THE DEFENCE OF PRIVATE NECESSITY AND THE PROBLEM OF COMPENSATION

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> . . . of Ships and Wharves and Storms in Ports, and Greater Things in the Law of Torts.

I. INTRODUCTION

The defence of necessity in some cases negatives tort liability for an intentional invasion of the interests of another, where the defendant has inflicted the damage under the stress of circumstances for the purpose of preventing a threatened substantially equal or greater harm. [1] Such threatened harm may be damage to the commonwealth or a larger section of the community, to another, or to the defendant himself, or to its, their or his property. The defence, whose basis has been called "a mixture of charity, the maintenance of the public good and self-protection," [2] is closely related to certain others, such as self-defence and inevitable accident. It differs from self-defence in that the plaintiff is innocent, [3] and from inevitable accident in that the injury to such innocent plaintiff was either intended or highly probable. [4] It is clear that here, as elsewhere in the law of torts, a choice has to be made between competing values, with the allowance of the defence approving the sacrifice of one to the other; in this sense, the term "necessity," taken literally, is misleading. [5]

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[1] *See generally* J. FLEMING, THE LAW OF TORTS 96-98 (3d ed. 1965); SALMOND, THE LAW OF TORTS 44-46 (14th ed. R. Heuston 1965); WINFIELD, TORT 49-51 (7th ed. J. Jolowicz & T. Lewis 1963), Williams, *The Defence of Necessity*, 6 CURRENT L. PROB. 216-35 (1953). While the defence is generally recognized, it has been characterized as vague, CLERK & LINSELL, TORTS § 48 (12th ed. A. Armitage 1961), and the authority on it as "scanty," WINFIELD, *supra* at 49, while one authority has gone so far as to deny its existence, Newark, Book Review, 19 MODERN L. REV. 320 (1953).

[2] WINFIELD, *op. cit. supra* note 1, at 49.

[3] SALMOND, *op. cit. supra* note 1, at 44. An additional difference from self-defence in some cases is that defendant may have acted entirely for the protection of others rather than of himself or his property. *Supra* note 2.

[4] J. FLEMING, *op. cit. supra* note 1, at 96. Sometimes, however, an injury has been characterized as "accidental" or the result of "inevitable accident," which under the above analysis would be an example of "necessity." The Thornley, 7 Jur. 659 (Adm. 1843). Defendant ship, while driving over a sand bar, collided with another ship anchored in deep water to leeward of the sand. To have anchored before she was over the sand, and thus keep clear of the other, would have been dangerous to defendant ship. The collision was held "purely and clearly accidental."

[5] "The language of necessity disguises the selection of values that is really involved." Williams, *op. cit. supra* note 1, at 224.

Although the English and Canadian courts generally do not in terms make this distinction, [6] it is convenient to distinguish between cases of *public necessity*, as for example where the defendant is a "public champion," who has pulled down the plaintiff's house to prevent the spread of a fire which could endanger a town or city, [7] and those of *private necessity*, where the defendant has harmed an innocent plaintiff to prevent harm to the defendant's own interests. An instance of the successfully asserted defence of private necessity is the holding of the English Court of Appeal that defendant was justified in burning heather on plaintiff's land in order to prevent a fire on plaintiff's land from spreading to land on which defendant's master had shooting rights. [8] To make good the defence in such circumstances, defendant need only establish that what he did was reasonably necessary. [9]

This comment is concerned with the defence of private necessity, and more particularly with the problem of compensation to the innocent plaintiff, the invasion of whose interest is held lawfully justified by the need to protect the equal or greater interest of the defendant. This problem is involved in the interesting history of a recent case in the Exchequer Court of Canada.

II. THE *MUNN* AND *VINCENT* CASES

In *Munn & Co. v. The Sir John Crosbie*, [10] defendant ship was moored to plaintiff's wharf in Harbour Grace, Newfoundland, where she had been discharging a cargo of coal belonging to the plaintiff. A wind of hurricane force arose, which at first tended to push the ship away from the wharf, but upon a shift in the wind's direction, pressed the ship against it, crushing the wharf in and causing it substantial damage. [11] Plaintiff sued for damages in the Admiralty District Court, alleging that defendant was negligent in failing to remove the ship from the wharf when the storm arose. The trial judge

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[6] The textwriters, on the other hand, do. See particularly H. STREET, THE LAW OF TORTS 81-82 (3d ed. 1963). The American authorities, however, are relatively more explicit in distinguishing between "public" and "private" necessity, because of the more limited effect of the "private" necessity defence in American law, as appears later in this comment. W. PROSSER, THE LAW OF TORTS 127-29 (3d ed. 1964).

[7] *Cf.* Saltpetre's Case, 12 Co. Rep. 12, 77 Eng. Rep. 1294 (Par. 1606): "For the commonwealth, a man shall suffer damage; as, for saving of a city or town, a house shall be plucked down if the next be on fire... and a thing for the commonwealth every man may do without being liable to an action." 77 Eng. Rep. at 1295. The urgency of recognition of the public necessity defence is illustrated by the statement by McKean, C.J., of the Supreme Court of Pennsylvania pointing to the failure of the Lord Mayor of London to halt the Great Fire of 1666 by tearing down wooden buildings in the fire's path because he feared liability for trespass. Respublica v. Sparhawk, 1 U.S. (1 Dall.) 357 (Pa. 1788). *But cf.* Cité de Québec v. Mahoney, 10 K.B. 378 (Que. 1901), decided on civil law principles, where the owner of a house demolished to arrest a fire threatening an entire city section recovered its value from the city.

[8] Cope v. Sharpe (no. 2), [1912] 1 K.B. 496 (C.A.).

[9] *I.e.*, to avert a danger real and imminent at the time. *Ibid*; Cresswell v. Sirl, [1948] 1 K.B. 241 (C.A.).

[10] [1967] 1 Can. Exch. 94.

[11] Plaintiff's claim was for $8,735; the parties agreed repairs were $6,500. 52 D.L.R.2d 48, at 52 (Nfld. Adm. 1966).

found that defendant had not been negligent, and dismissed the action. He concluded that to cast the ship off in the circumstances would have exposed it and her crew to grave danger; the captain's decision to remain moored to the wharf was, therefore, prudent and proper. [12]

Plaintiff appealed to the Exchequer Court, challenging the finding that defendant had not been negligent. As an alternative ground of appeal based upon an alternative cause of action, it also argued that defendant, having deliberately preserved the ship at the expense of the wharf, was liable for the damage to the wharf. As authority for the alternative ground of appeal, it cited the leading American case of *Vincent v. Lake Erie Transp. Co.* [13] In this case the Minnesota Supreme Court held a shipowner liable for damage to the plaintiff's wharf. The defendant's ship was moored to the wharf to discharge cargo when a severe storm blew up, and the captain deliberately decided to keep the ship moored there rather than to cast off, and for that purpose replaced parted or chafed lines. The damage to the wharf resulted from the ship's being thrown against it by the wind and waves. The court rejected plaintiff's contention that the captain had been negligent in remaining moored at the wharf when it became apparent that the storm was to be unusually severe. It agreed that to cast the ship off would have been highly imprudent and that the captain had exercised good judgment and prudent seamanship in keeping it tied to the dock. However, the court found defendant liable because "those in charge of the vessel deliberately and by their direct efforts held her in such a position that the damage to the dock resulted, and... thus preserved the ship at the expense of the dock." [14]

At the trial, plaintiff's counsel had not supported their claim on the authority of the *Vincent* case; [15] this case evidently first occurred to them when it was called to their attention by an editorial note published with the report of the trial judge's decision. [16] The note, quoted in full in the appeal decision, urged comparison of the instant case with *Vincent* which, it pointed out, "although virtually identical on the facts, reached an opposite conclusion on the question of liability for the damage occasioned." [17] After setting forth the *Vincent* facts and holding in some detail, the note stated:

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[12] 52 D.L.R.2d 48. *See also* Dumont, Comment, 5 ALTA. L. REV. 336 (1967). Evidently, to have cast off would also have endangered the wharf. *See infra* note 48.

[13] 109 Minn. 456, 124 N.W. 221 (1910).

[14] 124 N.W. at 222 (per O'Brien, J.). The opinion continues:

This is not a case where life or property was menaced by any object or thing belonging to the plaintiffs, the destruction of which became necessary to prevent the threatened disaster. Nor is it a case where because of an act of God, or unavoidable accident, the infliction of the injury was beyond the control of the defendant, but is one where the defendant prudently and advisedly availed itself of the plaintiffs' property for the purpose of preserving its own more valuable property, and the plaintiffs are entitled to compensation for the injury done.

[15] *Supra* note 10, at 95-96.

[16] *Supra* note 11, at 48-49.

[17] *Supra* note 10, at 96.

> In other words, although the defendant's ship was privileged to remain at the wharf and use it as a sanctuary (and if the plaintiff had cast it off, to its damage, the plaintiff would be liable therefor), the defendant could not also demand that the plaintiff should bear the expense of so preserving the defendant's property. Such a solution, conferring only an 'incomplete' privilege upon the defendant, as distinct from an absolute immunity, seems to be both sound and just. [18]

The Exchequer Court dismissed the appeal [19] and sustained the trial judge's finding that the defendant was not negligent. Dealing with the alternative ground of appeal, it pointed out that to succeed on this ground the plaintiff had two hurdles to pass: first, whether the alternative cause of action could be put forward at the appeal stage; second, whether such a cause of action existed and whether it was applicable to the facts of the case. The court ruled that the common-law responsibility or duty of the defendant ship, moored to the wharf with the owner's permission, to take reasonable care to avoid damage to the plaintiff's property, was no greater than if the ship had been under way—*i.e.*, not to cause injury either wilfully or negligently to "property adjoining a spot in which the public have a right to carry on traffic," failing the establishment of which willfulness or negligence the owner of the injured property must bear his own loss. [20] The court held there was no suggestion that defendant willfully did the damage, plaintiff's submission of defendant's failure to move the ship from the wharf being construed by the court as an allegation of neglect of a duty to remove her, which issue had already been ruled against the plaintiff.

The court found the *Vincent* case distinguishable: whereas in *Vincent* those in charge of the vessel "deliberately and by their direct efforts held

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[18] *Ibid.* The reference to "incomplete privilege" is an allusion to the analysis of the *Vincent* case doctrine in Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality*, 39 HARV. L. REV. 307 (1926). Not the least interesting aspect of the *Munn* case is this *acknowledged* effect of the editorial note in bringing to the attention of counsel and the court a line of relevant authority which undoubtedly would not otherwise have been considered. While there are other instances of what might be called the dissenting editorial note, this type of acknowledged impact on court and counsel is rarer. The editorial note cites *Vincent* in C. WRIGHT, CASES ON TORTS 125 (3d ed. 1963), which has included the case in all four editions. While the note is anonymous, the casebook editor, the late Dean Cecil A. Wright, of the Faculty of Law, University of Toronto, was chief editor of the *Dominion Law Reports* at the time, and the assistant editors were and are members of the same faculty. It has been said that Canadian courts, in contrast to those in the United States and particularly the United States Supreme Court, ignore the written views of the law professors in reaching their decisions—*i.e.*, they do not cite law-review articles in their judgments. Editor's Page, 1 OTTAWA L. REV. at v n.2 (1966). The *Munn* case is a striking and welcome example of a different, but more direct, possible channel of influence of at least some Canadian law professors upon Canadian courts.

[19] *Supra* note 10 (per Jackett, P., with Thurlow, J., concurring). No further appeal has been taken.

[20] *Id.* at 97. The court's reliance here was on extended obiter quoted from the judgment of Lord Backburn in River Wear v. Adamson, [1877] 3 Mar. L. Cas. (n.s.) 521, at 528, [1877] 2 App. Cas. 743, at 767. The quoted passage applying to damage by public traffic states: "In this respect there is no difference between a shop, the railings or windows of which may be broken by a carriage on the road, and a pier adjoining to a harbour or a navigable river or the sea, which is liable to be injured by a ship." This dictum of Lord Blackburn, together with his similar dictum in Fletcher v. Rylands, L.R. 1 Ex. 265, at 286 (1866), is intimately connected with the transition from trespass to negligence, as the measure of plaintiff's burden of proof and cause of action in highway accident cases. See J. FLEMING, *op. cit. supra* note 1, at 20, n.25, at 39, n.14.

her in such a position that the damage to the dock resulted," [21] thus deliberately preserving the ship at the expense of the dock, it had been neither alleged nor established in this case that defendant had taken any steps to preserve the ship at the expense of the wharf. It was not necessary, therefore, to decide whether the *Vincent* case principle is part of the law applicable in Newfoundland. The court added, however, that if it were forced to decide, it would be inclined to adopt the following view of the dissenting judges in *Vincent*:

> I am of the opinion that one who constructs a dock to the navigable line of waters, and enters into contractual relations with the owner of a vessel to moor the same, takes the risk of damage to his dock by a boat caught there by a storm, which event could not have been avoided in the exercise of due care, and further, that the legal status of the parties in such a case is not changed by renewal of cables to keep the boat from being cast adrift at the mercy of the tempest. [22]

The court concluded by ruling that even if the *Vincent* case principle were otherwise applicable, the point was not open to the appellant because the facts constituting the cause of action—*i.e.*, "acts done by the defendant in the emergency for the preservation of the ship at the expense of the wharf," were not pleaded and were not in issue when the case was being tried. [23]

III. The "Incomplete Privilege"

A. *Background: the American Authorities*

The *Munn* case did not fully and directly confront the problem of compensating the innocent plaintiff. The *Vincent* case, [24] reconciling as it does the propriety and lawfulness of the defendant's acts, as justified by necessity, with defendant's duty nonetheless to compensate the plaintiff injured thereby, exemplifies the doctrine subsequently called the "incomplete privilege."

Dicta in two nineteenth-century cases, one English and one American, and an American case decided in 1908, two years before *Vincent*, form a background to the *Vincent* case. In 1832, in *Anthony v. Haney*, Lord Chief Justice Tindal stated by way of dictum that if an occupier of premises should refuse, on request, to deliver to its owner a chattel taken by a third person and placed on the occupier's premises, "the owner might in such case enter and take his property, *subject to the payment of any damage he might commit.*" [25] A similar dictum appeared nine years later in an opinion of the

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[21] *Id.* at 99, *quoting* O'Brien, J., *in Vincent.*

[22] *Id.* at 100, *quoting* from *Vincent, supra* note 13, at 222.

[23] *Id.* at 100.

[24] *Supra* note 13.

[25] 8 Bing. 186, at 193, 131 Eng. Rep. 372, at 374 (C.P. 1832). [Emphasis added]. *Cf.* Read v. Smith, 2 N.B. 288 (Sup. Ct. 1836).

Supreme Court of Pennsylvania.[26] In *Ploof v. Putnam*,[27] the Vermont Supreme Court held that the mooring of a vessel under stress of weather, without permission, to a private dock owned by the defendant, was not trespass because it was justified by necessity. The defendant was found liable for damages because his representative upon the island unmoored the vessel, permitting it to drift upon the shore, with resultant destruction of the vessel and injuries to its passengers.[28]

In a well-known article, Professor Bohlen of Harvard Law School pointed out that the above dicta, together with the *Ploof* and *Vincent* cases, held that one acting to save life or property from destruction might be deemed the holder of an "incomplete privilege"; his act

> may be so far privileged as to deprive the person whose interest is invaded or threatened with invasion of the privilege which he would otherwise have to terminate or prevent the invasion and to preclude liability for the mere harmless invasion of the right of the owner to the exclusive possession of his property, but... not so far privileged as to relieve him from liability to pay for any material harm that he does thereby.[29]

As was the case when Professor Bohlen wrote, the American authorities recognizing the incompleteness of this privilege are those in which the defendant has invaded an interest of the plaintiff as possessor of real property,[30] although, as he argued, there is no inherent reason

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[26] Chambers v. Bedell, 2 W. & S. 225, at 226 (Pa. 1841) (per curiam): "[I]f a chattel is put upon another's premises without the fault or consent of either party, the owner of the chattel may enter and take it peaceably, after demand and refusal of permission, *repairing, however, any damage which may be occasioned by his entry*." (Ephasis added).

[27] 81 Vt. 471, 71 A. 188 (1908).

[28] *Ibid.* The decision was rendered in overruling a demurrer to plaintiff's declaration. The *Vincent* opinion, after referring to the *Ploof* decision, said: "If, in that case, the vessel had been permitted to remain, and the dock had suffered an injury, we believe the shipowner would have been held liable for the injury done." The court added: "Theologians hold that a starving man may, without moral guilt, take what is necessary to sustain life; but it could hardly be said that the obligation would not be upon such person to pay the value of the property so taken when he became able to do so. And so public necessity, in times of war or peace, may require the taking of private property for public purposes; but under our system of jurisprudence compensation must be made." *Supra* note 13, at 222.

[29] Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality*, 39 HARV. L. REV. 307, at 313 (1926). A suggested alternative to the Hohfeldian-sounding "incomplete privilege," and one more suited to English legal terminology, is "qualified license." See Stuart & Leigh, *The Right of Recaption of Chattels*, 1 ALTA. L. REV. 77, at 84 (1955).

[30] The doctrine of these authorities is summed up in the RESTATEMENT (SECOND) OF TORTS § 197, ch. 8 (1965) under title, "Privileged Entries on Land," reading:

> Private Necessity
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> (1) One is privileged to enter or remain on land in the possession of another if it is or reasonably appears to be necessary to prevent serious harm to
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> (a) the actor, or his land or chattels, or
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> (b) the other or a third person, or the land or chattels of either, unless the actor knows or has reason to know that the one for whose benefit he enters is unwilling that he shall take such action.
>
> (2) Where the entry is for the benefit of the actor or a third person, he is subject to liability for any harm done in the exercise of the privilege stated in Subsection (1) to any legally protected interest of the possessor in the land or connected with it, except where the threat of harm to avert which the entry is made is caused by the tortious conduct or contributory negligence of the possessor.

why the result should be any different if plaintiff's invaded interest is in personalty. [31]

The theory of the "incomplete privilege" is presently incorporated in the American *Restatement of Torts* [32] and *Restatement of Restitution.* [33]

B. *Rationale*

If *A*, in a situation of "necessity," deliberately damages *B*'s property to the tune of $5,000 for the purpose and with the result of saving *A*'s property worth $15,000, it would seem to the average reasonable man only just and fair that *A* make good the injury to *B*. No less would it seem just and fair for *A* to do so if *A* has, in addition to preserving his own property of greater value at the sacrifice of *B*'s property, by this means averted a threat to his (*A*'s) bodily safety. [34] Our average reasonable

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The *Vincent* and *Ploof* cases are sources of the principal illustrations to § 197, and Bohlen's

[31] Bohlen, *op. cit. supra* note 29, at 319. Section 263 of the RESTATEMENT (SECOND) OF TORTS, Appendix at 209-10 (1966).

[31] Bohlen, *op. cit. supra* note 29, at 319. Section 263 of the RESTATEMENT (SECOND) OF TORTS incorporates the same doctrine as to chattels, although recognizing that there is "scarcely any authority to support the principle." It refers, however, to Mouse's Case, *infra* note 37. RESTATEMENT (SECOND) OF TORTS, Appendix at 295 (1966). Section 263 reads:

> Privilege Created by Private Necessity
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> (1) One is privileged to commit an act which would otherwise be a trespass to the chattel of another or a conversion of it, if it is or is reasonably believed to be reasonable and necessary to protect the person or property of the actor, the other or a third person from serious harm, unless the actor knows that the person for whose benefit he acts is unwilling that he shall do so.
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> (2) Where the act is for the benefit of the actor or a third person, he is subject to liability for any harm caused by the exercise of the privilege.
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> Illustrations:
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> 2. A, a pharmacist, refuses to sell B a bottle of medicine available only from A and necessary to save the life of B. B takes the medicine and uses it. B is privileged to do so, but is subject to liability to A for the value of the medicine.

Cf. The court in *Vincent*: "Let us imagine in this case that for the better mooring of the vessel those in charge of her had appropriated a valuable cable lying on the dock. No matter how justifiable such appropriation might have been, it would not be claimed that, because of the overwhelming necessity of the situation, the owner of the cable could not recover its value." 124 N.W. 221, at 222.

[32] See *supra* notes 30, 31.

[33] RESTATEMENT OF RESTITUTION § 122 (1937) :

> *Benefits Derived from the Exercise of Incomplete Privilege*
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> A person who is privileged to harm the land or chattels of another while acting to preserve himself or a third person or to preserve his own things or those of a third person is under a duty of restitution for the amount of harm done except where
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> (a) the harm which he seeks to avert is threatened by the things which he destroys or by the tortious conduct or contributory fault of the owner or possessor, or
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> (b) his act reasonably appears to be necessary to avert a public catastrophe, or
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> (c) he is exercising his privilege as a member of the public to enter land adjacent to a highway which has become impassable.

[34] Some might feel that *B* ought to bear the property loss for the saving of *A*'s life, but not for that of *A*'s property. *Cf.* the statement of Devlin, J., in Esso Petroleum Co. Ltd. v. Southport Corp., [1956] A.C. 218, at 227, [1955] 3 All E.R. 1204 :

> I am not prepared to hold without further consideration that a man is entitled to damage the property of another without compensating him merely because the infliction of such

man would also feel, certainly in the latter situation, that *A* was not blameworthy in acting as he did, *i.e.*, he acted properly. Not only should he not be punished, but *B* should be made liable for any consequent harm to *A* if he had resisted *A*'s act. This judgment, however, would not alter his conclusion that *A* ought to make good the injury he has caused to *B*. It is unquestionably this sense that in such a situation *A*, although he is not blameworthy, should yet make good the injury to innocent *B*, which explains the dictum in *Anthony v. Haney*, the Minnesota court's decision in *Vincent*, and the opinion of the *Dominion Law Report* editors that a similar result in the *Munn* case seemed "sound and just," as well as the adoption of such a rule by the *Restatement of Torts* and the *Restatement of Restitution*. Professor Bohlen put the *rationale* this way :

> Society has an interest in saving human life and property from destruction, but its only concern with the cost of salvage is that it shall be put upon him who, as between individuals concerned, should bear it. As between the individuals concerned, it is obviously just that he whose interests are advanced by the act should bear the cost of doing it rather than that he should be permitted to impose it upon one who derives no benefit from the act. [35]

The rightness, or what we might call the "net justice," [36] of such a result is further evidenced by the generally recognized equitableness, in analogous situations, of the maritime principle of "general average" [37] and of the principle of compensation for the governmental taking of property for public purposes. [38]

IV. The Compensation Problem in Canadian Law

It seems clear that the English authorities regard the defence of private necessity as a complete one. [39] This result, however, is reached by a tacit

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damage is necessary to save his own property. I doubt whether the court in such circumstances can be asked to evaluate the relation of the damage done to the property saved, by inquiring, for example, whether it is permissible to do 5,000£. worth of damage to a third party in order to save property worth 10,000£..... The safety of human lives belongs to a different scale of values from the safety of property. The two are beyond comparison and the necessity for saving life has at all times been considered a proper ground for inflicting such damage as may be necessary on another's property.

[35] *Op. cit. supra* note 29, at 316. This rationale is approved by J. Fleming, *op. cit. supra* note 1, at 99.

[36] *Cf.* K. Llewellyn, *The Good, the True, the Beautiful in Law*, *in* Jurisprudence at 202-03 (1962), particularly as to "that phase of fairness which we speak of as even-handedness." The term "net justice" perhaps fits here also by analogy to net income, because the gross saving to the defendant should be reduced by taxing defendant with the expense (to plaintiff) of producing that saving.

[37] Where plaintiff's cargo has been jettisoned in a storm at sea to save the ship and other cargo, the vessel and cargo saved are legally liable to a ratable contribution towards indemnifying the plaintiff. Strang, Steel & Co. v. A. Scott & Co., 14 App. Cas. 601, 5 T.L.R. 705 (P.C. 1889) (per Lord Watson). There is no similar duty to indemnify, however, where the cargo has been jettisoned in a storm on a river. Mouse's Case, 12 Co. Rep. 63, 77 Eng. Rep. 1341 (K.B. 1609).

[38] *Supra* note 13, at 222. In the absence of statute, the Crown must pay compensation for private property used or destroyed in the exercise of the royal prerogative to prevent it from falling into enemy hands. Burmah Oil Co. v. Lord Advocate, [1965] A.C. 75.

[39] Cope v. Sharpe (no. 2), *supra* note 8; Cresswell v. Sirl, *supra* note 9; Winfield, *op. cit. supra* note 1, at 51; Williams, *op. cit. supra* note 1, at 231. *Cf.* Esso Petroleum Co. Ltd. v. Southport Corp., *supra* note 34; despite the quoted statement of the trial judge, Devlin, J., the case, which

assumption that if defendant's act was "lawful" it cannot subject the defendant to liability. Thus, there is a compensation *impasse* in such cases in English law. It results from the monistic fault theory of liability, which first requires a yes-or-no judgment as to whether the defendant's act was lawful, based on whether he was innocent or guilty of moral or social fault. Then it derives *all* consequences as to liability *vel non* according to the conclusion thus reached. So in the *Vincent* case situation, once it were adjudged that the defendant shipowner was not at fault in remaining tied up to the plaintiff's wharf during the storm, it would follow that his act was "lawful," [40] and hence could neither be resisted by the plaintiff, [41] nor result in the defendant's liability for the damage to the wharf. The "yes-but" alternative embodied in the theory of "incomplete privilege" is incompatible with this conceptual structure; under it one cannot say to the defendant: "Yes, your act was lawful, you were not at fault, but you must nevertheless be held liable." [42] The structure requires that there be no liability without fault; hence, if there is to be liability, it can *only* be because the defendant was at fault, because his act was unlawful, which by hypothesis he was not and it was not. [43]

The way out of this compensation *impasse,* if there is to be a way out, clearly lies in court recognition of an appropriate form of non-"fault" liability. The choice would seem to fall between reliance upon a theory of "strict" or "absolute" liability and upon one of quasi-contract—more specifically, avoidance of unjust enrichment. While neither finds present support in the English or Canadian authorities, [44] it is submitted that the quasi-contract theory is the more appropriate and promising.

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involved the discharge of oil (which reached plaintiff's foreshore) to save a vessel, was dealt with on the issue of negligence alone. *Cf.* also Romney Marsh v. Trinity House, L.R. 5 Ex. 204 (1870), where it was assumed that defendant's ship was, without negligence, thrown upon plaintiffs' sea wall. Defendant did not break up the ship until all valuable property had been removed, and during the removal period it caused additional damage to the wall, for which action was brought. This case was also dealt with on a theory of negligence, and the court denied recovery because "There was no duty to sacrifice the vessel in the plaintiffs' interests." *Id.* at 208. The paucity of English authority in the *Munn* and *Vincent* fact situation is explainable by the statutory rule of absolute liability in such cases under § 74 of the Harbours, Docks and Pier Clauses Act, 1847, 10 & 11 Vict., c. 27. *See* River Wear v. Adamson, *supra* note 20; The Mostyn, [1928] A.C. 57. In *Munn* the court held the statute inapplicable in Newfoundland. [1967] 1 Can. Exch. at 98.

[40] *I.e.*, if the resultant damage to the wharf could be viewed as deliberate, private necessity was a complete defence; if unintentionally caused, defendant was not negligent in causing it.

[41] *E.g.*, by casting the ship off from the wharf. See *supra* note 27.

[42] From the defendant's viewpoint, within this conceptual structure, it is no answer to say that since his act was lawful, if plaintiff had resisted it and caused the defendant harm in consequence, plaintiff would have been liable therefor.

[43] *Cf.* the criticism of the dictum in Anthony v. Haney, *supra* note 25, by the early American writer on torts, Cooley: "[B]ut if he (the owner) were liable in damages for the entry, it must be because the entry is unlawful; and in that case it might be resisted. There can be no such absurdity as a right of entry and a co-existent right to resist the entry." COOLEY, TORTS 52, n.4 (1st ed. 1879), 55, n.2 (2d ed. 1888), 66-67, n.28 (3d ed. 1906). The same anomaly appears, both conceptually and procedurally, if the action is for negligence, as the circumstances of necessity would lead to the conclusion that the defendant shipowner was not guilty of negligence (as in the *Munn* case), hence could not be held liable, whereas application of a theory analogous to that of "incomplete privilege" leads to liability.

[44] The *Munn* case, supra note 10, rejected both theories, at least by way of dictum, in the situation before the court. *See* discussion in text at 185-88 *supra;* note 47 *infra.*

The rationale of the *Vincent* case and of the "incomplete privilege" is founded on unjust enrichment, and a number of authorities, including the *Restatement of Restitution*, [45] support this view. [46] Unjust enrichment focuses upon a positive, radically different theory of liability, getting away almost entirely from the fault issue : defendant is to be made answerable not as the doer of the act, but as its beneficiary. Strict or absolute liability, "liability without fault," on the other hand, still focuses upon the question of fault and upon the defendant as actor; reliance upon such a theory for relief in a case like *Munn* or *Vincent* would unnecessarily commit the proponent to attempting to establish too much. One would be compelled to engage in the great debate on the modern basis of tort liability, with *Rylands v. Fletcher* overtones, and the certainty of stiff resistance from the courts. [47]

The suggestion, in short, is that in an appropriate case, perhaps similar to *Vincent* or *Munn*, Canadian courts should draw on the "incomplete privilege" theory and authorities and upon their own creative powers to grant relief to an innocent injured plaintiff against a defendant whose act is justified under conventional tort law by the doctrine of necessity. Such relief, novel in a Canadian jurisdiction, should be first accorded only in the clearest case, and cautiously developed on a case-by-case basis.

No suggestion is intended here that, on the basis discussed, the *Munn* decision was wrong in principle, that to have granted the plaintiff relief would have been "sound and just." For one thing, the facts as found in the trial court (and approved on appeal) would seem clearly to indicate that the alternative facing the captain if he attempted to move the ship in the storm was probable damage not only to the ship but to the wharf as well. [48] It is difficult, then, to conclude that in fact by staying tied up he saved the ship

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[45] *Supra* note 33.

[46] Bohlen, *op. cit. supra* note 29; Williams, *op. cit. supra* note 1, at 231-32; WINFIELD, *op. cit. supra* note 1, at 51-52. *But cf.* Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401, at 410-18. It is of interest to note that the French and Quebec civil law of unjustified enrichment (enrichissement sans cause), enforced by the action *de in rem verso*, tends to allow recovery in situations similar to that of *Munn* and *Vincent*, construing the benefit to the defendant to include the negative enrichment of avoidance of loss or certain expenditure. G. CHALLIES, THE DOCTRINE OF UNJUSTIFIED ENRICHMENT IN THE LAW OF THE PROVINCE OF QUEBEC 66-71 (1952). *Cf.* the French case of the ship captain who saved a ship from foundering by throwing gasoline barrels overboard, damaging plaintiff's oyster bed. Judgment of May 16, 1905, [1907] D.P. V at 34 (Trib. Comm. Dunkerque); although the action succeeded on a delictual responsibility theory, 3 DEMOGUE, OBLIGATIONS 239 (1923) suggests, with Challies' approval, *op. cit. supra*, at 70, that defendant was not at fault, but that an action *de in rem verso* lay *Cf.* Cité de Québec v. Mahoney, 10 K.B. 378 (Que. 1901). For details of *Mahoney*, see *supra* note 7.

[47] *Cf.* the appellate judgment in the *Munn* case: "We find no support in the authorities referred to by counsel... for his submission that a rule of absolute liability applies in a situation of this kind...." *Supra* note 10, at 97, *Cf.*, arguing for liability without fault, the Dumont's comment on the *Munn* trial court decision, *supra* note 12.

[48] "Since Captain Guilmont was faced with, in his view, probable damage to the ship *and the wharf* if he attempted to move the ship as against *possible* damage to the wharf if he did not attempt to move her, I find myself, in all the circumstances, unable to quarrel with his decision to remain at the wharf and ride out the storm there." *Supra* note 11, at 59 (per Puddester, D.J.A.). (Emphasis added). No similar danger to the wharf from an attempt to cast off appeared in *Vincent*.

at the expense of the wharf. For another, the argument that relief would be just rests on the theory that there was benefit to the defendant, but no benefit, only harm, to the plaintiff; however, it can just as well be contended that plaintiff *did* benefit. Plaintiff was a wharfinger; defendant tied up at plaintiff's wharf, with plaintiff's permission, for the benefit of both. [49] Why then should plaintiff not suffer the burden of a consequent loss caused it by "necessity" and without negligence?

It is regrettable that the procedural situation in the *Munn* case frustrated fuller litigation of the broader issues of the "incomplete privilege," perhaps even before the Supreme Court of Canada. It is to be hoped that should a similar opportunity arise in a future case, counsel and the court will be alert to explore these issues.

[49] The common benefit is implicit in the defendant ship's invitee status, recognized by the court. [1967] 1 Can. Exch. at 99. The situation as described is perhaps closer to that of *Vincent*; in *Munn* the benefit to plaintiff is even clearer, for the ship had been discharging a cargo of coal belonging to plaintiff. From this point of view, a stronger case would be made for plaintiff had it been the owner of a *private* wharf to which the defendant had been compelled and lawfully authorized by necessity to tie up in a storm. *Cf.* Ploof v. Putnam, *supra* note 27.