligence. And so the courts are pressed into continuously modifying and updating the legislative standards of sea carriage. Were the courts not able to do so, the Hague Rules would undoubtedly have stultified the law and rendered it completely out-of-date with current conditions in the shipping industry. Indeed, legislative fixity has occurred in many respects and contributes significantly to the difficulty of operating the Hague Rules today. Where the rules are made concrete by reference to physical objects, the courts' powers of interpretation are of very

limited effect. When commercial practice changes so that these factual points of reference lose their practical significance, the courts are still required to determine the parties' rights by reference to them. Thus, the dependence of the Hague Rules upon, for instance, a "bill of lading", storage under "deck", and limitation per "package" has forced courts to assess or excuse liability on the basis of outmoded tests of the circumstances. The consequence of this type of legislative inadequacy is an increased volume of cases, initiated by disgruntled claimants who advance every technical argument imaginable in an effort to circumvent the commercially unsound results of outdated standards. The recent torrent of litigation regarding the limitation of liability per "package" in an age of containerized traffic is a clear example of this unfortunate effect of the decrepity of the Hague Rules.

The discussion to this point should afford an appreciation of the need for the Hague Rules to be reformed, and should afford the basis for an understanding of them as compared with the Hamburg Rules.

III. The Hague and Hamburg Rules Compared

The objectives of the two sets of rules are essentially the same; the Hamburg Rules are simply supposed to do better what the Hague Rules originally failed to do or subsequently became unable to do. The Hamburg Rules, however, as the result of inevitable political and diplomatic compromise at the conference table, display their own share of blemishes from whatever perspective they are viewed. The question for serious consideration is, therefore, whether the Hamburg Rules actually will do a better job of regulating international sea carriage than the Hague Rules.

Three criteria will be used to make the comparison of the rules. Posed in the form of questions, they are: (1) Will the Hamburg Rules be more comprehensive than the Hague Rules in their regulation of sea carriage transactions? (2) Will the Hamburg Rules provide greater clarity in the law than the Hague Rules? (3) Will the Hamburg Rules distribute the risks of sea carriage more fairly than the Hague Rules in contemporary shipping conditions? The propriety of each of these questions will be discussed, along with a consideration of their answers. Their conclusions will foretell the relative legal merits of the two sets of international rules.

(a) *Comprehensiveness of the Rules*

The Hague and the Hamburg Rules are both mandatory regimes of law. Once they become applicable to a carriage transaction, no contracting party can evade them or disclaim his responsibilities under them.²⁵ Consequently, they pretend to exclusive regulation of the rights and obligations to cargo in sea carriage. This result is the legal method of enforcing the internationally agreed balance of commercial risks in the transaction. The rules do permit the parties to agree to greater responsibilities of carriage, and do not restrict freedom of contract outside of carriage. Indeed, the parties are free to arrange their affairs beyond the application of the rules in such a way as to undermine the rules' intended effects. Evidencing carriage contracts on waybills, rather than on bills of lading, is an arguable example. Consequently, the scope of the rules is most important: the more comprehensive their application to matters that genuinely affect carriage, the more successful they are likely to be. Since the Hague and Hamburg Rules share the objective of establishing mandatory and exclusive regimes, it seems appropriate to compare the scope of their application and to favour the set that is more comprehensive.

Many points of similarity exist between the Hague and the Hamburg Rules, but they are not of principal concern in a comparison of scope. The differences of application are what matter and, consequently, will be highlighted here. First, the Hague Rules are dependent on certain documentation. They apply only to the carriage of goods that will be covered by a bill of lading.²⁶ By contrast, the Hamburg Rules are not limited by documents, but relate to the character of the transaction. They apply to any contract of carriage by sea, including a multimodal transport agreement to the extent of its sea leg.²⁷ An exception is made for carriage under charter parties in both sets of rules.²⁸ The evident intent is that the rules shall govern the carriage of general and unitized cargo in liner services. Bulk goods moved in tramp ships are commercially quite different transactions. Since they are typically arranged by charter party, they are easily distinguished by law. The Hamburg Rules

25. Hague Art. III (8), Hamburg Art. 23.

26. Hague Art. I(b). Intention to issue a bill of lading is sufficient. *Pyrenne Co. v. Scindia Navigation Co.*, [1952] Q.B. 402; *Anticosti Shipping Co. v. St. Amand*, [1959] S.C.R. 372.

27. Hamburg Arts. 2, 1 (6).

28. Hague Art. V (2), Hamburg Art. 2(3).

cover general cargo effectively; the Hague Rules increasingly do not. Liner companies are giving up bills of lading in favour of waybills and receipts that are not documents of title. Some have already moved to electronic transfers of freight data. The modern shipping industry, consisting of container traffic and administered by computer processes, is well within the scope of the Hamburg Rules.

A more important limitation of the Hague Rules is a geographic restraint. Typically, these rules operate only on outbound cargoes.²⁹ Imported goods are subject to foreign law, which may apply a different version of the Hague Rules or even individual laws of its own creation. If the Hague Rules were truly universal, then the "proper law" of the carriage contract would always be the same in content. Whether or not that was the expectation in 1924, it has not been the result. However, the Hamburg Rules offer a much greater chance of this uniformity occurring. They are expressly made applicable to inbound, as well as to outbound, cargoes of states adhering to the convention.³⁰ Hence, where either the exporting or importing country implements the Hamburg Rules, trade between them will fall under those rules. Where only one state is party to the Hamburg Rules, local courts may still be faced with a conflict of laws. For instance, should the suit of a consignee which is brought at the port of destination, in a jurisdiction that applies the Hamburg Rules, be decided by those rules or by the law of the port of loading, namely, the Hague Rules? The international and statutory force of the Hamburg Rules will make it hard for courts to choose some other law. Cargo owners, whether they be shippers or consignees, may confidently expect a much more uniform regime of carriage law under the Hamburg Rules.

The most important difference in the scope of the two sets of rules may well be their temporal extent. The period of responsibility under the Hague Rules is stated as extending "from the time when the goods are loaded on to the time when they are discharged from the ship."³¹ "Loaded on" is interpreted to mean that period starting at the moment that the loading begins, that is, when the ship's tackle

29. COGWA s. 2, Hague Art. X.

30. And through several other places of substantial contact with the particular transaction; Hamburg Art. 2(1).

31. Hague Art. 1(e).

first hooks the cargo.³² Hence, the Hague Rules are commonly said to apply from tackle to tackle. As a result, the carrier who has custody of the goods before loading or after discharge is not subject to the Hague Rules, but may contractually limit or exclude his responsibility as he sees fit. The rules themselves expressly confirm this power.³³

In practice, carriers often take charge of cargoes in the port of loading before they are put on board, and deliver them ashore at the port of discharge. Indeed, a much higher proportion of the damage and loss to goods today occurs not at sea, but during dockside moving and storage activities carried out by cargo handlers who are instructed by the carriers. Subject to the peculiarities of local law, carriers are able to exempt themselves from responsibility for loss and damages suffered during these risky activities. Often, the cargo handlers also enjoy the same exemption.³⁴ Even if the carriers and handlers do not contract out of caring for the cargo, the applicable national laws regarding bailment and custody of property display great diversity in standards of care. In consequence, the distribution of risks of carriage determined by the Hague Rules is disturbed when the goods are not at sea. Commercially speaking, however, the goods are in carriage as long as the carrier has them, whether they are ashore or afloat. This viewpoint is particularly clear given the increasing instances of multimodal transport. The sea carrier has charge of the goods from the moment that they are received from one land carrier until they are transferred to another.

Unlike the Hague Rules, the Hamburg Rules are intended to cover the entire period of carriage. They are expressed as applying to "the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge."³⁵ Not surprisingly, this has been dubbed the port-to-port rule. Unfortunately, in attempting to detail when the

32. *Pyrenne Co. v. Scindia Navigation Co.*, [1952] Q.B. 402; *Falconbridge Nickel Mines Ltd. v. Chimo Shipping Ltd.*, [1974] S.C.R. 933.

33. Hague Art. VII.

34. *Midland Silicones v. Scruttons*, [1962] A.C. 446 (H.L.); (*The Lake Bosomwe*) *Canadian General Electric Co., Ltd. v. Pickford and Black*, [1971] S.C.R. 41; (*The Eurymedon*) *New Zealand Shipping Co. Ltd. v. A.M. Satterthwaite and Co. Ltd.*, [1974] 1 L.L.R. 534 (H.L.); (*The New York Star*) *Salmond and Spraggon (Australia) Pty. Ltd. v. Port Jackson Stevedoring Pty. Ltd.*, [1980] 2 L.L.R. 317 (P.C.); *Miida Electronics Inc. v. Mitsui O.S.K. Lines Ltd.* (1981), 124 D.L.R. (3d) 33 (F.C.A.).

35. Hamburg Art. 4.

carrier can be said to be "in charge" of the goods, the subsequent paragraphs leave open the possible interpretation that he may contractually limit his port-to-port duties to a degree approaching tackle-to-tackle liability. Whether the courts will accept any such attempt in the face of the evident purpose and stated principle of the Hamburg Rules remains to be seen. In the event that such an attempt is not successful, the port-to-port principle of the Hamburg Rules would overcome much of the weakness, not to say circumvention, of the Hague Rules.

Transshipment is another aspect of the temporal scope of carriage that the Hague Rules do not regulate. In the interest of the safety of the goods, a contracting carrier is bound to transport the cargo to its destination. He is not permitted to subcontract the transit or to transship the goods. Nevertheless, the parties may agree to segmented transport, the carrier may stipulate for a power to transship, and sometimes he may incur a duty to do so as the result of an emergency.³⁶ When goods are lawfully transshipped, they are of necessity put beyond the ship's tackle, and so the carrier is free of the Hague Rules and is able to disclaim any responsibility for the goods.³⁷ As a result, the goods rest in midcarriage, at the risk of the cargo owner, in some distant port where he has no control over them.

Containerization of cargo has made transshipment an increasingly common feature of carriage. Warehouse-to-warehouse carriage necessarily involves several transshipments between the modes of transit. But even in sea transit itself, modern scheduled liner services for container traffic are increasingly organized in collection and distribution patterns around transshipment centres, rather than in a multitude of direct routes. In spite of the commercial efficiencies of these services and even considering the reduction of the risk of loss and damage to containerized cargo at transshipment, the law does not support them. Indeed, transshipment is outside the bounds of the Hague Rules. By comparison, the Hamburg Rules at least ensure that the contracting carrier will always remain responsible for the goods until their final delivery.³⁸ Thus, the contracting carrier is liable for lost cargo during transshipment

36. *Owen v. Outerbridge* (1896) 26 S.C.R. 272. The conditions of such a duty are discussed in Carver, *supra*, n. 13, para. 1245.

37. *Marcellino Gonzalez v. James Nourse Ltd.*, [1936] 1 K.B. 565; *Captain v. Far Eastern Steamship Co.* (1978), 7 B.C.L.R. 279 (B.C.S.C.).

38. Hamburg Art. 10(1).

ashore and during on-carriage by another party, who, naturally, is individually responsible for his part of the transit.³⁹ A major exception to this comprehensive principle was made in the Convention at the behest of shipowners.⁴⁰ As a result, the Hamburg Rules permit the contracting carrier to exempt himself of responsibility for a segment of the transit where the contract explicitly provides for part-performance by a named actual carrier.⁴¹

There are two serious disadvantages to the exception allowed for the cargo owner. First, in the event of a claim, the cargo owner may have great difficulty in determining how the loss or damage was caused and, hence, which carrier was at fault. The practical difficulties for the cargo owner of gathering proof of events over large periods of time and great distances cannot be underestimated. It is obviously relatively easier for the industry participants — that is, the carriers themselves — to do so. Second, if the cargo owner can establish who the defaulting party is, the actual carrier may be resident in a foreign jurisdiction and may have no local agent, like the contracting carrier, with whom the carriage is agreed upon and with whom the issue can subsequently be disputed. Even so, the exception does not extend to the transshipment itself, so that, under the Hamburg Rules, the cargo owner is assured that his goods are always the responsibility of some carrier that is known to him.

The carriage of deck cargo is another incident that falls outside the scope of the Hague Rules. Since the risks of the sea and weather damaging goods exposed above deck are obviously much greater than the risks to cargo stowed in watertight holds, the Hague Rules do not subject carriers to the same degree of responsibility for them. They do, however, oblige carriers to stow the cargo below deck unless deck carriage is specifically agreed upon in advance and the face of the bill of lading is so clausured.⁴² The courts have been strict about these requirements.⁴³ The reason may be that, because lawful carriage on deck is outside the Hague Rules, the carrier is therefore

39. Hamburg Art. 10 (2).

40. See Tetley, "Articles 9 to 13 of the Hamburg Rules", in Mankabady, ed., *The Hamburg Rules on the Carriage of Goods by Sea* (1978) p. 200.

41. Hamburg Art. 11.

42. Hague Art. I(c).

43. *Svenska Traktor Aktiebolaget v. Maritime Agencies (Southampton) Ltd.*, [1953] 2 Q.B. 295; *Grace Plastics Ltd. v. The Bernd Wesch II*, [1971] F.C. 273.

free to excuse himself from all liability for the cargo.⁴⁴ The alternative extremes of liability do not provide a sensible system of regulation, in any event, and have become increasingly ridiculous given the current containerization of goods. Purpose-built container ships are designed to carry containers, stacked from the floor of the holds upwards, without regard to deckline, and the containers themselves provide waterproof protection. In these circumstances, the distinction in the Hague Rules between carriage above and below deck makes no sense at all.

In the alternative, the Hamburg Rules contain simple, practical provisions. The practice of carrying goods on deck is always within the scope of the rules, but is subject to special arrangements. That is, the ship may only carry goods on deck by agreement with the shipper or by custom of the trade. Deck carriage that is not in accordance with these standards will attract increasingly severe liability for the carrier, depending on the error of his ways.⁴⁵ Lawful deck carriage will attract the usual standard of care for cargo. If the risks are greater, the carrier presumably can refuse the cargo or increase the freight. Thus, ships in the container trade, for instance, may custom stow containers above or below deck. The cargo owner may expect an ordinary standard of care for his goods, but the carrier will be able to limit his liability in the usual way.

Delay in delivery of the cargo is another incident that is not covered by the Hague Rules. In this case, however, the courts have not had much difficulty in regarding unreasonable delays as a breach of the carrier's underlying duty of dispatch.⁴⁶ Delays, unaccompanied by physical damage or loss of the goods, create purely financial injuries, but since economic losses are compensable in contract, the courts have applied the ordinary rules for measurement of damages.⁴⁷ However, a delay of the goods has quite a different character from the loss or destruction of the cargo. Physical injury to the property may be traced to an event that occurred at a single moment in time. Proof of this cause is an important element to establishing legal liability. By comparison, delay is not a physical, but a temporal, problem. In particular, it is not an event, but a continuous incident; it does not occur at one

44. *H.B. Contracting v. Northland Shipping* (1971), 24 D.L.R. (3d) 209 (B.C.C.A.).

45. Hamburg Art. 9.

46. Ivamy, *supra*, n. 11, 95; Carver, *supra*, n. 13, paras. 1205-1212.

47. (*The Heron II*) *Koufos v. Czarnikow*, [1969] 1 A.C. 350 (H.L.).

time, but is the cumulative effect of the lack of dispatch of the carrier. Without fixed dates for different stages of the carriage — for example, guarantees of loading times or sailing dates — there is no telling whether a delay has been committed until the goods fail to arrive by the expected delivery time. Indeed, apportioning blame between several carriers when, in fact, it is the last who has caused the delay may be extremely difficult.

Perhaps for these reasons, the Hamburg Rules, though they expressly include delay, do so by creating a separate scheme of liability. They define delay individually and apart from loss or damage,⁴⁸ and fix a different limit of liability by reference to freight.⁴⁹ Delay and loss are brought together by the rule that a delay in delivery of sixty days entitles the cargo owner to treat the goods as lost⁵⁰ and, as a consequence, to receive compensation according to the usual limitation per package or kilo. There are, however, a number of unexposed obscurities in the definition and application of the special scheme for covering delay, as well as in the obligation and liability that would apply.⁵¹ Thus, it is rather difficult to assert that the comprehensiveness of the Hamburg Rules in this respect is much of an advantage over the Hague Rules.

Two other differences in the scope of the two sets of rules may be noted in passing, as they are of less commercial importance, though are still of significance. Although the Hague Rules are mandatory and disclaimers of obligation are void,⁵² they contain no prohibition against the attempt at or the inclusion of disclaimers. By contrast, the Hamburg Rules reinforce their obligatory character by granting compensation for losses caused through the inclusion of invalid clauses in the carriage contract.⁵³ The Hamburg Rules also require that more details be included in the bill of lading than do the Hague Rules. The practical reason is to ensure that the cargo owner is adequately informed of the facts he needs in order to enforce his rights. Thus, the extra information includes the names of all the ports of loading and discharge, so as to determine whether the Hamburg Rules apply to the transaction; a statement of the

48. Hamburg Art. 5(2).

49. Hamburg Art. 6(1)(b).

50. Hamburg Art. 5(3).

51. These matters are explored by M. Ganado, *Shipowner Responsibility for Delay in the Carriage of Goods By Sea Under Bills of Lading*, unpublished LL.M. Thesis, Dalhousie University, Halifax, Nova Scotia, 1983.

52. Hague Art. III(8).

53. Hamburg Art. 23.

freight payable by the consignee, so that he has notice of the amount; and the names of the contracting carrier and any others, so as to identify the responsible party at all times throughout the carriage.⁵⁴

There are no matters in the Hague Rules which are not included in the Hamburg Rules. If anything, longer experience has led to greater elaboration in the Hamburg Rules. It is evident from this survey of the differences in application of the rules that the Hamburg Convention is considerably more comprehensive in commercially important ways.

(b) *Clarity of the Law*

Obscurity in the expression of the rules leads to commercial uncertainty, breeds litigation, and encourages complicated drafting of contractual clauses to evade the uncertainties. Indeed, it obstructs the objective of the rules, namely, to fix the terms of carriage contracts. Clarity of the law is an evident virtue and an obvious criterion for comparison of the rules.

Much could be made of the difference in the style of draftsmanship of the Hague and the Hamburg Rules. The relative brevity and conciseness of the Hague Rules is more akin to common law legislation than the diplomatic wordiness of the Hamburg Convention is. The important matter, however, is how well the rules convey the legal concepts which are intended to capture the agreed-upon commercial standards of conduct and distribution of risks in the carriage. Specifically, the question is whether one set of rules or the other expresses these concepts with more precision. Accordingly, comparison will be made here only between the expression of the major principles of the rules.

The Hague Rules display obscurities of commission and omission which the makers of the Hamburg Rules had the opportunity to correct. The drafters of the Hamburg Rules did so, in part, but some of the old difficulties persist and new ones have inevitably appeared. The principal difficulties of commission in the Hague Rules concern the points of physical reference to the goods and the ship. As was already pointed out, the references to a "bill of lading", a cargo "package or unit", carriage "under deck", and "carrier" identity are no longer congruent with the practices of the

54. Hamburg Arts. 15, 11(1).

shipping industry. The Hamburg Rules attack these obscurities and eradicate most of them.

Though the shipper may still call for a bill of lading,⁵⁵ the application of the Hamburg Rules is not dependent on it or on the issuance of any form of documentation. The itemization of cargo is important for the calculation of the maximum limit of the carrier's liability. Packages of cargo have increased in size with the advent of mechanical unitization at the same time as the fixed financial limit has depreciated as the result of inflation. The Hamburg Rules tackle this problem, as is discussed in the next section. The problem of establishing carrier identity has been resolved under the Hamburg Rules in the process of dealing with transshipment and through carriage. The carrier is defined as the party that is contracting with the shipper, unless additional parties are named in the documents. Deck cargo is now included within the scope of the Hamburg Rules. However, the distinction between carriage above and below deck will remain significant to the determination of the appropriate limit of carrier liability. The difficult matter of determining the deckline in container ships may still persist when the carrier defaults.

Apart from deck cargo, therefore, the Hamburg Rules have removed the obscurities of commission that exist in the Hague Rules. They have done so by changing the reference points for their application and, thus, have defined away the difficulties of the Hague Rules. Even in the case of deck cargo, inclusion of this category within the scope of the rules has reduced this obscurity to a more limited enquiry in the event of default.

The chief error of omission from the Hague Rules concerns their application to employees, agents, and subcontractors. Since no provision was made, principles of national law have determined whether those who work under instructions from the carrier are subject to the rules. Most of the problems that have arisen have surrounded the claims by these parties, when in the role of defendants to actions brought for lack of care of the goods, to the benefit of limited liability under the rules. Suits against the master, crew members, stevedores, or ship's agents are not common, but when brought they are often designed to circumvent the limitation of liability granted to the carrier by the Hague Rules.

The difficulties of the liability of employees and agents lie in the doctrine of privity. As third parties to the contract between the

55. Hamburg Art. 14.

carrier and the cargo owner, they cannot demand the benefit of the rules implied into it.⁵⁶ Yet, a suit brought against them, rather than the carrier, in an effort to evade the rules is not attractive either. The issue has been much debated, both in and out of the courts.⁵⁷ The cases have occurred around the construction of "Himalaya clauses",⁵⁸ which expressly seek to extend disclaimers of responsibility and limitations of liability to all who work for the carrier. A contractual nexus with the cargo owner is constructed through the agency of the carrier.

The Hamburg Rules appear, at first glance, to have resolved the continuing dispute. Servants and agents are expressly entitled to avail themselves of the carriers' defences and limits of liability, so long as they act within the scope of their employ.⁵⁹ The article is clear as to the position of employees and agents: to that extent, the issue is settled in their favour. However, the issue remains open in the case of subcontractors, such as stevedores, terminal operators, wharfingers, and warehousemen. Independent contractors, as these persons are often categorized, constitute a separate class from servants and agents in the common law. Unfortunately, the courts are given no guidance as to how to interpret the reference to servants and agents only.⁶⁰ The threefold classification of the common law may be too well ingrained to overcome the admonitions of the rules to international uniformity of interpretation.⁶¹ At any rate, Himalaya clauses will probably continue to be used, given the uncertainty of interpretation, and the old obscurity of the law will persist.

Fresh doubts are raised by the Hamburg Rules where new concepts are invoked. The application of the rules to the contract between carrier and shipper, regardless of documentation, has given rise to an as yet unanswered question about the status of the consignee. What is his legal relationship to the carrier? At common law, contractual rights of carriage were not assignable before the

56. *Midland Silicones v. Scruttons*, [1962] A.C. 446 (H.L.).

57. See the cases at n. 34 and the vigorous criticism of Tetley, *supra*, n. 15, pp. 382-383. Carver's new edition adds an illuminating new chapter on the debate. Carver, *supra*, n. 13, paras. 333-412.

58. After the name of the ship in *Adler v. Dickson*, [1955] 1 Q.B. 158.

59. Hamburg Art. 7(2).

60. Unlike the Visby Amendments to the Hague Rules, which, while adding protection for servants and agents, expressly exclude independent contractors. Hague/Visby Art. IV bis (2).

61. Hamburg Art. 3.

Bills of Lading Acts.⁶² Since then, however, the holder of a bill of lading can enforce it against the carrier. This legislation predated, but was sufficient for, the Hague Rules. The consignee of goods by waybill or freight receipt under the Hamburg Rules may not be so obviously protected. Since the Bills of Lading Acts refer only to bills of lading and since the Hamburg Rules merely define the consignee and do not explain his rights,⁶³ the complications of assignment at common law may occur once again. This unnecessary obscurity may yet be overcome by domestic amendment of the Bills of Lading Acts.

The new port-to-port principle for application of the Hamburg Rules is also a source of uncertainty. Although the port-to-port period of carrier responsibility is clear in principle, its operative details are open to varied interpretation and manipulation. Determining the moment at which the carrier is deemed to take charge of, and to hand over, the goods depends on too many variables. Indeed, on close reading it seems possible for the carrier to contract to take over the goods from the shipper at the rail of the ship⁶⁴ and to discharge them over the side for the consignee.⁶⁵ This arrangement is nothing more than the tackle-to-tackle law of the Hague Rules, which the port-to-port principle is supposed to replace. Such obscurity is not a happy result of the Hamburg Conference. Only time and litigation will tell what express contractual refinements will be allowed to cut back the generality of the port-to-port principle to cover a smaller period of carrier responsibility.

The other main new source of obscurity in the Hamburg Rules concerns the standard of carrier responsibility. The duty of care for the cargo will be discussed on its merits in the next section, on fairness in the rules. The point of clarity in the law concerns the scope for comparative interpretation of the old and new obligations. The language in the Hague Rules⁶⁶ obliging the carrier "to exercise due diligence" to make the ship seaworthy and to "properly and carefully" carry the goods is very similar to the requirement in the Hamburg Rules that he take "all measures that could reasonably be

62. Bills of Lading Act, Stats. U.K. 1855, c. 111; Bills of Lading Act, R.S.C. 1970, c.B-6.

63. Hamburg Art. 1(4).

64. Hamburg Art. 4(2)(a)(i).

65. Hamburg Art. 4(2)(b)(ii).

66. Hague Art. III(1), (2).

required’’⁶⁷ in the circumstances. Indeed, it is assumed that the essence of all these expressions is one and the same — the standard of reasonable care. Yet, modern shipping conditions demand different standards of conduct from the practices that were acceptable at the advent of the Hague Rules. While reasonableness is a concept that may be imbued with expectations relative to current times and situations, there is considerable risk that the fascination of common lawyers for precedent may cause much of the past jurisprudence on the Hague Rules to infuse the novel interpretation of the Hamburg Rules. As much as anything, the intrinsic uncertainty of the content of “reasonableness” encourages this danger, but any more certain, yet fixed, standard of care would expose the Hamburg Rules to intractable obscurities in their application, as commercial conditions of carriage continue to change.

It is difficult to estimate from this survey whether or not the Hamburg Rules will afford greater clarity in the law of carriage than the Hague Rules. Most of the major obscurities of the Hague Rules have been eliminated. Aside from the status of subcontractors, the opportunity to correct the problems shown up by past experience has been well used. However, the new obscurities which surround the application and the standard of the Hamburg Rules affect the core of their reformatory objectives. Their importance, yet lack of clarity, make litigation inevitable, but whether the courts will be able to clarify them is less certain.

(c) *Fairness of the Risks*

The purpose of the rules is to fix a fair balance of commercial risks and legal duties in the contractual relations between carriers and cargo owners. The balance achieved under the Hague Rules was, as has already been pointed out, not necessarily fair in an objective sense, but was an acceptable compromise subjectively. A principal motivation for the Hamburg Rules was a sense that the changes in the shipping industry over the last fifty years were so great that the balance of risks in the Hague Rules had been undermined. The carrier’s risks have changed, to his advantage, and have done so to such an extent that the compromise on his liability is no longer acceptable.

67. Hamburg Art. 5(1).

If the Hague Rules fail to maintain the original balance of risks in contemporary carriage situations, do the Hamburg Rules redress the imbalance? A comparison of the two sets of rules cannot yield an absolute measure of their fairness, but it will permit a summation of their relative worth. The promotion of business efficacy in commercial relations is an old and respected principle of law.⁶⁸ The Hague Rules proved efficacious for many years before technological developments substantially altered shipping practices. If the Hamburg Rules redistribute the risks and costs of sea carriage under modern conditions in a way equivalent to that of the Hague Rules, they may be said to be at least as fair and may be expected to be equally efficacious. Comparison of the rules will demonstrate their relative fairness and efficacy.

Fairness in law is both substantive and procedural. There is little value in a right without a remedy for its breach and a process of redress. In carriage matters, for example, a claimant cargo owner must be able to sue and must have access to evidence of events during the transit if he is to have a fair chance of establishing the liability of the carrier for default in caring for his goods. The Hague and the Hamburg Rules determine both the substantive and procedural responsibilities in the carriage contract. The distribution of commercial risks is effected by an integrated group of legal provisions about standards of cargo care, burdens of proof of conduct, limits of financial liability, and procedures for claims. For convenience, they will be compared here separately.

The procedures for claims under the Hamburg Rules are somewhat more relaxed than those under the Hague Rules. The periods of time within which notice of loss can be given and suits can be brought have been lengthened. Notice of loss or damage to cargo ought to be given promptly, so that the carrier can be informed and relevant evidence can be preserved, preferably before the ship leaves port. The rules confirm this principle.⁶⁹ However, difficulties occur in fulfilling it where the damage is concealed. In such circumstances, the Hague Rules give the consignee three days of grace in which to give notice.⁷⁰ The Hamburg Rules grant a more

68. *The Moorcock* (1889), 14 P.D. 64 at 68.

69. Hague Art. III (6) demands notice be given at the time the consignee receives the goods. Hamburg Art. 19(1) requires notice no later than the next day.

70. Hague Art. III(6).

generous extension of fifteen days,⁷¹ and seem more appropriate in light of the nature of the problem.

Delay in bringing an action, even though notice of loss has been given, is always grounds for nonsuit. The limitation period in the Hague Rules of one year⁷² seems surprisingly short when compared to the usual time bar for contracts, and so it has proved. A year is too often insufficient and agreements for extension are common. Part of the Gold Clause Agreement of the British Maritime Law Association⁷³ generalized a two-year limit amongst its adherents. The Hamburg Rules have formalized this experience under the Hague Rules by adopting a two-year time bar, fixing the commencement of the period and assuring that defendants may have recourse on any indemnity agreements, even after the time limit.⁷⁴ The Hamburg Rules also include provisions to regulate the choice of court⁷⁵ or arbitration⁷⁶ in which to bring a claim. In the absence of controls in the Hague Rules, choice of forum clauses are frequently included in bills of lading at the carriers' convenience. Cargo owners face the costly and inhibiting choice of bringing their claims in the distant location cited in the carriage document or fighting a jurisdiction battle over forum shopping. The thrust of the Hamburg Rules is to allow the use of jurisdiction and arbitration clauses to continue, but to offer the cargo claimant an overriding choice between the named place and several other locations associated with the carriage transaction. They include the carrier's place of business, the port of loading, and, most conveniently, the port of discharge.

These procedural provisions do not impinge on the efficacy of carriage, but they do affect its cost indirectly. If the carrier can avoid a claim by extending negotiations for a settlement beyond the time limit for suit or by pre-selecting awkward locations for adjudication, then he can shift the cost of liability to the cargo owner, who suffered the loss, and his insurer. In this area, on which the Hague Rules barely touch, the Hamburg Rules do not readjust a distribution of risks of loss that has gone wrong. Yet, the Hamburg

71. Hamburg Art. 19(2).

72. Hamburg Art. III (b), para. 3. Amended to two years under Hague/Visby Art. III(6).

73. Set out in Tetley, *supra*, n. 15, p. 563.

74. Hamburg Art. 20.

75. Hamburg Art. 21.

76. Hamburg Art. 22.

Rules are eminently fairer in the sense that they make provisions for the procedures of claims in ways that experience under the Hague Rules has shown are necessary.

The standards of cargo care are the core of the rules. The distribution of the commercial risks of carriage is spelled out in terms of legal responsibilities towards the goods, owed by each party and, primarily, by the carrier. The Hague Rules took the approach of specifying the different aspects of carriage to be attended to and granted the carrier a long list of excuses for failing to do so. Thus, the Hague Rules are said to operate “in relation to the loading, handling, storage, carriage, custody, care and discharge. . .” of the goods.⁷⁷ The carrier is bound to fulfill all these functions “properly and carefully”.⁷⁸ He is also bound at the beginning of the voyage to provide a vessel that is seaworthy, cargoworthy, and properly manned, equipped, and supplied.⁷⁹ In addition, there is the negative inference that the carrier must complete his obligations without unreasonable deviation,⁸⁰ but there is no mention of any responsibility to do so without undue delay.⁸¹ To all of these different responsibilities, the carrier has a list of “excepted perils”.⁸²

A more cumbersome way of expressing legal obligations could hardly be imagined. Worse, the variety of different facets of liability and excuse have led to fierce disputes and fine distinctions. In their place, the Hamburg Rules impose a brief but encompassing standard. The carrier is liable for loss, damage, and delay while the goods are in his charge, unless he can show that he, his employees, and his agents “took all measures that could reasonably be required to avoid” the injury.⁸³

The merits of the alternative draftmanship are not so important as the legal standards that are imposed. Cutting through the phrasing to the pith of the obligations, there is good reason to think that the Hague and the Hamburg Rules both establish the same relative

77. Hague Art. II.

78. Hague Art. III(2).

79. Hague Art. III(1), IV(1).

80. Hague Art. IV(4).

81. Carriage with dispatch and without deviation are obligations of pre-existing common law and will normally be applied to the contract, supplementary to the Hague Rules. See the references at n. 46.

82. Hague Art. IV(2).

83. Hamburg Art. 5(1). Liability for unreasonable deviations under this paragraph is supplemented by Art. 5(6).

principle of carrier responsibility, which may be summed up as reasonable care. "Due diligence" towards the ship, "reasonable" deviation in the voyage, and the proper and careful carrying of the goods, as expressed in the Hague Rules, add up to the requirement of "all reasonable measures" contained in the Hamburg Rules. The content of the standard — what is reasonable conduct in the circumstances — will vary with the particular carriage.

The chief differences between the rules lie in the exceptions to them. Having established an affirmative principle of liability for fault, the Hague Rules proceed to grant many exceptions. The Hamburg Rules, however, do not. Hence, the question of comparative fairness in the standards of care under the rules devolves to an investigation of the impact of the exceptions listed in the Hague Rules. Their omission from the Hamburg Rules may suggest a relative generosity to carriers under the Hague Rules, until a closer scrutiny of the rules is made. Most of the excepted perils in the Hague Rules involve events that are beyond the control of the carrier and which are not the function of acts of the shipper or characteristics of the goods. The carrier is not liable for damage caused by perils of the sea, acts of God, acts of war, acts of public enemies, restraints of lawful authorities, seizure under legal process, quarantine, strikes, lock-outs, and riots, if he could reasonably avoid them.⁸⁴ Indeed, he will not be liable for loss arising from any other cause without his actual fault or the neglect of his employees and agents.⁸⁵ Nor will the carrier be responsible for damage resulting from acts or omissions of the cargo owner or inherent vice, insufficiency in packing, or inadequacy of marks of the goods.⁸⁶

The four exceptions which depend on the carrier's conduct, rather than on persons or events beyond his control, are negligence, fire, rescue, and latent defects. Of these, the last two are not true exceptions. The saving of life and property⁸⁷ are self-evident human purposes and are legitimate grounds to deviate from the regular voyage. However, since deviations must be reasonable in order to be lawful, this exception will not overreach the principle. Thus, deviations that are made in order to save property for salvage are not within the exception when they do not constitute reasonable

84. Hague Art. IV(2)(c), (d), (e), (f), (g), (h), (j), (k).

85. Hague Art. IV(2)(q).

86. Hague Art. IV(2)(i), (m), (n), (o).

87. Hague Art. IV (2)(l).

conduct.⁸⁸ Similarly, a latent defect in the ship which renders it unseaworthy is only an excuse when “not discoverable by due diligence.”⁸⁹ Thus, rescue and latent defects are not so much exceptions to the standard of reasonable care in carriage as express examples of it. By contrast, fire and negligence are genuine exceptions to liability and, if liberally applied, would substantially reverse the principle of responsibility for fault. However, they are not without constraint. Damage to goods by fire is an exception, “unless caused by the actual fault or privity of the carrier.”⁹⁰ Thus, the carrier will never avoid his liability where he can be blamed personally for the fire. He is excused where the fire is set by strangers, where it arises accidentally, or where it results from unknown causes, but these situations are not inconsistent with the principle of fault. They are comparable to the other exceptions for events and persons beyond the carrier’s control. The chief advantage of the exception is that the carrier is excused from the operation of the principle of responsibility for the acts of his employees. He will not be liable for loss caused through the fault or neglect of his crew members and other workmen in permitting or failing to prevent the outbreak of fire. Unreasonable conduct by employees which results in loss by fire is an exception to the carrier’s obligations to exercise reasonable care.

Negligence is an even broader exception. The carrier is not responsible for damage resulting from the “act, neglect or default” of the master and the crew “in the navigation or in the management of the ship.”⁹¹ Since the carrier’s obligations are almost wholly performed by his employees, he would virtually never be liable for cargo loss unless he personally intervened in the carriage. Not surprisingly, the phrases modifying the exception have been interpreted to limit this conclusion. Thus, the carrier will only be excused for his employees’ negligence in the navigation of the ship, and not for his mismanagement of the cargo. The exception depends on an ability to distinguish between an act’s effects on the ship and on the cargo.⁹² The distinction is often difficult on the facts, and

88. *Stag Line Ltd. v. Foscolo, Mango and Co.*, [1932] A.C. 328 (H.L.); Carver, *supra*, n. 13, para. 547; Tetley, *supra*, n. 15, 351-354.

89. Hague Art. IV(2)(p).

90. Hague Art. IV(2)(b).

91. Hague Art. IV(2)(a).

92. *Gosse Millerd v. Canadian Government Merchant Marine*, [1929] A.C. 223 (H.L.); *Kalamazoo Paper Co. v. C.P.R.*, [1950] S.C.R. 356.

may be somewhat impressionistic, especially when the error affects the venture as a whole.⁹³ A collision, for example, may injure both ship and cargo.⁹⁴ The wide scope and the uncertainty of application make this exception very controversial.

The omission of all these exceptions from the Hamburg Rules would appear to signify their abolition. However, the provision in the Hamburg Rules for carrier responsibility is not devoid of an escape clause. The carrier is liable for cargo loss unless he can show that he took all reasonable measures to prevent it. Thus, he may excuse himself where he acted reasonably but the loss nevertheless occurred. In other words, he is no more liable under the Hamburg Rules than under the Hague Rules for losses he could not prevent because they were caused by persons and events beyond his reasonable control. Presumably, therefore, the carrier may, under the Hamburg Rules, assert as excuses arguments analogous to all but two of the exceptions granted in the Hague Rules, according to what the circumstances will support. Fire and negligence are the only exceptions in the Hague Rules which run counter to the principle of responsibility for unreasonable error, the principle on which both sets of rules are built.

Vicarious liability for the negligence of the carrier's employees in causing loss by fire or mismanagement of the ship is what distinguishes the standards of care in the rules. In these two respects, the Hamburg Rules have undoubtedly altered carriers' obligations under the Hague Rules. Yet, one may wonder why the Hague Rules ever granted such gross incursions into the principle of employers' liability. The exceptions seem chiefly to have antiquity in their favour. They developed when the shipping industry lacked the means for communication between the shipowner and his ship when it was at sea. The owner had to rely on the independent observations and judgment of the master he appointed, and he was not willing to accept responsibility for an employee whom he could not supervise or direct. What began as common contractual exceptions, which the courts would enforce, though narrowly,⁹⁵ found their way into the Hague Rules.

If such was the argument, it certainly has no validity today, if indeed it ever had any. Modern technology permits continuous

93. Tetley, *supra*, n. 15, p. 172.

94. *Leval & Co. Inc. v. Colonial Steamships, Ltd.*, [1961] 1 L.L.R. 560 (S.C.C.).

95. Carver, *supra*, n. 13, paras. 172 and 232. Canada does not have a fire statute equivalent to U.K. Merchant Shipping Act, s. 502.

ship-to-shore communications so that carriers and masters may consult about the transit, except, perhaps, during an emergency, such as an impending collision. Given these circumstances, there is no longer sufficient reason to relieve a carrier of his normal vicarious responsibilities, which both the Hague Rules and the general law otherwise uphold. In this light, the Hamburg Rules may be seen to reaffirm the general principle of fault, common to both sets of rules, by the elimination of the exemptions in the Hague Rules for employees' negligence in fire and navigation, which appeared necessary when introduced. The Hamburg Rules readjust the standard of cargo care in modern conditions to a level originally intended by the Hague Rules, except insofar as the equipment and prevailing methods then available seemed to make that level unfair to carriers.

Liability for breach of the standard of cargo care depends upon adequate proof. It is usual in law for the claimant to have to prove his claim before the defendant is called upon to rebut or excuse his alleged defaults. In cases of carriage under the Hague Rules, the carriers' responsibilities are so dissected with interdependent exceptions that the burdens of proof have become quite confused. Once the cargo owner has shown that his goods were lost in transit, may the carrier immediately claim an exception, such as perils of the sea or insufficient packing? Must the carrier first prove he was diligent in preparing the ship for the voyage and careful in the carriage, or may he leave their proof to the cargo owner in rebuttable of his exemption? The courts have still not completely determined these basic issues,⁹⁶ partly because the definitions of obligation and exception are circular. The seas are only a peril to a ship when they are unforeseeably fierce, and the owner who diligently prepares his vessel will make it seaworthy against foreseeable weather, including the likelihood of typical storms. Thus, proof of the excepted peril is evidence that unseaworthiness was not the cause of loss, while proof of seaworthiness suggests the peril must have been the cause.

Cases are often lost because adequate proof of events cannot be made. How did a fire start? How did water enter? If the party who has the burden of proof cannot answer this kind of question, at least

96. Compare, for instance, *Maxine Footwear v. Canadian Government Merchant Marine* (1959), 21 D.L.R. (2d) 1 (P.C.) and *Gamlen Chemical Co. v. Shipping Corporation of India Ltd.*, [1978] 2 N.S.W.L.R. 12 (C.A.). See Carver, *supra*, n. 13, paras. 511-513.

through circumstantial evidence, then he will bear the loss. In this way, the distribution of the burdens of proof may indirectly, but substantially, affect the commercial risks of carriage. Hence, a fair distribution of the burden of proof is as important as the establishment of a reasonable standard of cargo care.

In point of fact, the cargo owner often faces difficulty in establishing the cause of his loss. The carrier and his employees, who are not likely to implicate themselves, typically have exclusive access to the evidence of a mishap in port or at sea. Usually, the cargo owner is able to establish a *prima facie* case of liability by proving that the damage or loss occurred while the carrier had charge of the cargo. This the cargo owner can do by producing the bill of lading as proof of the quantity and condition of the goods when loaded⁹⁷ and by requesting an independent survey of the cargo at discharge.⁹⁸ The Hague Rules do not expressly set the order of proof, but the cargo owner's obligation to make a *prima facie* case in this way may fairly be read out of their provisions, especially those relating to bills of lading.⁹⁹ The uncertainties in the burden of proof arise thereafter in the degree to which the carrier must disprove the cargo owner's claim. The Hamburg Rules, by comparison, are much more straightforward. Their expression of the standard of cargo care makes clear that the carrier is liable "if the occurrence which caused the loss, damage or delay took place while the goods were in his charge . . . unless the carrier proves that he . . . took all measures that could reasonably be required to avoid the occurrence and its consequences."¹⁰⁰ Plainly, the cargo owner must prove the loss or damage that occurs during carriage,

97. Under the Hague Rules Art. III(4), the bill of lading is only *prima facie* evidence of the goods, but under the Hague/Visby Rules Art. III(4) and the Canadian Bills of Lading Act, R.S.C. 1970, c. B-6, s. 4, it becomes conclusive proof in the hands of the consignee.

98. Canada Shipping Act, R.S.C. 1970, c. S-9, s. 609 obliges the port warden, when requested by carrier, master, or cargo owner, to examine the goods on board, to ascertain the cause of their damage, and to keep a note of his inquiries. Under s. 611, the carrier is presumed negligent and liable for cargo that is discharged in a damaged condition when the hatches of the ship have not been first opened by a port warden. The clear implication is that the master should call for an independent examination under s. 609 if he has any reason to suspect that the cargo has been injured during the voyage.

99. Hague Art. III(3), (4), (5), (7). And see Tetley, *supra*, n. 15, c. 5.

100. Hamburg Art. 5(1).

and then the carrier must clear himself of all implication of liability, if he can. The Hamburg Rules, therefore, sustain the same general principles regarding order of proof that the Hague Rules imply, but quickly confuse.

The Hamburg Rules are not entirely without exceptions to the order of proof, of which the main one concerns fire. Although carriers have become responsible under the Hamburg Rules for the negligence of employees in the event of fire, the cargo claimant must affirmatively prove their default.¹⁰¹ This specific onus is a serious reversal of the general order of proof that the carrier shall show that he and his employees were not negligent, because the cause of a spontaneous fire is often very difficult to establish. Yet, although the burden of proof on the cargo owner is an exception under the Hamburg Rules, it is not out of line with practice under the Hague Rules, where the carrier is exempt.¹⁰² On the whole, the Hamburg Rules reassert, with clarity, principles of the general law regarding burdens of proof, which were also known to the Hague Rules before they were lost in a welter of exceptions to the carrier's commercial responsibility.

Even when the standard of cargo care has not been met and a case may be proven against the carrier, the claimant's victory will still be incomplete because the carrier has a right to limit his liability. This right is as important as the standard of responsibility or the burdens of proof. Commercially, it fixes the outcome of the case, which is all that matters to the disputing businessmen. By inference, it sets the financial boundaries to the commercial risks of each contracting party from the beginning of the carriage. Thus, carriers and cargo owners alike can calculate their costs in advance, set their charges, and buy insurance for foreseen financial contingencies. This way of organizing an industry can be successful, providing the limits of liability are not too low. The legal concern must be that the limitation on liability does nothing to impair the carrier's principal obligation to care for the goods. Making the carrier pay for his faults is the surest way to enforce the legal standard. Although limitation of liability runs counter to the principle of fault, it will not defeat it

101. Hamburg Art. 5(4).

102. His exemption does not extend to his own faults regarding fire, but the burden of proof of them is uncertain. See Tetley, *supra*, n. 15, p. 185.

as long as the monetary limits are high enough to make it worthwhile for the carrier to take the necessary precautions for cargo care.¹⁰³

The Hague Rules seemed to satisfy these commercial and legal requirements at their inception. The carrier's liability was originally limited to £100 "per package or unit",¹⁰⁴ unless the nature and the value of the goods was declared upon shipment. However, the rigidity of this limit has run into at least three kinds of problems over the passage of time. First, exchange rates were never constant and they fluctuate even more today. Yet the Hague Rules allowed states to legislate the limit in their own currency.¹⁰⁵ Canada calculated the equivalence at \$500, but this sum is nearer three times the value of £100 today. Second, inflation has dealt rampantly with the value of goods, while the Hague Rules long remained unchanged.¹⁰⁶ Third, the itemization of cargo has been altered by developments in shipping technology in ways that the referents in the Hague Rules do not accommodate.

The term "unit" has always raised arguments, whether it was shipping or freight units that were intended. The American enactment expressly refers to "customary freight units",¹⁰⁷ which is certainly the more rational of the two meanings when calculating limits of liability for bulk cargoes. But bulk goods are not usually carried under bills of lading, to which the Hague Rules apply, and other states, including Canada,¹⁰⁸ have determined that the unqualified word "unit" should be read ejusdem generis with "package". The difference lies in whether or not the item of cargo is enclosed by packing.

Whether they were packages or units, the pieces of cargo were only so large as could be manhandled. More recently, the development of mechanical handling methods has permitted the consolidation of goods on pallets, in containers, and in LASH barges. Their use has grossly increased the size of the unit moved

103. Lord Diplock, *Conventions and Morals Limitation Clauses in International Maritime Conventions* (1969-70) 1 J. Mar. L. & Comm. 525.

104. Hague Art. IV(5).

105. Hague Art. IX.

106. The Visby Amendments to Hague Art. IV(5) doubled the monetary limit, but they still afford less recovery at today's values than the Hague Rules did at their inception.

107. U.S. Carriage of Goods by Sea Act, 1936, 46 U.S.C. 1304(5).

108. *Falconbridge Nickel Mines et al v. Chimo Shipping Ltd. et al*, [1974] S.C.R. 933.

and has complicated the itemization of the cargo. Attempts by carriers to limit their liability for a twenty- or forty-foot container to that for either a package or a unit of carriage have, in general, not been successful. Indeed, an award of \$500 compensation for a container filled with goods would be derisory. Yet great uncertainty as to how to count the cargo inside such a container for the purposes of limited liability has been generated.¹⁰⁹

The Hamburg Rules deal straight forwardly with all of these problems of limited liability, while maintaining the principle. The rate of compensation is raised and its mode of calculation is changed. The Hamburg Rules grant up to "835 units of account per package or other shipping unit or 2.5 units of account per kilogramme."¹¹⁰ The unit of account is the Special Drawing Right of the International Monetary Fund.¹¹¹ It was deliberately chosen in an effort to overcome the divergencies between exchange values of national currency. Thus, courts, in making awards of damages, should be able to fix liability limits in local funds that are made internationally uniform by reference to IMF valuation on the day of the judgment.¹¹² But, while this system may cope with fluctuations in exchange rates, it obviously does not deal with inflation in monetary values of cargoes. Lack of inflation protection is particularly a weakness of the Hamburg reforms, since the limit of liability, though higher, is yet not great. The compensation rate of 835 SDRs per package is roughly equal to C\$1,250,¹¹³ or two and a half times the amount granted by the Hague Rules, as applied in Canada. The Canadian dollar has devalued considerably more over the same period of time. Thus, the Hamburg Rules do not afford even as much compensation to an injured cargo owner as the Hague Rules did at their adoption. Whether this limit is sufficient to attract the attention of carriers to provide proper care for cargoes has yet to

109. *Consumers Distributing Co. Ltd. v. Dart Containerline et al* (1980), 31 N.R. 181 (F.C.A.D.). See Carver, *supra*, n. 13, paras. 552-559. The functional package test has now been abandoned. *Mitsui & Co. Ltd. and Ataka & Co. Ltd. v. American Export Lines, Inc.*, [1981] A.M.C. 331 (2d Cir.).

110. Hamburg Art. 6(1)(a). Cp. Hague/Visby Art. IV(5), as further amended after the Hamburg Rules by a Protocol of 1979.

111. Hamburg Art. 6(3), 26.

112. For states that are not members of the IMF, separate provision is also made for the translation of Hamburg units of account into their local currencies. Hamburg Art. 26(2).

113. Assuming 1 SDR is valued by the IMF at about C\$1.50.

be tested.¹¹⁴ Other features of the Hamburg regime may be more encouraging to them.

The introduction of an alternative limitation by weight, "whichever is the higher",¹¹⁵ is advantageous to cargo owners and especially to owners of heavy goods. In addition, it provides a convenient resolution to some of the problems of cargo itemization. For compensatory purposes, bulk goods can easily be accounted for, and unitized goods can be weighed readily. Description of cargo items has been further clarified by explicit reference to shipping, not freight, units,¹¹⁶ and by instructions regarding containers and pallets. Consolidated goods are to be regarded as they are enumerated in the carriage documents.¹¹⁷ Thus, if the shipper supplies information to the carrier that expresses the quantity of items or the number of cases of goods in a container, the limitation of liability for loss will be calculated using those figures as the number of packages or units. Furthermore, the container itself, if not the carrier's, is considered a separate shipping unit.¹¹⁸ Failing enumeration of the contents, the container will be treated as one unit. Thus, the cargo owner has a powerful influence on the limit of the compensation he may expect, determined by how he initially describes the goods to be carried. The provision seems to be an appropriate rule of self-interest.

The Hamburg Rules make two other innovations of less certain consequence. They concern liability for delay and liability for wilful default. Consistent with the separation of responsibility for loss by delay from responsibility for physical loss or damage to the goods, the Hamburg Rules set particular limits to liability for delay. That amount is "two and a half times the freight payable for the goods delayed, but not exceeding the total freight."¹¹⁹ Furthermore, the aggregate of liability for lost and delayed goods may not

114. The Hamburg limitation on sea transit is much lower than limits in all other modes of transport, so much so that it caused difficulties in obtaining an acceptable liability regime in the Multimodal Convention of 1980. See United Nations Convention on International Multimodal Transport of Goods, Art. 18(1)(3). That convention, incidentally, increased the sea-leg limit of liability by ten percent over the Hamburg Rules to allow for inflation that occurred since 1978, even though they have never yet been applied. Multimodal Convention Art. 18.

115. Hamburg Art. 6(1)(a).

116. *Id.*

117. Hamburg Art. 6(2)(a).

118. Hamburg Art. 6(2)(b).

119. Hamburg Art. 6(1)(b).

exceed the limited amount if all the cargo had been destroyed.¹²⁰ It is not obvious why damages for delay should be related to freight, rather than to the value of goods as they are with other causes of loss. Indeed, a claim for delay is typically made because the cargo owner has suffered an economic loss in the value of his goods. How this new approach will effect awards for delay is not yet known, but it has undoubtedly complicated the liability rules. The need to correlate damages for delay and for loss has been crudely recognized in the aggregation rule, but so intimate a relationship might best not have been severed in the first place.¹²¹

The other innovation made by the Hamburg Rules is to permit the breaking of the limits of liability. That is, the carrier will lose the right to limit his liability if he acted with intent to cause loss or acted recklessly in disregard of damage to the goods.¹²² Neither of these extremes of conduct are likely, but they just might catch the carrier who is not mindful of the goods because the limitation amounts do not make it worth his while to do so. In the result, he will find he is loaded with unlimited liability. The more obvious issue is whether this provision ousts the doctrine of fundamental breach. The doctrine has been used on occasion to impose unlimited liability in the face of the Hague Rules, even though their provision on limited liability is expressed to apply "in any event."¹²³ The Hamburg Rules certainly set stiffer criteria for the claimant to meet before the carrier loses his right to limit liability. In common law jurisdictions, there would ordinarily be no reason to imply ouster without mention of fundamental breach, but, in an international convention which unifies law in numerous jurisdictions, many of which are not familiar with the doctrine, courts may pause to consider that the Hamburg Rules grant an absolute right to limit liability, except under their express exceptions.

Apart from these two uncertain innovations, the Hamburg Rules have reformed the limits of liability consistently with the original purposes of the Hague Rules. Far from adding grossly to the carrier's liability, they have tended to restore, albeit not completely, the amount of responsibility initially imposed on him by the Hague

120. Hamburg Art. 6(1)(c).

121. Tetley, *supra*, n. 15, 135.

122. Hamburg Art. 8.

123. For example, *Jones v. The Flying Clipper*, [1954] A.M.C. 259 (S.D.N.Y.); *Stag Line Ltd. v. Foscolo, Mango and Co.*, *supra*, n. 96. See the discussion in Tetley, *supra*, n. 15, p. 27.

Rules. Monetary values that have been eaten away by inflation are partially replaced by increased limits. Cargo units that have been increased by mechanical handling techniques may be broken down, through enumeration, to their actual items. Whether so intended or not, both changes bear relation to the values and practices current under the Hague Rules at their inception.

IV. Conclusion

The Hamburg Rules are to replace the Hague Rules. The question pursued here is whether the Hamburg Rules will regulate international sea carriage better than the Hague Rules now do. In light of comparative investigation of the comprehensiveness of the rules, the clarity of the law, and the fairness of the risks, the answer is affirmative. The Hamburg Rules extend their scope of application beyond that of the Hague Rules to include a number of commercially significant aspects of carriage. In particular, they make provision for imported, as well as exported, goods and do so without regard to any special form of carriage document. They extend to cargoes from port to port and include any intervening transshipment or transit on deck. In general, the greater comprehensiveness of the Hamburg Rules presages more success than the Hague Rules had in achieving an internationally uniform regime for sea trade.

The makers of the Hamburg Rules made good use of the opportunity to clarify the obscurities of the Hague Rules. The Hamburg Convention obviates the significance of the references to bills of lading, deck carriage, and carrier identity, and provides a new formula with which to count cargo units. The Hamburg Rules may be less successful in dealing with contractors, employed independently by the carrier, who handle the goods on the waterfront. Until the courts express themselves on the issue, there must also be doubts about the ultimate scope of both the period and the standard of the carrier's responsibility. As yet, it is difficult to foretell whether the benefits of clarifying the obscurities under the Hague Rules will outweigh the disadvantages introduced by the uncertainties of the Hamburg Rules.

The distribution of the commercial risks in sea carriage is adjusted considerably by the Hamburg Rules, and is notably consistent with the objectives of the Hague Rules. In the substantial matters of responsibility for cargo, proof of fault, and limitation of

liability, the Hamburg Rules make provisions that are congruent with the standards adopted by the Hague Rules. The changes contained in the provisions reflect the technological developments that have taken place in the shipping industry during the intervening years. In large measure, the Hamburg Rules correct the balance of risks, which, on the whole, has moved over time to favour carriers, and reset it under modern conditions toward the equilibrium originally struck by the Hague Rules. In addition, the Hamburg Rules include procedural amendments for claims and actions, which experience under the Hague Rules rendered necessary. Overall, the Hamburg Rules seem to offer more of a chance for international uniformity of law in the carriage of goods by sea, and constitute a regime that is as fair to carriers and cargo owners as the Hague Rules ever were.