opinion that the plaintiff had been "peeping", he told the plaintiff he was under arrest and took him to the police station where he was confined.

At trial, the claim by the plaintiff, Frey, for civil damages for false imprisonment and malicious prosecution was dismissed against all three defendants, that is, the civilian Fedoruk and the two police officers, Watt and Stone. On appeal to the British Columbia Court of Appeal, the claim against Watt was allowed and $100 damages against him were awarded. However, the claim against Fedoruk and Stone were dismissed. It was these latter dismissals that were appealed to the plaintiff to the Supreme Court of Canada.

The issue dealt with by the Supreme Court was whether or not the plaintiff had committed a criminal offence when he "peeped" through the window of Fedoruk's mother's bedroom. If he was, then all parties defendant would have been justified in arresting the plaintiff. Mr. Justice O'Halloran held for the majority of the British Columbia Court of appeal that the plaintiff's actions constituted a breach of the peace in that he disturbed the "tranquility and privacy in a manner that he would naturally expect to invite immediate violence against him". He continued:

> It is my judgment that the circumstances here surround the intruder's act of looking in the window with such sinister implications, that in the lack of a credible explanation, his conduct as a whole must be regarded as criminal at common law. It was late at night, the intruder was on private property some 40 to 50 feet back from the street line; he was looking in a side window which did not face the street, the window was lighted and he could see a woman preparing for bed. Quite apart from the "peeping-Tom" aspect, the presence of a prowler in such circumstances, the dread of the hostile unknown at night, would naturally frighten the inmates of the house, and incite them to immediate violent defensive or offensive action against him.

This judge had specifically found that the plaintiff's conduct constituted neither an offence against the provisions of the existing Criminal Code nor the common law. In effect, Mr. Justice O'Halloran was criminalizing the conduct of the plaintiff not for what he did, but for the probable consequences that could ensure from that conduct the potential for violent retaliation for his conduct.

Mr. Justice Robertson, dissenting, observed that a "mere trespass" onto private property could not constitute a breach of the peace, even in these rather disturbing circumstances. The fact that this conduct had the distinct potential for disturbing those in peaceable possession of the residence did not alter his opinion. In particular, he found that any response by the residents would have been "offensive and retributive" rather than defensive in the absence of any evidence that the intruder displayed an intent to become violent. This latter element had been clearly established by the plaintiff's immediate flight from the premises when pursued by the defendant Fedoruk. In that regard, Mr. Justice Robertson made the following comment:

> I do not think that it is safe to hold as a matter of law, that conduct, not otherwise criminal and not falling within any category of offences defined by the criminal law, becomes criminal because a natural and probable result thereof will be to provoke others to violent retributive action.
>
> If such a principle were admitted, it seems to me that many courses of conduct which it is well settled are not criminal could be made the subject of indictment by setting out the facts and concluding with the words that such conduct was likely to cause a breach of the peace. Two examples may be mentioned. The speaking of insulting words unaccompanied by any threat of violence undoubtedly may and sometimes does produce violent retributive action, but is not criminal. The commission of adultery has, in many recorded cases, when unexpectedly discovered, resulted in homicide; but, except where expressly made so by statute, adultery is not a crime.

• (1730)

He went on to note that the only remedy provided for such conduct in addition to civil damages would be the procedure to have the person bound over to keep the peace and be of good behaviour. In reference to a claim that there was an inherent judicial power to declare any conduct to be an offence if it is in fact injurious to the public, even though it had never been declared to be criminal conduct, he noted:

> In my opinion, this power has not been held and should not be held to exist in Canada. I think it safer to hold that no one shall be convicted of a crime unless the offence with which he is charged is recognized as such in the provisions of the Criminal Code, or can be established by the authority of some reported cases as an offence known to the law.
>
> I think that if any course of conduct is now to be declared criminal, which has not up to the present time been so regarded such declaration should be made by Parliament and not by the Courts.

In relation to any claim of justification relied upon by the defendants, these failed of necessity, in the opinion of this judge, on the principle that ignorance of the law provided no such defence.

Mr. Justice Cartwright of the Supreme Court of Canada, speaking for himself and five other judges, agreed with the opinion of Mr. Justice Robertson in dissent in the British Columbia Court of Appeal. Mr. Justice Kerwin of the Supreme Court agreed with the reasoning of Mr. Justice Robertson in a separate concurring judgment despite the fact that he referred to the conduct of the plaintiff as contemptible.

The state of the law as a result of this judgment was considered to be unsatisfactory. Accordingly, in the amendments to the Criminal Code that came into effect in 1954, this new offence of trespassing at night came into existence. The harmful nature of the prohibited conduct flows from the very fact that it is happening at night. This essential aspect, mentioned by Mr. Justice O'Halloran in the *Frey v. Fedoruk* case, is essential and is worth repeating. It reads:

> It was late at night, the intruder was on private property—the window was lighted and he could see a woman preparing for bed. Quite apart from the "peeping-Tom" aspect, the presence of a prowler in such circumstances, the dread of the hostile unknown at night, would naturally frighten the inmates of the house . . .

This was many years before the Canadian Charter of Rights and Freedoms came into effect. What concerns me about the amendment to Section 173 proposed by the Hon. Member for Glengarry—Prescott—Russell (Mr. Boudria) is that the addition of the liability to daytime hours may very well cause the provision to become Charter vulnerable. I do not purport to be a constitutional law expert, but even I am aware of the prohibition in the Charter against any provision that offends the presumption of innocence of an accused person.