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THE COURT OF APPEAL OF ENGLAND AND THE SUPREME COURT OF NORTH DAKOTA: A PSYCHOLOGICAL COMPARISON

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This piece is designed as a brief speculative survey into possible effects on court decisions of contrasting institutional structures established for the decision-making process. The goal of any judicial system is justice, and the varying procedures adopted ideally are directed at arriving at the same end. Yet it may be that these varying institutional patterns, selected as they are according to varying priorities of values, are responsible for differences in decisions reached. This discussion is based on far too limited a statistical sample to attempt to prove or establish anything, and is merely designed to suggest possible results and indicate the types of comparisons a quantitatively adequate sample could be expected to demonstrate.

Humans being the endlessly diverse and individual creatures they are, it may be assumed that no two courts are identical. Though it would not be possible or fruitful to attempt to classify the personal idiosyncrasies of every court, it may be possible to investigate the psychological impact of varying formal processes and procedures on the decision-making functions of different courts. In the absence of more thorough and sensitive investigative resources, the decisions rendered by different courts may be examined for the purpose of seeing what attitudes the judges have taken toward discharging their functions, how these attitudes may have been shaped by the different procedures followed, and how this influences the type or form of decision that results. This investigation is not an attempt to analyze differences in substantive results in terms of doctrines and holdings of law, or to compare decisions qualitatively. Also generally excluded from this study are considerations of the social environment of the court, or the personal backgrounds and dispositions of the individual judges.

In an effort to see if such psychological phenomena are discernible, comparison is being attempted between the Court of Appeals of England and the Supreme Court of North Dakota. The choice of these two particular courts

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was mainly arbitrary, but within a selected requirement that the courts to be compared should be within the same legal system (here, Anglo-American common law) yet have some notable procedural differences; this reduces the amount of extraneous variables that would be encountered in a comparison of two courts from different basic legal systems. And further for the purpose of reducing extraneous variables, the decisions selected for study have been severely limited as to the time and subject-matter. The subject-matter has been limited to torts cases. The reports compared are those in 79 North Dakota,[1] covering the period of August, 1952, to September, 1953, and in Law Reports (1953) 1 and 2 Queen's Bench,[2] covering the period of October, 1952, to July, 1953. Thus the period of time involved, from considerations of both length and contemporaneousness, is quite similar as to both courts. And there was a high correlation between the total number of cases, since there were 69 cases decided by the North Dakota court, and 65 by the Court of Appeal coming up from Queens Bench.[3] And the number of torts cases proved to be twelve in both courts.

Despite the seemingly high degree of statistical correspondance in those particular isolated factors, it is apparent that the sample selected, without much further refinement, is too small on which to base properly scientific projections or conclusions. However, the present purpose is not to prove or establish scientific propositions, but rather to make a tentative exploration to see if any distinctive patterns emerge suggesting particular conclusions. Then the validity of any such patterns and conclusions might be tested in more thorough scientific investigations and samplings.

There are particular points of difference in the procedures followed by these two appellate courts that have been singled out especially for this study. In conformity with the general if not universal practice of American appellate courts, in North Dakota the briefs of counsel are submitted

1. At pages 1, 27, 51, 143, 168, 177, 300, 316, 422, 495, 726 and 834.

2. 1 Q.B. 54, 153, 167, 328, 429, 473, 597 and 724; 2 Q.B. 95, 202, 231 and 464.

3. This, of course, does not consider the cases reaching the Court of Appeal from Chancery Division and the Probate, Divorce and Admiralty Division.

4. For the Rules of Practice of the Supreme Court of North Dakota, see 76 N. D. xvii (1951).

in advance of oral argument.[4] It appears, however, that the judges of the North Dakota court rarely, if ever, read these briefs in advance of oral argument. A monthly term of court begins the first Tuesday of every month, and continues until all cases set for argument have been disposed of. The appellant is normally limited to one hour for presentation, and the appellee to 45 minutes. Parties rarely forego their opportunity for oral argument, and it appears that the court actively questions counsel during the presentation.[5] The cases are assigned to the judges for opinion in advance of oral argument. These cases are assigned in rotation, and since there are five judges on the court, each judge is assigned every fifth case. In the absence of detailed information on judicial conferences, one may assume that there is essentially unlimited opportunity for communication among the judges, both formally and informally, and that the judges avail themselves of it to whatever extent they desire.

The characteristic procedures of the English Court of Appeal contrast sharply. Normally no written briefs are submitted by counsel at all. Oral argument is unlimited, and the reports of cases themselves indicate that vigorous questioning of counsel is routine. Each judge delivers his own opinion, and this is normally done orally, and usually at the conclusion of the oral arguments. How much communication there may be among the judges in the form of whisperings and note-passing among themselves while majestically ranged together on the bench in open court cannot be fully determined. But any such intercommunication is obviously far more informal and less in time and amount than is the practice of the North Dakota court. The exception to this occurs in the minority but substantial number of cases where the court indicates it wishes to deliberate before rendering a decision (*"Curia advisere vult"*). Then days or weeks may transpire before a decision is given, and presumably the opportunity for inter communication among members of the court is then on a par with that of the North Dakota court.[6]

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5. Some discussion of the court's habits and practices appears in Newton, **Appellate Practice and Procedure in North Dakota,** 27 N.D.L. Rev. 155 (1951).

6. See EVERSHED, THE COURT OF APPEAL IN ENGLAND (1950).

The following table gives some of the statistics culled from the described survey of the two courts:

	North Dakota Supreme Court	England Court of Appeal
Total cases during period	69	65
Total torts cases:	12	12
Negligence:	11	11
Automobile cases	7	0
Employee injury	1	8
Landowner duty	2	2
Fire	1	0
Fright	0	1
Battery	1	1
Jury in lower court	11	1
Affirmances	10	5
Reversals	2	7
Dissents	1	1
Concurrences	1	NA*
Average length of oponion	10 pp.	8.5 pp.

*The American concept of a "concurring" opinion presumably cannot apply to the Court of Appeal, where all three judges give their individual opinions in nearly all cases anyway.

It is, of course, not surprising that in both courts the vast majority of torts cases are in the negligence field. The main difference is that in North Dakota the routine negligence case involves automobiles, while in England it is employee injuries allegedly due to the fault of the employer. However, no distinctive pattern appears in the routine as opposed to the more unusual type of negligence case with respect to the various other factors listed. For example, in North Dakota one of the reversals occurred in an automobile case, but the other was a landowner liability case. And in England the reversals in the employee injury cases did not deviate significantly from normal mathematical expectancy.

The disparity in the ratio of affirmances to reversals in the two courts seems significant in perhaps several ways. It appears that in North Dakota there is a rather deliberate and emphatic attitude that the decision of the lower court is presumptively correct. Supposedly this is to some extent always true in an appellate case, because by the nature of appeal the appellant has to demonstrate affirmatively that the decision

below was wrong. However, the greater the extent to which an appellate court adverts to the presumptive correctness of the inferior, the less becomes the likelihood of a reversal. No such emphasis has appeared in the attitude of the Court of Appeal.

Further speculation on this matter of the divergence in the proportion of affirmances to reversals may be made from a consideration of the manner in which the decisions are rendered. In North Dakota a judge is assigned to prepare the opinion on a case prior to oral argument. This undoubtedly tends to put him in a dominating position, in that he will have been motivated to study the case more throughly and be more attentive to counsel, and thus his brethren may tend to defer to his conclusions in the absence of any strong impression to the contrary. The weaker doubts or qualms of the other judges are then likely to be suppressed altogether. But at the same time the judge assigned for the case will suppose that his colleagues, indulging in the presumption of the correctness of the lower court, anticipate affirming, and, in the absence of strong conviction, he will not want to disappoint that anticipation or thrust himself forward into an exposed dissenting position. So, the one-judge opinion, through a tendency to inhibit communication, may increase an already normal tendency toward affirmances.

By contrast in the English system, where each of the three judges speaks, the members of the court know that each of his colleagues is going to express himself. Hence, each will tend to give freer rein to his doubts, which might ripen into a reversal that would not have occurred had all of these nuances been suppressed.[7] This is not to suggest that English judges are inherently endowed with greater strength of character or intellect than those in North Dakota, but merely to speculate on the possible different influences generated by the procedures each court follows.

Moreover, there was some accentuation of the English court's bent toward reversals where the court reserved its opinion by stating "*curia advisere vult*". Of four such cases in the sample taken, three resulted in reversals. In a sense this might seem like an approach to a system like North

7. Id. at 26. This would seem to be an illustration of the "combined judicial operation" of which Lord Evershed speaks.

Dakota's and hence should militate against reversal. However, it is engrafted upon a system already conditioned to greater individual expression by the judges, which would be increased by the delay for unlimited deliberation, and in such a setting should logically make for more rather than fewer reversals. Such a conclusion also suggests the possibility that the delay in rendering decisions in North Dakota is fruitful not so much for the opportunity of deliberation among its members it affords the court as it is for permitting the assigned judge time to write a well-considered opinion.

The nature of negligence cases and the manner in which the lower court reached its decision may also bear on the attitude of the appellate judges. It is to be noted that in the English court all but one of the cases were tried below without a jury, while in North Dakota the proportion was just the opposite, and all cases save one were tried to a jury in the lower court. Findings of fact are a particularly strong element in negligence cases, and appeals frequently are based on inadequacy of the evidence or some improper handling of it by the trial court. An appellate court is usually very cautious about tampering with findings of fact in a lower court. One may surmise that this may be especially true where the findings were by a jury rather than by a single trial judge. Hence, the North Dakota court would tend to feel more inhibited about overturning negligence cases, fortified as they are by a jury's finding of fact, than would the English court, which has to call in question the findings of but one man.

On the basis of the foregoing, one might expect that there would be many more dissents in the English than in the North Dakota court. The North Dakota procedures suggest that the judge assigned beforehand for the opinion would assume a pre-eminently active and dominant role, militating against dissents and concurrences by his colleagues. In fact that is true, since the survey shows only one dissent, and one casual and superficial concurrence of one brief paragraph. If, by contrast, the English system promotes more independent and individualized thinking by each judge, one would expect a greater proportion of dissents, probably something like the comparison between the two courts as to affirmances and reversals. However, that is not the case, and England also shows but one dissent. Here we have the explanation offered

that the equally full participation by each judge in the decision-making process, and hearing each others' ideas during the oral argument and the oral rendering of decisions makes each aware of the views of the others, which results in their usually reaching a sort of spontaneous consensus. This suggests that the similarity in the very rare dissents in both courts is reached by divergent routes. In North Dakota it is the relatively authoritarian function of the assigned judge that leads to this result, while in England it is a natural harmony resulting from a greater airing of the views of the entire court.

However, there are indications that the English court nevertheless is slightly more prone to dissents. For one thing, there is the simple mathematical proposition that the larger the number of individuals involved, the greater is the likelihood of lack of unanimity. Hence, on a basis of pure mathematical probability, one would anticipate more dissents in North Dakota's five man court than in England's three man court. On this basis, the survey does show that the English court's procedures are somewhat more productive of dissents, but this is counteracted by the smaller number on the court.

Moreover, the dissent in the North Dakota court occurred in the most unusual of the cases before it. It was the assault and battery case, the only one outside the field of negligence, and the only one which had not been tried to a jury in the lower court. This suggests a hypothesis that an unusual case will stimulate the entire court to more active and independent participation and less reliance on the leadership of the assigned judge, and hence dissents are more likely to eventuate. Also, it is to be noted that this unusual case may have stimulated conditions closer to the English practices, which suggests a hypothesis that the more the North Dakota court operates like the English case, the greater becomes the likelihood of dissent.

On the other hand, no strong contrast should be suggested between the English court of three strongly individualistic judges on the one hand and a North Dakota court of one dominant judge with four supine cyphers on the other. In eight of the twelve English cases the opinion of the presiding judge, the first to speak, was longer than the opinions of the two other judges combined. Frequently the remarks

of the other two judges would be couched in terms of having a few words to add to what the presiding judge had said, and sometimes they would merely state their agreement and make no remarks at all. For example, Lord Hodson was on the court for eight of the cases, and he invariably spoke last. On two occasions he had nothing to say but state his agreement, and in another he added only a very brief paragraph. His opinions were always the shortest of the three, with one exception when all three judges gave opinions of about equal length. There may be various particular explanations for the seemingly subdued role of Lord Hodson, but otherwise it suggests something of the passiveness hypothetically ascribed to the North Dakota judges.

Little in the way of patterns appeared as to the total length of opinions. Perhaps the chief one is the fact that the North Dakota opinions averaged ten pages as opposed to eight and one-half pages for the English opinions. This of course points to a conclusion that written opinions tend to be longer than oral, even though there be but one judge writing as opposed to three judges speaking. Two of the English opinions were apparently written (although the reports of the cases do not make formal indications when opinions are written), and although their respective lengths of nine and eleven pages were somewhat longer than average, they were not among the longest. There was a weak tendency in both courts for the majority opinion to be somewhat longer when there was a dissent.

This survey suggests the following conclusion by way of positive contrasts regarding the decision-making processes of the English Court of Appeal compared to the Supreme Court of North Dakota:

1. They promote a definitely higher rate of reversals.
2. They encourage dissenting opinions to a slightly greater degree.
3. They result in somewhat shorter opinions.

Again, the limitations of the survey must be borne in mind. For purposes of stating these conclusions, it is assumed that the admittedly inadequate sample nevertheless reflects accurately what would have been discovered had the sample been multiplied a hundredfold. It is suggested that the various

judicial attitudes producing these conclusions are conditioned by the judicial machinery fashioned for the decision-making function, tending to produce diverse psychological pressures in various respects in the two courts. And the survey was limited to one particular appellate court in each of two jurisdictions. How far one might generalize beyond this sample cannot be stated, but it provides a base for similar surveys into other courts and jurisdictions, and resulting comparisons might yield significant insights.