MANITOBA

LAW REFORM COMMISSION
COMMISSION DE RÉFORME DU DROIT

REPORT
ON
SECTION 45 OF THE

OFFENCES AGAINST THE PERSON ACT, 1861

Report #8

July 27, 1972

The Manitoba Law Reform Commission was established by "*The Law Reform Commission Act*" in 1970 and began functioning in 1971.

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The subject of this Report is the recommended repeal of a pre-Confederation statute of England and Ireland, or so much of it, which purports to suppress the civil right of a common assault victim to sue the assaulter for damages where the latter has been charged with assault "by or on behalf" of the victim.

This subject needs a little historical review to be clearly understood. Manitoba was created a province and admitted to Confederation on July 15th, 1870. *"The British North America Act" 1867*, in section 129 provided in essence that

> ... all Laws in force in (the four original provinces) ... existing at the Union, shall continue (therein respectively), as if the Union had not been made; subject nevertheless ... to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.

That Act of the Canadian Parliament, by which our province was formed, the *Manitoba Act*, Victoria (1870) Chapter 3 incorporated the provisions of the B.N.A. Act, including section 129, in this way:

> 2. On, from and after the said day on which the order of the Queen in Council shall take effect as aforesaid, the provisions of the British North America Act, 1867, shall, except those parts thereof which are in terms made or, by reasonable intendment, may be held to be specially applicable to, or only to affect one or more, but not the whole, of the Provinces now composing the Dominion, and except so far as the same may be varied by this Act, be applicable to the Province of Manitoba, in the same way, and to the like extent as they apply to the several Provinces of Canada, and as if the Province of Manitoba had been one of the Provinces originally united by the said Act.

So it was that the new Province of Manitoba received English law as it stood on July 15th, 1870, although certain judicial authorities expressed doubt about it in those early days of the province. To allay those doubts the Legislature of Manitoba, by statute[1] determined that "the laws existing, or established and being in England" on July 15th, 1870, were indeed the legal inheritance of the province.

Finally, Parliament also declared by statute,[2] on and for its part of the jurisdictional division, that "the laws of England relating to matters within the jurisdiction of the Parliament of Canada ... were from the said day and are in force in the Province of Manitoba ... ".

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1 *"The Queen's Bench Act"*, S.M. 1874, Cap. 12.

2 *An Act respecting the Application of certain Laws therein mentioned to the Province of Manitoba*, 1888, 51 Victoria, Chap. 33 (later consolidated under the title of *The Manitoba Supplementary Provisions Act*, R.S.C. 1927, Chapter 124).

One of the Laws existing or established and being in England on July 15, 1870 was Chapter 100, 24 & 25 Victoria, *An Act to consolidate and amend the Statute Law of England and Ireland relating to Offences against the Person* which had an earlier history but came into force in consolidated form on August 6th, 1861. The provisions of this *Offences against the Person Act* were, therefore, part of the law of Manitoba from the first day of the formal existence of this province. Moreover, unless and until "repealed, abolished or altered by the Parliament of Canada, or by the Legislature of the . . . Province, according to" their respective constitutional authorities, those provisions remain in force in Manitoba. Such is Section 45 of this Act:

> 45. If any Person, against whom any such Complaint as in either of the last Three preceding Sections mentioned (i.e. common assault and battery) shall have been preferred by or on the Behalf of the Party aggrieved, shall have obtained such Certificate,[3] or having been convicted, shall have paid the whole Amount adjudged to be paid, or shall have suffered the Imprisonment or Imprisonment with Hard Labour awarded, in every such Case he shall be released from all further or other Proceedings, Civil or Criminal, for the same Cause.

The manifest injustice of this century-old provision was the subject of much judicial comment in many cases which arose under slightly variant species. The comments were relevant to Sections 733 and 734 of the *Criminal Code*, R.S.C. 1927, Chap. 31. These sections originated in Section 45 of the cited *Offences against the Person Act*, which was adopted virtually in total by the Parliament of Canada in 1869. Section 45 found its way into the Dominion summary convictions legislation and thence into the *Criminal Code* in 1892. Always the constant element remained: ". . . released from all further or other proceedings **civil** or criminal, for the same cause", and the question of whether the Dominion Parliament had the power to suppress the complainant's civil right to sue the accused for damages "for the same cause" has attracted no little litigation. Confederated Canada's Parliament and provincial legislatures cannot legislate with such blithe indifference to the subject and nature of the enactments as can the Parliament at Westminster. There was a divergence of judicial opinion among the appellate courts of various provinces as to the validity of those sections of the *Criminal Code*, and the question never got before the Supreme Court of Canada before Sections 733 and 734 were repealed in the major revision of the Code in 1954. It now seems clear that the definitive judgment, objectively, is that of the Supreme Court of Nova Scotia in *Rice v. Messenger* (1929) 2 D.L.R. 669, which held Section 734 to be *ultra vires*, as trenching on civil rights

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3 i.e. A certificate of dismissal of the complaint (s. 44).

which is a subject assigned exclusively to the provincial legislatures. This conclusion was supported by Professor Bora Laskin (now Mr. Justice Laskin of the Supreme Court of Canada) in an article which appeared in (1941) 19 Canadian Bar Review at 379. That learned writer stated:

> First it might be noted, as has been pointed out, that 'at common law, a party's civil rights were not taken away by the fact that the wrong complained of amounted to a criminal offence or that the defendant has been convicted under criminal proceedings'. And on any view of the authorities with respect to ancillary legislation, it cannot be said that the provision in s. 734 releasing from civil proceedings is 'necessarily incidental to' or 'reasonably necessary for' or 'necessary to control effectively' the criminal offence of common assault.

That the deprivation of a civil right of action, as attempted by the now repealed section of the *Criminal Code* and as effected by Section 45 of the *Offences against the Person Act* of 1861, is within the jurisdiction of the provincial Legislature hardly admits of doubt in our opinion.

An examination of the whole of the *Offences against the Person Act* brings us to the conclusion that the only provisions of it, other than Section 45, which are or may be within the constitutional jurisdiction of the Legislature, that is:

Section 53 –

> offender incapable of taking any estate or interest, legal or equitable in abducted woman's property; (property rights); and

Section 72 –

> where a serious assault has been committed against a child under 16 years of age, two justices of the peace may require the guardian or the "overseers of the poor" to conduct the prosecution (administration of justice in the province)

have been effectively repealed, altered or modified by subsequent legislation as to be no longer in force in Manitoba.

Is Section 45 of that 1861 statute still in force in Manitoba? We think so. We could find no legislative enactment of this province abolishing or repealing it.

This provision was enforced in Manitoba recently in an action brought under Part II of *"The County Courts Act"*. In Suit No. 583 in Winnipeg, the plaintiff claimed a small sum from the defendant "for damages caused by assault on December 1, 1971". The action was referred to a Judge of the Court for adjudication because it involved a point of law more appropriately to be decided by a judge. The record shows a Certificate of Conviction against the defendant in that he did unlawfully assault the plaintiff, and the defendant was fined $10.00 and costs of $3.30, alternatively to be imprisoned 3 days in default of payment. There is a notation on this Certificate that the charge was not prosecuted by the Crown. It was, therefore, a so-called "private" prosecution even though the defendant was

as surely convicted under the *Criminal Code* of Canada as if he had been prosecuted by the Crown. The plaintiff's action for recovery of damages to dentures and clothing was, accordingly, dismissed.

The policy consideration on which the deprivation of action was founded seems to be that it was in the public interest that in cases of common assault, where no serious injury was inflicted, a justice of the peace should be able to dispose of the matter without a duplication of proceedings. We question that policy.

In the cited case of *Rice vs. Messenger*, Mr. Justice Paton (at p. 696 D.L.R.) said:

> In the *Trinea*[4] case the Justice convicted the accused but imposed no fine nor imprisonment; he simply required the offender to give security to keep the peace for a year. Nevertheless, the Court held the person assaulted as deprived of his civil remedy under s. 734 of the Code. Who was punished? Certainly not the convicted criminal. His recognizance to keep the peace was only an undertaking to do what he and every one else is supposed to do. If he later broke his undertaking, and forfeited the amount pledged, such punishment would arise from the subsequent offence and not the first. The only person punished was the victim of the assault.
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> That result is brought about by the theory that Parliament may occupy the whole field of punishment. Just what does that theory mean? It is claimed that Parliament having imposed what it considers sufficient punishment must be able to prevent the offender from suffering any additional punishment, and so may release him from all other consequences of his wrongful acts. If we accept that theory, it would appear that of all crimes for which the offender is also liable to a civil action, a common assault, when tried summarily by a Justice, is the only one for which a sufficient punishment has been imposed. For it is the only case in which the civil remedy is barred. It is also remarkable that where the offender is tried by indictment he is liable to a greater punishment, and yet the civil action is not taken away. It is altogether probable that the old law in force in Upper and Lower Canada before Confederation was simply copied along with other laws, into the legislation of 1869 without much consideration being given to its constitutionality.

A later case, in Prince Edward Island, which also dealt with Section 734 of the Code, was *Dawson vs. Muttart* (1941) 2 D.L.R. 341. There Mr. Justice Saunders of that province is reported as saying:

> Now in the present case we have the defendants convicted and fined a nominal sum for the alleged assault out of which this action arises.
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> Am I now to say no matter how great the damages the plaintiff has sustained he is now forever barred from any civil right or

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4 *Trinea vs. Duleba* (1924) 3 D.L.R. 640; 42 C.C.C. 296.

> remedy because he elected to have the defendants first tried under the criminal law?
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> . . .
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> Who was punished for this assault? No one. And yet it was held that the assaulted person who may have been seriously damaged had no civil remedy. I fear this decision at once explodes the theory that 'There can be no wrong without a remedy.'
>
> I say no one was punished because the recognizance to keep the peace was only an undertaking to do what every law abiding citizen should do. If he broke his recognizance, his punishment would arise from the violation of his pledge, and not for the assault.

When the Crown declines or neglects to prosecute a common assault charge, why, we ask, should the victim who "privately" prosecutes be deprived of a right of action for recovery of damages from the assaulter? Is this deprivation logical or in any other way supportable in light of the fact that the prosecution for a **grievous** assault does not deprive the victim of his civil right? Is the fear that the County Court might become choked with assault suits reasonable and, even if it were, is it justification enough to maintain this deprivation of civil rights? We think not.

Assuming, as a conjecture, that the Court dockets would bulge under the pressure of this kind of litigation, we think that there would still be no rational basis to deprive people of this civil right on the basis of more intensive employment of Court time, alone. One must proceed either on the premise that the plaintiffs would generally have legitimate grievances, or on the premise that the incidence of triflers and malicious prosecutors would be unduly high among our people. We not only prefer, but thoughtfully adopt the former premise. If it be an individual right to prosecute a charge of common assault, it is no less a right to recover compensation for damages inflicted by that very assault. If the prosecution be frivolous or malicious the Attorney-General can always intervene and stay proceedings exercising his undoubted responsibility for the administration of justice in the province.

The reform which we recommend in this Report is neither effected nor obviated by the provisions of *"The Criminal Injuries Compensation Act"*, Cap. C305 of the statutes of this province. For instance, that Act would have afforded no relief to the plaintiff in the recent County Court action because, by section 12(3), it limits payment of compensation to awards in excess of $150, and his total claim was in the amount of $87.45. What if the damages sustained by the assault victim significantly exceeded the minimal limit of $150? Then the release of the assaulter from civil suit under the *Offences Against the Person Act* would present a positive obstacle to the spirit and operation of *"The Criminal Injuries Compensation Act"* because, by section 17(2) of the latter Act, the Board is entitled to request the applicant (victim) to bring action against the offender, and if the applicant fails to do so the action may be commenced in his name and on his behalf by the Attorney-General. Moreover, section 17(4) provides that if the applicant

> "fails to bring or prosecute an action or fails to co-operate with the Attorney-General in an action brought on his behalf, the board

(a) may decline to award compensation; or
(b) may, where compensation was previously awarded, reduce or revoke the award."

It may be said that no problem would arise if only the victim would not launch a "private" prosecution against the alleged offender. To hold that view may be, possibly, to be pandering to violence and private retribution as a social norm. Why should an assault victim forego the right to prosecute his assaulter according to the law and in the tribunal of a civilized community, when the Crown is unable, unwilling or uninterested in bringing the alleged offender to bar? Assault and battery may, in some instances, be of minor consequence in terms of monetary damage or personal injury. No matter how minor the consequence may be, the species of behaviour is always hideous. The cumulative effect of minor dispersed amounts of mould in the fabric of society may be, ultimately, to rot the fabric. Having answered society's charge in terms of the criminal law, why then should the offender not have also to compensate the victim for the loss, damage and personal injuries inflicted? And if the victim, notionally on behalf of society prosecutes the offender, why should the victim then have to forego his right to personal compensation at the offender's personal expense? We think that there are no reasonable affirmative answers to these questions. We also think that it is no reasonable answer, where a civil action against the offender would be successful (and if it were not, the plaintiff would bear the expense), that society as a whole should ultimately pay for the offender's depredation through an award of The Crimes Compensation Board.

The repeal which we suggest should not be construed to deprive interested persons of the right to obtain either a Certificate of Conviction or a Certificate of Acquittal after assault prosecutions, but should merely abolish the release of the accused person from all further or other civil proceedings for the same cause. Nor, we think, should an acquittal under the *Criminal Code* work any such release. While the release remains, it is absolute. It operates irrespective of conviction or acquittal and the adjudicating magistrate knows that his disposition of the case one way or the other will effect no different civil ramifications. Abolition of the release ought also to be absolute. Although the standard of proof in a civil action is different from that in a criminal prosecution, nevertheless an acquittal in the criminal case would usually make the "private" prosecutor think twice about commencing civil proceedings against the acquitted accused, lest the action fail, and put the prosecutor to the costs of it.

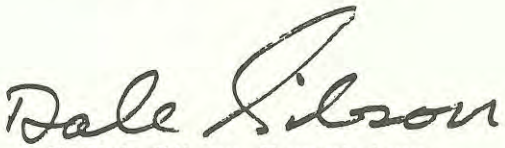
The repeal which we suggest should be enacted in a public statute where it will appear in the continuing consolidation of Manitoba statutes. We suggest that a new subsection (4) to section 3 of *"The Tortfeasors and Contributory Negligence Act"*, Cap. T90, be enacted in the following, or similar, expression:

(4) The provision in Section 45 of the Offences against the Person Act, (1861) 24 & 25 Victoria, Chapter 100 effecting a release from all further and other civil proceedings for the same cause is repealed.

Such an enactment would do no more and no less, we think, than we intend to recommend as a reform in this Report.

This is a Report pursuant to section 5(2) of "*The Law Reform Commission Act*" dated the 27th day of July, 1972.

Francis C. Muldoon, Chairman



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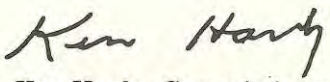

Ken Hanly, Commissioner