TORTS

*Frederick B. Sussmann**

I. INTRODUCTION

The extremely wide scope of the law of torts, arising out of its function to adjust the losses or injuries occasioned by the activities and clashes of modern society, [1] raises problems of selection, classification, and presentation for any general survey. In brief outline, the present article first describes some of the more noteworthy tort decisions of the Supreme Court of Canada for the period covered, and then takes up recent decisions of all courts on the intentional torts, negligence, and occupiers' liability, in that order. A concluding general section covers decisions on strict liability, nuisance, deceit, defamation, and a few other categories.

No preliminary general review of the field or discussion of recent substantive changes is included in this initial article. [2] On the other hand, it often reaches back for much more than a year to discuss significant recent decisions. Future torts survey articles, it is anticipated, will be on a more truly annual basis.

Of especial note is the publication in 1968 of the pioneering *Studies in Canadian Tort Law*, [3] whose pertinent articles will be found frequently cited.

II. IN THE SUPREME COURT OF CANADA

Four recent tort judgments of the Supreme Court of Canada, one on occupiers' liability, two on negligence, and one on slander, are of particular interest.

A. *On occupiers' liability*

In *Brandon v. Farley*, [4] the Supreme Court denied recovery for injuries suffered by a tank truck operator in taking from a municipal fire hall water he had purchased for resale. Plaintiff was injured when he slipped and fell

---

* B.A., 1935, M.S. in Ed., 1937, College of the City of New York; LL.B., 1943, Columbia University. Associate Professor of Law, Faculty of Law (Common Law Section), University of Ottawa. The author wishes to thank Mr. C.S. Barnett, third year student and member of the Board of Editors, for his substantial assistance in the preparation of this survey.

[1] See C. WRIGHT, CASES ON THE LAW OF TORTS 1 (4th ed. 1967).

[2] This has largely been done elsewhere. See Alexander, *Recent Developments in the Law of Torts*, *in* LAW SOC'Y OF UPPER CANADA SPEC. LECTURES (1966); Linden, *A Century of Tort Law in Canada: Whither Unusual Dangers, Products Liability and Automobile Accident Compensation?*, 45 CAN. B. REV. 831 (1967).

[3] (A. Linden ed. 1968) [Hereinafter cited STUDIES IN CANADIAN TORT LAW]. This book is a volume of essays on the law of torts in Canada dedicated to the memory of the late Dean C.A. Wright as "father of Canadian tort law." In this author's opinion, it will prove a very useful reference work and source-book of ideas in the field.

[4] [1968] Sup. Ct. 150, 66 D.L.R.2d 289.

on ice (on a door sill of the fire hall) formed of water spillage from a hose used to fill tank trucks. The Court held that the ice did not constitute an "unusual danger" to the plaintiff, who was an invitee, and in so doing, it reaffirmed the Court's adherence to the "classic" definition of the occupier's liability to an invitee as stated by Mr. Justice Willes in *Indermaur v. Dames*, [5] and applied Lord Porter's "objective" definition of "unusual danger" contained in his judgment in the House of Lords in *London Graving Dock Co. v. Horton*. [6] The Court held that the danger was not an unusual but rather an expectable one for members of plaintiff's class, and moreover that plaintiff had knowledge of the actual danger during that winter season and even several times on that very day before his fall. It distinguished its prior decision in *Campbell v. Royal Bank of Canada* [7] on the ground that the successful invitee in that case had been an ordinary customer of no particular class, who would have been entitled to expect the economical and easy precautions required to remove the danger. [8]

B. *Negligence: Only one cause of action for a single wrongful act*

In *Cahoon v. Franks*, [9] plaintiff had been sitting in his properly parked car when it was struck by a car owned and driven by defendant. Plaintiff in good time commenced an action in the Alberta District Court against the defendant, alleging negligence, to recover the value of this car, which had been destroyed beyond repair in the collision. Subsequently, but after the expiration of the applicable twelve-month limitation period, [10] he obtained orders giving him leave to amend his statement of claim to include a claim for personal injuries, and transferring the action to the Alberta Supreme Court. The defendant appealed, [11] contending that the amendments raised a new cause of action which was barred by the statute of limitations. Defendant relied on *Brunsden v. Humphrey*, [12] in which the Court of Appeal in England held that different rights were infringed in the two actions brought and that a tort causing both injury to the person and injury to property gave rise to two distinct causes of action. Plaintiff argued, on the other hand,

---

[5] L.R. 1 C.P. 274 (1866).

[6] [1951] A.C. 737, at 745.

[7] [1964] Sup. Ct. 85, 46 W.W.R. (n.s.) 79, 43 D.L.R.2d 341 (1963).

[8] [1968] Sup. Ct. at 154-56. In the *Campbell* case the plaintiff, a customer of the defendant bank, was injured when she slipped and fell on the bank floor, on a dangerous glaze near the teller's wicket resulting from slush which customers had tracked into the bank on a snowy day. Mr. Justice Spence had stated in *Campbell* that a test of unusual danger was the ease by which the occupier might avoid it, by way of comment on the trial judge's finding that a few strips of matting might have kept the floor nearly dry. [1964] Sup. Ct. at 96-97. *Cf.* Goldman v. Regina, 63 D.L.R.2d 470 (Sask. Q.B. 1967).

[9] [1967] Sup. Ct. 455, 63 D.L.R.2d 274.

[10] Section 131(1) of the Vehicles and Highway Traffic Act, ALTA. REV. STAT. c. 356 (1955) (repealed by Alta. Stat. 1966 c. 49, § 4(2)).

[11] Defendant's appeal to the Supreme Court of Canada was from a judgment of the Alberta Supreme Court, Appellate Division, 58 W.W.R. (n.s.) 513, 60 D.L.R.2d 237 (1967), which had dismissed defendant's appeal from the orders referred to.

[12] 14 Q.B.D. 141 (C.A. 1884).

that *Brunsden v. Humphrey* was no longer good law; that there is only one cause of action for a single wrongful or negligent act, with damages resulting from the single tort having to be assessed in the one proceeding; and that the distinction between the old causes of action for injury to the person and damage to goods had been swept away.

The Supreme Court, through Mr. Justice Hall, in dismissing the defendant's appeal, agreed with the detailed reasons for judgment of Mr. Justice Porter in the court below, and declared that "*Brunsden v. Humphrey* is not now good law in Canada and it ought not to be followed." [13] Porter, in his reasons for judgment thus approved by the Supreme Court, had pointed out that of the five judges involved in the *Brunsden* case, three had disagreed with the judgment and one of the remaining two had declared himself in doubt. He pointed to the language of Lord Denning in *Letang v. Cooper* as to the necessity of shaking off the trammels of the old forms of action [14] and to the "dominant American practice" rejecting *Brunsden*, and concluded that "[f]ree as we are to apply reason unhampered by precedent," the *Brunsden* principle should be rejected. [15] In the result, cases such as *Sandberg v. Giesbrecht* [16] are no longer good law in Canada.

C. *Negligence: Anticipated propensities of children*

In *Harris v. Toronto Transit Commission*, [17] the infant plaintiff, a boy of thirteen, had his arm crushed and broken when a bus owned by defendant commission in which he was a passenger hit a steel pole on the sidewalk as it was pulling away from a bus stop, causing some damage to the bus as well. The boy had, in violation of a by-law and a notice to "Keep arm in," of which he was aware, extended his arm through a window to point out something to a companion. The trial judge had divided the fault equally between the parties, but the Ontario Court of Appeal, in a decision rendered orally by Mr. Justice Laskin at the conclusion of the argument, had dismissed the claim on the ground that the infant plaintiff was "the author of his own misfortune." [18] Mr. Justice Ritchie, writing the majority judgment of the Supreme Court, [19] reversed and restored the trial judgment, dividing the fault equally. The Court found that the bus driver was guilty of negligence, and had been aware of the propensity of children to put their arms out the

---

[13] [1967] Sup. Ct. at 460.

[14] [1965] 1 Q.B. 232, at 239 (C.A. 1964).

[15] *Quoted in* the *Cahoon* case, [1967] Sup. Ct. at 457-59.

[16] 42 D.L.R.2d 107 (B.C. Sup. Ct. 1963). The *Sandberg* case was similar to *Cahoon*, except that plaintiff had recovered a judgment against defendant for negligently caused damage to plaintiff's car. After this action had gone to trial plaintiff commenced another action in a different court for damages for his personal injuries, and defendant contended there could be no recovery because the entire matter was res judicata. The British Columbia Supreme Court held the second action maintainable, applying *Brunsden v. Humphrey*.

[17] [1967] Sup. Ct. 460, 63 D.L.R.2d 450.

[18] [1967] Sup. Ct. at 462.

[19] Mr. Justice Judson dissented. *Id.* at 467-69.

window notwithstanding posted warnings. There are two particularly interesting aspects to its judgment: *first*, a reaffirmation, as to the defence of *volenti non fit injuria*, of Glanville Williams's distinction between physical and legal risk, and the acceptance of the requirement that for a good *volenti* defence, "there must have been an express or implied bargain between the parties whereby the plaintiff gave up his right of action for negligence"; [20] *second*, a rejection of the theory, based on outdated authority, that plaintiff's violation of a statutory prohibition is a complete defence rather than going to the question of plaintiff's contributory negligence, merely reducing his recoverable damages under the modern apportionment statutes. [21]

D. *Slander: Qualified privilege qualified*

In the slander action of *Jones v. Bennett*[22] the Supreme Court, reversing a unanimous decision of the British Columbia Court of Appeal, [23] determined that the facts failed to support the defence either of qualified privilege or of fair comment. Defendant, the Premier of British Columbia, while addressing a meeting of his own political party concerning various matters of public interest including the government's having introduced a bill to remove the plaintiff from his appointed position as Chairman of the Provincial Purchasing Commission, made the statement complained of in referring to the plaintiff and to the government's said action. [24] At the meeting in question, two reporters were present, and it was found that defendant knew this.

In respect of the defence of qualified privilege, the Court stated that while qualified privilege attaches to statements about a candidate made by an elector to his fellow electors which he honestly believes true and which, if true, would be relevant to the candidate's fitness for office, it would be an unwarranted extension of this privilege to attach it to statements by a holder of high elective political office to his supporters regarding his stewardship, with no election pending. However, the Court held, even assuming that the occasion would have been privileged had no newspaper reporters been present, any such qualified privilege was lost by reason of their presence to the defendant's knowledge, so that, as he must have known, he was communicating the words complained of to the public generally, *i.e.*, "to the world." [25]

---

[20] *Id.* at 463. The relevant comments on the *volenti* defence were made by Williams in his work on JOINT TORTS AND CONTRIBUTORY NEGLIGENCE 308 (1951), and were first adopted by Mr. Justice Cartwright, speaking for the majority of the Court, in Lehnert v. Stein, [1963] Sup. Ct. 38, at 44 (1962).

[21] [1967] Sup. Ct. at 465-67.

[22] 66 W.W.R. (n.s.) 419 (Sup. Ct. 1968).

[23] 66 D.L.R.2d 497 (B.C. 1968).

[24] *Cf. supra* note 22, at 421. Defendant's words complained of were, "I'm not going to talk about the Jones boy. I could say a lot, but let me just assure you of this: the position taken by the government is the right position."

[25] See, by way of contrast, the constitutionally-based decision of the United States Supreme Court in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), to the effect that public officials may not recover in libel against critics of their official conduct without proving deliberate falsity or

As to the defence of fair comment, the Court, while conceding that the controversy between plaintiff and the government was a matter of public interest and a proper subject for comment, agreed with the trial judge's ground for rejecting this defence, that if any element of comment were contained in Mr. Bennett's remarks, it was too bound up in false statements or imputations of fact to support a fair comment defense. [26]

III. Intentional Harms

Here the cases of interest are those of battery, [27] with regard to invasions of the person, and of conversion, as to property. One battery case, involving an infant defendant, was framed in trespass, and considers the present status of that ancient form of action where personal injury is alleged. Two criminal cases of indecent assault, but which from a tort viewpoint may be treated as involving "medical" battery, consider the defence of consent, and more particularly, what fraud on defendant's part will serve to vitiate the consent defence. In addition, a rather rare case involves the problem whether a defendant whose intentional invasion of an innocent plaintiff's interests is justified under the doctrine of necessity, might still be required to compensate such plaintiff.

A. *Battery: The action framed in trespass*

In *Tillander v. Gosselin*, [28] the infant defendant, who was just under three years old, had removed the infant plaintiff from her carriage and dragged her about the ground, causing her severe injury. The court dismissed the action, which was framed in trespass, ruling that no action will lie in trespass if the act is neither intentional nor negligent, and that an infant so young can be guilty neither of negligence, because he lacks sufficient judgment to be capable of exercising reasonable care, nor of forming an intention to inflict harm, because he lacks the mental ability to appreciate the nature of his act. The trial court's reasons for judgment are of interest in reviewing and reaffirming the earlier English and current Canadian authorities which reject the theory of strict liability in trespass, but which unfortunately retain a substantial vestige of such liability by holding that in a

---

reckless disregard for probable falsity. The constitutional basis for the decision was that the rule of law applied would otherwise fail to provide the required safeguards for freedom of speech and of the press. U.S. Const., First & Fourteenth Amendments. *Cf.* Time, Inc. v. Hill, 385 U.S. 374 (1967), applying a similar standard in an action by a "newsworthy person" against a magazine publisher for violation of a right-of-privacy statute.

[26] *See* 59 W.W.R. (n.s.) 449, at 458-59 (B.C. Sup. Ct. 1967).

[27] What is here referred to as "battery" is usually termed "assault." *See generally*, Atrens, *Intentional Interference with the Person*, Studies in Canadian Tort Law at 378.

[28] 60 D.L.R.2d 18 (Ont. High Ct. 1966), a decision by Mr. Justice Grant, *aff'd mem.*, 61 D.L.R.2d 192 (Ont. 1967).

trespass action where plaintiff proves injury by defendant's direct act, the onus falls upon the defendant to prove that his act was both unintentional and without negligence. [29]

B. *Medical Battery*

Both of the criminal cases of "medical" battery (charged as indecent assault [30]) involved vaginal examinations or other intimate physical contacts with women by a male defendant, in the guise of medical examination or treatment, where consent had been given in fact, and the issue was whether defendant's fraud as to his own or an observer's medical status nullified that consent as a legal defence, as having been obtained by false and fraudulent representations as to the nature and quality of the act. [31] The issue, then, was essentially the same as if the cases had been civil actions.

In *Bolduc v. The Queen*, [32] one defendant, a physician about to conduct a vaginal examination, falsely introduced the other defendant, a lay friend of his, to the patient as a medical intern, and obtained her consent to his observing the examination. The physician defendant then proceeded with the examination and treatment in the presence of the lay defendant. The physician touched the patient in the course of this procedure; the layman did not, but merely observed. The Supreme Court of Canada dismissed the appeals and quashed the convictions, holding that the fraud thus practised on the patient did not vitiate her real and comprehending consent to what the physician was supposed to and did do. The false and fraudulent misrepresentations as to the identity of the lay observer were not, the Court held, as to the nature and quality of the act.

On the other hand, in *Reg. v. Maurantonio*, [33] the Ontario Court of Appeal reached the opposite result on somewhat similar yet distinguishable facts. It dismissed appeals against conviction of the defendant, a layman who had falsely held himself out to the public, including the female complainants, as a licensed physician. The court held that the defendant's fraudulent representation which induced the complainants' consent to his touching their persons was not that he was a duly qualified and licensed physician, but that he was about to conduct a medical examination or to administer medical treatment, to which alone consent was given. The ques-

---

[29] 60 D.L.R.2d at 25. The rule in Canada (highway cases apart) appears to be established by the majority statement of Mr. Justice Cartwright in Cook v. Lewis, [1951] Sup. Ct. 830, at 839, citing the cases collected and discussed by Mr. Justice Denman in Stanley v. Powell, [1891] 1 Q.B. 86 (1890). *Cf.* Walmesley v. Humenik, [1954] 2 D.L.R. 232 (B.C. Sup. Ct.). It is to be hoped and anticipated that the Canadian courts will eventually adopt the modern English rule that the onus of proof of intent or negligence is on plaintiff in such a case, as laid down in the later cases of Fowler v. Lanning, [1959] 1 Q.B. 426, [1959] 1 All E.R. 290 (1958) and Letang v. Cooper, [1965] 1 Q.B. 232, [1964] 2 All E.R. 929 (C.A. 1964).

[30] CRIM. CODE § 141(1).

[31] CRIM. CODE § 141(2).

[32] [1967] Sup. Ct. 677, 63 D.L.R.2d 82.

[33] 65 D.L.R.2d 674 (Ont. 1967).

tion whether the physical touching was or was not a necessary part of a bona fide medical examination, the court held, went to the nature and quality of the act, and was an issue of fact which the trial judge had determined adversely to the defendant upon ample evidence.

Passing mention may be made here of *Male v. Hopmans*,[34] which involved an issue of informed consent to medical treatment, although it arose on a question of negligence rather than of battery. The particular question was whether it was incumbent on the doctor to disclose to the patient the known risks of a contemplated treatment. The Ontario Court of Appeal, affirming the trial court on this issue, held that on all the facts the defendant doctor was not negligent in not having made such disclosure.[35]

C. *Private necessity*

In *Munn & Co. v. The Sir John Crosbie*,[36] the Exchequer Court obliquely considered the defence of private necessity in justification of the intentional invasion of another's property interests, and more particularly whether an innocent plaintiff against whom the defence is successfully raised may nonetheless be compensated. The court by way of dictum rejected such a compensation claim, which was advanced on the authority of a leading American case.[37]

D. *Conversion*

Three conversion cases illustrate the special, sometimes anomalous, characteristics as well as the limits of an action for conversion, with the rapid price fluctuations of stock shares providing an interesting backdrop in two of them. In *MacLellan v. Melanson*,[38] which involved the seizure of a fishing boat from plaintiff under a warrant signed on defendant's behalf, the court reaffirmed that conversion properly lies upon plaintiff's establishing a possessory right (rather than ownership) in the chattel, and that defendant has, without lawful justification, intentionally exercised adverse control over it, whether or not with knowledge of plaintiff's right.[39]

---

[34] [1967] 2 Ont. 457. *See also* text accompanying notes 75 and 142, *infra*.

[35] *Cf.* Halushka v. University of Saskatchewan, 53 D.L.R.2d 436 (Sask. 1965), where, however, the issue of consent arose on a question of battery (trespass to the person), and the case was one of medical research rather than treatment. The different results in the two cases would seem to bear out the distinction made in *Halushka* that "there can be no exceptions to the ordinary requirements of disclosure in the case of research as there may well be in ordinary medical practice." *Id.* at 444. *Cf.* MacKenzie, Note, 1 OTTAWA L. REV. 736 (1966).

[36] [1967] Can. Exch. 9. See Sussmann, Comment, 2 OTTAWA L. REV. 184 (1967); Dumont, Comment, 5 ALTA L. REV. 336 (1967). The latter is a comment on the trial judgment, 52 D.L.R.2d 48 (Nfld. Adm. Dist. 1965).

[37] Vincent v. Lake Erie Transp. Co., 109 Minn. 456, 124 N.W. 221 (1910).

[38] 62 D.L.R.2d 40 (N.S. 1967).

[39] *See generally*, J. FLEMING, THE LAW OF TORTS at 52-53, 63 (3d ed. 1965); Hiort v. Bott, L.R. 9 Ex. 86 (1874).

A British Columbia case is of interest in that defendant had become the owner of the property allegedly converted. Plaintiff, a stock brokerage company, mistakenly sent to defendant, against payment, stock shares which defendant had not ordered from it. Defendant paid for the shares, and plaintiff had to purchase replacement shares in the market at a higher price in order to meet its obligation to another customer. The court held that on these facts defendant had completed the purchase of the shares, and that in the absence of fraud conversion did not lie. [40]

In the third case, [41] which involved alleged conversion of stock shares, plaintiff had pledged corporate share certificates to defendant as security for repayment of a loan, and the defendant, after plaintiff's default, sold more of the pledged shares than was required to realize the amount of the loan. The Ontario Court of Appeal held that defendant had converted only so many of the shares as exceeded such required number but would be held, as to the converted shares, to damages measured by the best market price at which they had been traded in the interval. The rationale was that had the defendant wrongdoer returned them to the plaintiff pledgor when he rightfully should have, the pledgor might have been able to sell them at such best market price.

IV. Negligent Harms

The comparative dearth of decisions as to intentional wrongs is as usual offset by an abundance of negligence cases. The basic pattern of these decisions is not marked by the upsetting of established doctrines, but rather, as with the intentional wrongs, by the application of familiar principles to differing fact situations.

A. *Elements of Negligence*

A notable exception to this basic pattern is the Supreme Court of Canada decision already discussed, which rejected long-standing authority in the English Court of Appeal and held that a wrongful or negligent act causing injury both to the person and to property gives rise to only one, not two causes of action, with damages from the single tort being assessed in the one proceeding. [42]

As has so often been the case, the nature of the negligence action again fell to be tested upon the construction of a statute of limitations. In a Manitoba Court of Appeal case where plaintiffs, injured in an airplane crash, sued defendants for their alleged negligence in repairing and overhauling

---

[40] Waite, Reid & Co. v. Rodstrom, 62 D.L.R.2d 661 (B.C. Sup. Ct. 1967). The court observed that there might, however, be a cause of action arising from mistake and justifying rescission, and gave leave for plaintiff's counsel to seek an amendment to plead mistake. *Id.* at 670.

[41] Brady v. Morgan, 65 D.L.R.2d 101 (Ont. 1967).

[42] Cahoon v. Franks, *supra* note 9; *see also* accompanying text.

the plane over six years before the crash, it was held that since damage resulting from a breach of duty is necessary to a cause of action in negligence, the cause of action did not arise until the damages were suffered by reason of the negligent act, and hence it was not statute-barred.[43] The court distinguished the recent Ontario Court of Appeal case of *Schwebel v. Telekes*[44] on the ground that in that case a contractual relationship existed between the parties, and the alleged damage was the result of a breach of the contract.

The *Schwebel* case is itself of interest. It arose in that borderland of tort and contract where there has been a breach of duty under a contract of employment. Defendant, a notary public and translator, was engaged by plaintiff to assist her in the settlement of a matrimonial dispute with her husband which involved the purchase of a home for plaintiff of which she was to have sole legal and beneficial title. Defendant, who was not himself a solicitor although plaintiff thought he was, retained a solicitor to act in the land transaction, with the result that certain land was conveyed to plaintiff as sole grantee under a registered deed. Plaintiff's husband, however, later successfully asserted a claim to an interest in that land. Plaintiff's action alleged negligence, but the Ontario Court of Appeal held itself bound by authority in cases of alleged negligence arising out of the solicitor-client relationship, to the effect that the cause of action arose (and hence the limitation statute commenced to run) when the breach of duty occurred, the result being that the action was statute-barred.[45] In his judgment for the court, however, Mr. Justice Laskin rather strongly indicated that statutes of limitation applicable to malpractice actions (medical, legal, or other) which commence to run from the breach of duty and not from the time when it was or ought to have been discovered by the client, are unjust to the victims of professional negligence and ought to be revised.[46] From this view it would be difficult to dissent.

---

[43] Long v. Western Propeller Co., 63 W.W.R. (n.s.) 146 (Man. 1968).

[44] [1967] 1 Ont. 541.

[45] *Id.*

[46] *Id.* at 544-46. *Cf.* the following, all cited by Mr. Justice Laskin in the court's judgment: Note, 63 COLUM. L. REV. 1292 at 1308-09 (1963); Lillich, *The Malpractice Statute of Limitations in New York and Other Jurisdictions*, 47 CORNELL L.Q. 339 (1962); Sullivan v. Stout, 199 A. 1 (N.J. 1938), where a negligent title search in 1910 resulted in the invalidation of the plaintiff's title in 1931, but the ensuing action was held to be statute-barred because the cause of action accrued in 1910. It has been pointed out with respect to American decisions in medical malpractice cases, that the courts have frequently tempered the severity of the rule that the limitations statute runs from the time of the acts constituting the malpractice, by adopting a "continuous treatment" theory—*i.e.*, that the existence of a continuous doctor-patient relationship tolls the statute; it is also observed, however, that such a theory is inapplicable in many attorney malpractice cases since an attorney-client relationship often involves but a single transaction. Note, 63 COLUM. L. REV. at 1309 (1963).

B. *Standard of care*

The standard of care required to discharge an assumed or ascertained duty of care will vary according to the circumstances. The law imposes as the general standard of measurement what the "reasonable man of ordinary prudence" would do in the circumstances. [47] The application of this abstract general standard to particular circumstances is left to the jury or to the judge in the jury's stead. [48] Necessarily, since reasonable men (even judges) may differ as to their appraisal of how the general rule is to be applied in any particular set of circumstances, predictability of result in an individual case is most difficult. [49] Yet in many cases, albeit not so much the litigated ones, a sound result may readily be recognized, however confused or mysterious its recipe. Moreover, in frequent type-situations such as employer-employee (master-servant) and carrier-passenger, the decided cases have developed more detailed guidelines. The relative abundance of the decisions reported on standard of care is typical.

Standard of care: Employer-employee. It is a well-settled facet of an employer's common-law duties to his employees that he owes them "an overriding managerial responsibility to safeguard them from unreasonable risks in regard to the fundamental conditions of employment—the safety of plant, premises and method of work." [50] The content of this duty of care exacted of employers varies, of course, according to the circumstances of each case; while the standard is high, and at one time approached a strict duty to ensure safety, the most recent trend has been a reversion to the ordinary negligence standard, *i.e.*, the exercise of reasonable care according to the circumstances. [51] This more modest measure was recently applied by the Supreme Court of Canada in denying a teacher recovery for injury against a school authority. The teacher had slipped on a piece of apple on the floor of a school-room which had been used by students for eating lunch and then had been imperfectly cleaned up. [52] The Court distinguished authorities appealed to as supporting plaintiff's case by the circumstance

---

[47] J. FLEMING, *supra* note 39, at 111.

[48] See *Id.*

[49] *See, e.g.*, Ware's Taxi Ltd. v. Gilliham, [1949] Sup. Ct. 637, [1949] 3 D.L.R. 721, a three-to-two decision in which the Court majority held the defendant taxi company negligent for having transported young children in the rear of a four-door sedan equipped with door handle and pushbutton without a safety locking device or what it deemed adequate supervision, the infant plaintiff having been injured when it fell out of the rear door, which opened when it evidently played with the mechanism. The dissenting minority pointed out that the defendant's transportation method was customary in other places in Canada and was acquiesced in by school authorities and parents.

[50] See J. FLEMING, *supra* note 39, at 455. *See also* Wilsons & Clyde Coal Co. v. English, [1938] A.C. 57 (1937); Smith v. Baker [1891] A.C. 325.

[51] J. FLEMING, *supra* note 39, at 455; Davie v. New Merton Mills [1959] A.C. 604 (P.C.).

[52] Thiessen v. Winnipeg School Div. No. 1, [1967] Sup. Ct. 413, 62 D.L.R.2d 1.

that in the cases cited the courts were dealing with conditions of dangerous employment, in which "the subject-matter was found to have created a duty falling little short of absolute obligation." [53]

The employer's duty encompasses also the obligation to give proper instructions to inexperienced workers employed on dangerous work, and one would have thought that if a third factor—that of youth and immaturity —were added to those of inexperience and danger, the case might be one where the subject-matter likewise could be found to create a duty little short of absolute obligation. Yet the Saskatchewan Court of Appeal, in a two-to-one decision reversing the trial judge, held defendant employer not liable to an inexperienced seventeen-year old boy employee who lost parts of several fingers under a meat-cutter blade which he was set to operating after brief instruction. [54] The result is perhaps justifiable on the facts, [55] but it is important to note that under the authorities cited in the majority opinion (including one involving a fifteen-year old girl employed in an English cartridge factory in the early years of the century), [56] "the duty of the master differs only in degree, and not in kind, with the nature of the danger and with the age and experience of the servant." [57]

Standard of care: Employer-employee standard applied to other relations. In analogous situations, one who "employs" another is under the same obligation with respect to safe equipment and conditions of work as in the strict employer-employee relationship. Examples illustrated by recent cases where the same obligation is recognized are those of the independent contractor [58] and the "volunteer" called upon for ad hoc assistance. [59]

---

[53] *Id.* 62 D.L.R.2d at 4. The cases thus distinguished, referred to by Mr. Justice Freedman in his dissenting opinion in the Manitoba Court of Appeal, were Naismith v. London Film Prods., Ltd., [1939] 1 All E.R. 794 (C.A.) (involving serious burns suffered by a firm "extra" whom the employer had provided with inflammable material which covered her costume), and Wilsons & Clyde Coal Co. v. English, *supra* note 50 (involving a haulage plant put in motion underground in a mine when an employee was caught in an exposed position and crushed).

[54] Fiddler v. Waterhen Fur Farm Ltd., 62 D.L.R.2d 299 (Sask. 1967).

[55] The majority opinion seemed largely to turn on the premise that the cutter had been so set up by the agent of the defendant that plaintiff's hand could not under ordinary circumstances have reached the cutter blade, and that the accident happened only because, without the defendant's knowledge, plaintiff had stood on a wooden block to operate the machine. *Id.* at 318-19.

[56] Cribb v. Kynoch, Ltd., [1907] 2 K.B. 548. The plaintiff in this case was injured through causing a cartridge to explode owing, as the court found, to a forewoman's negligent failure to give her proper instructions and warning as to the dangerous nature of the work. The court exonerated the defendants under the old doctrine of common employment, holding that the employer's duty to instruct a young or inexperienced person employed by him on dangerous work could be delegated by the employer to a foreman, and that the negligence of the foreman is a risk which a fellow-servant, even though an infant, takes upon himself.

[57] *Id.* at 560-61.

[58] Thiessen v. A.K. Penner & Sons, 61 W.W.R. (n.s.) 81 (Man. Q.B. 1967).

[59] Lettich v. Ocvirk, 65 D.L.R.2d 690 (Ont. 1967), citing Chapman (or Oliver) v. Saddler & Co., [1929] A.C. 584. In the *Lettich* case the plaintiff, a weekly tenant of the defendant, was injured by a fall from a defective ladder furnished him by defendant, who had asked his help with a storm window.

Standard of care: Non-employment activity requiring skilled supervision and preparatory instruction. A recent case [60] technically much further removed, but where the test applied was strikingly similar, is that of the obviously inexperienced young rider who was killed on a group "trail ride" supervised by the defendant riding academy when she fell from her horse and was trampled by another horse following too closely behind. The court held that the defendant breached its duty of reasonable care to prevent injury to its customers by providing incompetent trail guides for the ride, which involved twenty-seven or twenty-eight young riders including the deceased, who was known to be inexperienced. The guides had failed to keep the horses from bunching and failed to see that the deceased had, as a result, lost control of her horse. Further, the court held, it was negligent to permit an inexperienced rider such as the deceased to canter her horse during a ride, and to permit such a person to ride without proper instruction on how to sit correctly on a horse, and hold the reins and check the mount.

One limiting thread running through the employer-employee and analogous cases is that the "master" need not provide against obvious dangers, the risk of which the "servant" assumes. The concept of "obvious danger" varies with the "servant." One who is hired as an expert repairman, therefore, will be expected to exercise a very high standard of care for his own safety. [61] On the other hand, the danger of placing one's hand under a descending meat-cutter blade in the Saskatchewan case considered above was deemed obvious even to a complete novice operating the machine, and thus not to require specific warning. [62]

Standard of care: Carrier-passenger. While carriers are not insurers of their passengers' safety, a very high standard of care is required of them in this context. The Supreme Court of Canada has reiterated substantially this rule in at least two recent cases: *Harris v. Toronto Transit Commission* [63] and *Ruch v. Colonial Coach Lines Ltd.* [64] In the *Ruch* case, plaintiff, a female passenger on defendant's bus, was reclining with her back against the side of the bus and her legs stretched out over three back seats. She was injured by being thrown around when the bus went over a bump. At trial the jury found the bus driver not negligent, but the defendant company

---

[60] Saari v. Sunshine Riding Academy Ltd., 65 D.L.R.2d 92 (Man. Q.B. 1967).

[61] *Supra* note 58.

[62] *Supra* note 54 and accompanying text.

[63] *Supra* text accompanying notes 17-21.

[64] 1 D.L.R.3d 1 (Sup. Ct. 1968). In both the *Harris* and *Ruch* cases, the Court approved the following statement of Chief Justice Kerwin in Kauffman v. T.T.C., [1960] Sup. Ct. 251, at 255:

> While the obligation upon carriers of persons is to use all due, proper and reasonable care and the care required is of a very high degree, *Readhead v. Midland R. Co.* [(1869), L.R. 4 Q.B. 379], such carriers are not insurers of the safety of the persons whom they carry. The law is correctly set forth in 4 Hals., 3rd ed., p. 174, para. 445, that they do not warrant the soundness or sufficiency of their vehicles, but their undertaking is to take all due care and to carry safely as far as reasonable care and forethought can attain that end.

negligent in not having given warning by a posted sign of the danger of using the back seats of the bus in a reclining position. After verdict, plaintiff was allowed an amendment to plead such negligence. The Supreme Court, through Mr. Justice Ritchie, agreed with the reasons for judgment in the Court of Appeal dismissing the action, thus finding the defendant company not to have breached the high standard required.

In *Rizos v. Nyholt*, [65] plaintiffs were invitees injured while riding in a train owned and operated by defendants in their amusement park. The court, while quoting the standard of care owed to an invitee under the established formula,[66] laid more emphasis upon the carrier-passenger standard in holding defendants liable. In substance, the court held that defendants, as carriers of the plaintiffs for hire, were, although not insurers, under a very heavy duty of care to carry them in safety and to ensure that their vehicle was fit for this purpose and free from defects capable of detection by any reasonable inspection. Apart from negligent operation by their driver, the court held, the defendants had failed in this duty with respect to the vehicle in that they had failed properly to inspect its equipment before the trip in question and to provide a safety device which reasonable prudence would have required.

Standard of care: Dangerous things. The standard required varies with the foreseeable injury. In *York v. British Columbia Hydro & Power Authority*, [67] plaintiff was a passenger in a float-equipped airplane flown by a licensed commercial pilot. While practising landing on the water of Vancouver Harbour, the plane collided with an unmarked power transmission line owned by defendant, killing the pilot and injuring the plaintiff. The court held that in such a situation a high degree of care should be exacted of the defendant, because should an aircraft strike a transmission line, loss of life is probable. [68] The court found that while the pilot was negligent in failing to familiarize himself with the existence of the line, defendant company had breached its duty of care by not marking its lines or properly painting its towers, it being foreseeable that some pilots would fail to exercise reasonable care. [69]

---

[65] 60 W.W.R. (n.s.) 1 (Sask. Q.B. 1967).

[66] See Justice Willes in Indermaur v. Dames, L.R. 1 C.P. 274, at 288 (1866).

[67] 65 D.L.R.2d 186 (B.C. Sup. Ct. 1967).

[68] Id. at 189, citing Paris v. Stepney Borough Council, [1951] A.C. 367, at 375 (per Lord Simonds); and Yoffee v. Pennsylvania Power & Light Co., (1956) 123 A.2d 636, a decision by the Pennsylvania Supreme Court in an action for damages arising out of the death of a pilot whose aircraft struck the defendant's transmission line where it crossed a river.

[69] The court, pursuant to the Contributory Negligence Act, B.C. REV. STAT. c. 74 § 5(1960), determined the degrees of fault of the pilot and the defendant as fifty percent for each. *Id.* at 196.

Some products commonly used in modern life are regarded as inherently dangerous. With respect to them, the law requires the highest possible standard of care, imposing a duty practically that of an insurer. One is natural gas, and injuries caused through it brought liability to defendants in two recent cases: one in Alberta in which death and serious illness were caused by carbon monoxide poisoning resulting from imperfect combustion of natural gas in defectively installed equipment, [70] and one in Manitoba involving property damage from an explosion caused by the rupture of a subsurface gas pipe. [71] In the Alberta case, the specific standard of care was determined by statute, and both the defendant installing-contractor and the Crown were held liable for its breach, the latter vicariously for the negligence of its officer, a building inspector who failed to discover the dangerous condition and to require its remedy. In the Manitoba case, one of the defendants held liable for negligence was a property-owner who had ordered some work to be done by the other defendants without disclosing to them the presence of the concealed pipe in a position where it was likely to be disturbed by the work, while the others had made no inquiries to find out if there was a gas line on the property nor taken appropriate precautions, although they knew that gas had been supplied to many houses in the vicinity for some years.

Standard of care: Medical malpractice. In the Alberta gas-death case, [72] a third defendant was a physician, a general practitioner who had misdiagnosed the illness as influenza rather than the actual carbon monoxide poisoning. The court agreed with the trial judge's conclusion that negligence on the physician's part had not been established. The standards applied were those laid down by Justices Rand and Abbott respectively in *Wilson v. Swanson.* [73] Applying Rand's test to the conflicting expert testimony, the court could not find it established that the "preponderant opinion of the group would have been against" the defendant's judgment, nor could it find, applying Abbott's test, that the defendant did not use the degree of skill of a general practitioner. In short, the court found that the evidence dis-

---

[70] Ostash v. Sonnenberg, 67 D.L.R.2d 311 (Alta. 1968).

[71] McKenzie v. Hyde, 61 W.W.R. (n.s.) 1 (Man. Q.B. 1967).

[72] *Supra* note 70.

[73] [1956] Sup. Ct. 804, 5 D.L.R.2d 113. Mr. Justice Rand said: "There is here only the question of judgment; what of that? The test can be no more than this: was the decision the result of the exercise of the surgical intelligence professed? Or was what was done such that, disregarding it may be the exceptional case or individual, in all the circumstances, at least the preponderant opinion of the group would have been against it? If a substantial opinion confirms it, there is no breach or failure." 5 D.L.R.2d at 119. Mr. Justice Abbott said: "The test of reasonable care applies in medical malpractice cases as in other cases of alleged negligence. As has been said in the United States, the medical man must possess and use that reasonable degree of learning and skill ordinarily possessed by practitioners in similar communities in similar cases." 5 D.L.R.2d at 124.

closed an error of judgment on defendant's part, and not "an act of unskilfulness or carelessness or which was due to lack of knowledge." [74]

In *Male v. Hopmans*, [75] plaintiff had become deaf as a result of defendant doctor's use of a radical drug in the treatment of plaintiff's knee infection. The insert or label of the drug package, which defendant had read, warned of possible deafness as a side effect and described tests to determine its onset. The court rejected, under the principles of *Wilson v. Swanson*, the ground of negligence urged for defendant's having administered the drug in the chosen manner and dosage, but sustained another ground: failure to make the recommended periodic tests which would have given early warning of the hearing impairment. The court adopted the view that defendant, having determined to embark on a radical treatment, was required to exert the utmost vigilance for his patient's safety, but had failed in that duty.

Standard of care: Motor vehicles. Two Supreme Court of Canada automobile negligence cases are of interest. One emphasizes, were emphasis needed, that the reasonable care standard must take account of all the circumstances viewed together rather than in isolation from each other; the other, while recognizing that a driver may not disregard common follies of other road-users which are to be anticipated, strikes down what it considers too high a standard for such anticipation. Two cases in other courts reflect divergent views on the relatively new topic of "seat-belt negligence," and the usual crop of rulings appears on what constitutes "gross negligence" or "willful and wanton misconduct" in gratuitous passenger cases.

In *Curbello v. Thompson*, [76] defendant, driving a heavy truck at night on a straight but wet and very slippery stretch of the Trans-Canada Highway, braked and turned his wheel to avoid a deer bounding across the road. The truck skidded, and defendant attempted to counteract the skid by a steering maneuver, but the truck continued to skid, spun halfway around and toppled over atop a car coming from the opposite direction on its own side of the road. The Supreme Court, reversing the Court of Appeal for British Columbia, restored trial judgments in consolidated actions holding the defendant driver liable in negligence. The truck had been travelling at about fifty miles per hour in a sixty-mile-per-hour zone, the defendant was keeping a reasonably careful lookout, the truck was heavily loaded, but not beyond its proper carrying capacity, the rear tires were roadworthy although eighty per cent worn with minimal centre tread left, and the driver's

---

[74] *Supra* note 70, at 331. The court also relied, in support of its conclusion on this point, on the doctrine of non-interference with the trial judge's conclusion as to the weight of the evidence, citing Powell v. Streatham Manor Nursing Home, [1935] A.C. 243, at 250-51 (Viscount Sankey, L.C.).

[75] [1967] 2 Ont. 457. *See also* text accompanying notes 34 and 142, *infra*.

[76] [1968] Sup. Ct. 626, 68 D.L.R.2d 551 (per Hall, J.).

reactions on seeing the deer showed no lack of reasonable care. While none of these factors taken in isolation could be said to amount to negligence, the Court agreed with the trial judge's conclusion that they could not be considered in isolation, but that the defendant was driving at an excessive speed in the circumstances of this particular case, and in consequence could not control his vehicle when he found it necessary to slow down.

In *Adams v. Dias*, [77] plaintiff's car had come into a main highway intersection from a side road at night at a safe, traffic-free moment, but stalled twice while traversing it to enter the far highway lanes. Having restarted after the second stall and turned into the highway, plaintiff's car was struck head-on by defendant's police car, which, speeding well over the fifty-mile limit in the opposite direction on the highway, had veered across the median strip onto plaintiff's side. The trial judge had found plaintiff forty per cent at fault for not having, after stalling the second time, kept a proper lookout, which the judge felt would have permitted him to avoid or diminish the severity of the collision. The Supreme Court's judgment reversed this finding of plaintiff's contributory negligence. Citing the well-known observation of Lord Uthwatt on anticipating the follies of other highway-users, [78] it considered defendant's actions "the type of folly which a driver is not bound to anticipate," and ruled that the trial judge's finding of plaintiff's fault imposed a much higher duty of care than that required of a reasonably prudent motorist. [79]

In what appears to be the first reported case in Canada on the issue, Mr. Justice Monroe of the Supreme Court of British Columbia held that the deceased's failure to have had the available seat belt fastened contributed twenty-five per cent to his injuries, and he reduced the damages accordingly. [80] In reaching this result, Monroe relied on expert testimony and American authority, noting the absence of Canadian authority. [81] In a later decision by Mr. Justice Dubinsky of the Nova Scotia Supreme Court, however, the British Columbia case was expressly disapproved, and no contributory negligence was found for failure to have worn the available seat belt. [82] The two cases are factually distinguishable in that in the British Columbia case the expert opinion testimony of a physician was to the effect that the deceased would not have suffered fatal injuries had he been wearing

---

[77] 70 D.L.R.2d 1 (Sup. Ct. 1968) (Ritchie, J.).

[78] In London Passenger Trans. Bd. v. Upson, [1949] A.C. 155 (1948), at 173, where he said: "A driver is not, of course, bound to anticipate folly in all its forms, but he is not, in my opinion, entitled to put out of consideration the teachings of experience as to the form those follies commonly take."

[79] *Supra* note 77, at 5-7.

[80] Yuan v. Farstad, 62 W.W.R. (n.s.) 645, 66 D.L.R.2d 295 (B.C. Sup. Ct. 1967).

[81] 62 W.W.R. (n.s.) at 651-54. The authorities cited were appeal court opinions in Wisconsin and California. The defendants' expert witnesses on the issue were also American: a retired captain of the Seattle police force and a Seattle physician and surgeon specializing in internal medicine, both of whom had studied the effectiveness of seat-belts in protecting motorists from injuries.

[82] MacDonnell v. Kaiser, 68 D.L.R.2d 104 (N.S. Sup. Ct. 1968).

the seat belt at the time of the collision, and the judge so concluded. There appears to have been no such testimony, indeed, no expert testimony at all, in the Nova Scotia case. In disapproving the earlier decision, Dubinsky states: "The contention that failure to wear a seat belt constitutes contributory negligence *per se* does not appeal to me," yet he appears to reject any such expert testimony as was adduced in the prior case by approving a writer's statement that there are too many variables involved for any doctor to be able to say exactly what injuries would have been suffered if the victim had worn a seat belt, as compared to those incurred without one. [83] The British Columbia case, it may be further noted, pointed to the provincial statute requiring front-seat belts in all cars manufactured after 1963 as giving some legislative sanction to the wearing of belts. [84]

The question of "seat-belt negligence" is thus very much an open one in Canada, and one which alert defence counsel will no doubt be quick to test further.

Standard of care: Motor vehicles—the guest passenger. Under the almost universally criticized statutory provision in force in all provinces except Quebec, an injured guest passenger must prove gross negligence to succeed against his driver. [85] While "gross negligence" is very difficult to define, it unquestionably posits a much more severe breach of the duty to take care than does "ordinary" negligence. The currently accepted meaning of "gross negligence" is simply very great negligence. [86]

One consequence of the greater difficulty of proof of such a case is that the plaintiff generally tries to show that he is not the type of passenger against whom the driver may plead this lower care standard. Differences both in statutory language and in judicial interpretation give rise to varying results when this issue is raised. [87] On the other hand, it may be suspected that at least some courts and juries are disposed to stretch a few points to find gross negligence in such cases. [88]

---

[83] *Id.* at 107.

[84] 62 W.W.R. (n.s.) at 653.

[85] Gibson, *Guest Passenger Discrimination*, 6 ALTA. L. REV. 211 (1968). The most typical statutory provision refers to "gross negligence or wilful and wanton misconduct." *E.g.*, the New Brunswick Motor Vehicle Act, N.B. Stat. 1955 c. 13, § 242.

[86] Cowper v. Studer, [1951] Sup. Ct. 450.

[87] *Compare* Fuller v. Atlantic Trust Co., 62 D.L.R.2d 109 (N.S. Sup. Ct. 1967), where passenger had agreed to pay for gasoline, he was not shown to be a "guest without payment", *with* Teasdale v. MacIntyre, [1968] Sup. Ct. 735, where parties were friends who arranged on a camping trip that plaintiff supply the camping equipment, defendant the car, and both share equally gasoline and oil costs; *held*, not a commercial arrangement within the exception of the guest passenger rule of the Ontario statute. It may be suggested that some confusion has arisen through the general application as precedent of Ouelette v. Johnson, [1963] Sup. Ct. 96, 37 D.L.R.2d 107, interpreting the Ontario statute, since the language of the other provincial statutes often differs significantly.

[88] In Holland v. Hallonquist, 59 W.W.R. (n.s.) 41 (1967), the British Columbia Court of Appeal considered that the owner (not driving) would be liable to a guest passenger for ordinary negligence in allowing his car to be driven while not in a proper state of repair; it held, however, that where the owner was himself the driver, the cause of action for negligent maintenance became

In making a finding of gross negligence, the judge often lists the circumstances and states that their cumulative effect is gross negligence while each of the individual elements, separately considered, would amount only to ordinary negligence. [89] Examples of driver conduct found in recent cases to constitute gross negligence vis-à-vis a guest passenger include: running through a red light at a city intersection at a speed of seventy to eighty miles per hour down a steep incline and entering a flat unbanked curve with which the driver was completely familiar; [90] racing on the highway with another vehicle in contravention of the dangerous driving prohibition of the Criminal Code; [91] and falling asleep at the wheel as a result of continuing to drive when feeling tired after having gone thirty-six hours with very little sleep. [92] In the last-mentioned case, the Supreme Court of Canada very recently held that the *res ipsa loquitur* principle may be invoked to infer gross negligence. [93]

Standard of care: Effect of breach of statute. In the above Alberta case, [94] where defendants were held liable for death and injury caused by the defective installation of gas-burning equipment, the court found breach of a duty and of the specific standard of care laid down in the Provincial Gas Protection Act and Regulations. Applying the well-known rule of the *Lochgelly* case, [95] it had no difficulty in finding that the act and regulations were enacted for the protection of persons in the position of plaintiffs, and therefore that the breach of their provisions, causing injury, entailed liability. [96]

C. *Proof of negligence: Res ipsa loquitur*

The recent decisions on the application of the *res ipsa loquitur* rule to negligence cases do not alter the essentials of the rule as accepted by the Supreme Court of Canada. That is, it is a circumstantial inference from

---

fused into the act of operating the vehicle, and proof of gross negligence would be necessary for liability. The Supreme Court of Canada on appeal, [1968] Sup. Ct. 130, agreed that gross negligence was required since the owner was driving, but expressly declined comment as to his liability if he were not. *Cf.* Causey v. McCarron, 63 W.W.R. (n.s.) 680 (B.C. 1968) holding, on construction of §§ 46 and 71 of the British Columbia Motor Vehicle Act, that the statutory liability of parents for the "ordinary" negligence of their minor child in driving the parents' car which they had entrusted to him, was not restricted by the provision requiring gross negligence in an action by a guest passenger against the "owner or driver" of a motor vehicle.

[89] Following Burke v. Perry, [1963] Sup. Ct. 329.

[90] Walton v. Todoruk, 66 D.L.R.2d 556 (B.C. Sup. Ct. 1967).

[91] Ridgeway v. Hilhorst, 59 W.W.R. (n.s.) 309 (Man. Q.B. 1967).

[92] Walker v. Coates, [1968] Sup. Ct. 599, 68 D.L.R.2d 436. *Cf.* Barnett, Note, at p. 355 *infra*.

[93] Walker v. Coates, *supra* note 92.

[94] Ostash v. Sonnenberg, *supra* notes 70 and 72. *See also* accompanying text.

[95] Lochgelly Iron & Coal Co. v. M'Mullan, [1943] A.C. 1.

[96] Ostash v. Sonnenberg, 67 D.L.R.2d at 321-25 (Alta. 1968). It is not so clear in Canadian law that defendant's violation of a penal statute intended for the protection of persons in plaintiff's situation and causing plaintiff's injury, *ipso facto* entails civil liability in a negligence action. See Sterling Trusts Corp. v. Postma, [1965] Sup. Ct. 324, 48 D.L.R.2d 423; Alexander, *The Fate of Sterling Trusts Corp. v. Postma*, 2 OTTAWA L. REV. 441 (1968).

proven facts, not a presumption of law. There must be reasonable evidence of negligence, but where the instrument of harm is shown to have been within the management of the defendant, "and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care." [97]

One noteworthy development, already referred to, is that the Supreme Court of Canada has now held that *res ipsa loquitur* may be invoked to infer *gross* negligence. In so doing, the Court dispelled the notion that it had ruled to the contrary in a prior case. [98]

An Ontario Court of Appeal case [99] was concerned with the "management" or control requirement. Defendant had exclusively serviced and repaired an oil furnace which exploded. Plaintiffs had not touched the furnace except to adjust the thermostatic control to increase or decrease heat, and no other agency intervened. In these circumstances, although defendant did not have physical custody or possession of the furnace, the court ruled that the type and extent of defendant's control was sufficiently exclusive for *res ipsa* to apply.

Other recent cases have to do with procedural questions in the application of the principle. Thus, one Saskatchewan decision held that if it is intended to be relied on it must be pleaded, [100] while two others considered it inapplicable if evidence were adduced as to the cause of the accident. [101]

Res ipsa and food products liability. In the field of products liability—more particularly, food products liability—the "pure" *res ipsa* principle has been stretched in the direction of absolute liability of the manufacturer, by making of it something akin to a true if theoretically rebuttable presumption, saddling the defendant with a most onerous burden of disproof. [102] The classical illustrative instance of the exploding coca-cola bottle produced at least two recent decisions in plaintiff's favour. In a Quebec case the Supreme

---

[97] Scott v. London & St. Katherine Docs Co., 3 H. & C. 596, at 601, 159 Eng. Rep. 665, at 667 (Exch. Chamber 1865). Application of the rule in these terms to negligence cases has been accepted by the Supreme Court of Canada. *See, e.g.*, Ottawa Elec. Co. v. Crepin, [1931] Sup. Ct. 407, [1931] 3 D.L.R. 113, at 116; Parent v. Lapointe, [1952] 1 Sup. Ct. 376, [1952] 3 D.L.R. 18, at 20. *See also* Wright, *Res Ipsa Loquitur*, STUDIES IN CANADIAN TORT LAW at 41 (A. Linden ed. 1968).

[98] Walker v. Coates, 68 D.L.R.2d at 439-40.

[99] Kirk v. McLaughlin Coal & Supplies Ltd., [1968] 1 Ont. 311 (1967).

[100] Rizos v. Nyholt, *supra* note 65. *See also* text accompanying notes 65 and 66, *supra*.

[101] Wild v. Allied Tiling, 60 W.W.R. (n.s.) 181 (Sask. 1967) (plaintiffs held entitled to rely on *res ipsa*); Regina Storage Co. v. Regina, 61 W.W.R. (n.s.) 443 (Sask. Dist. Ct. 1967).

[102] Zeppa v. Coca-Cola, [1955] Ont. 855, [1955] 5 D.L.R. 187; Varga v. John Labatt, 6 D.L.R.2d 336 (Ont. High Ct. 1957); Arendale v. Canada Bread, [1941] 2 D.L.R. 41 (Ont.). *See* Linden, *Products Liability in Canada*, STUDIES IN CANADIAN TORT LAW 216, 244-47; Linden, *A Century of Tort Law in Canada: Whither Unusual Dangers, Products Liability and Automobile Accident Compensation?* 45 CAN. B. REV. 831, at 859-60; Wright *supra* note 97.

Court of Canada reached this result by invoking the "presumption of fact" provision of the Quebec Civil Code, [103] and its decision was applied by an Ontario decision evidently grounded on *res ipsa*. [104] The principle laid down by the Supreme Court in the former case was quoted by the Ontario High Court in the latter: "The bottler of carbonated beverages owes a duty to furnish containers of sufficient strength to withstand normal distribution and consumer handling." [105] The Supreme Court added that "[e]ach case turns upon whether the evidence in that particular case excludes any probable cause of injury except the permissible inference of the defendant's negligence," [106] and both courts found negligence against the defendant in failing to provide an inspection system adequate to prevent defective bottles reaching customers.

D. *Proximate Cause: Remoteness; Last Clear Chance*

In the Manitoba natural gas case [107] already discussed under the standard of care required as to dangerous things, an issue arose as to the "reasonable foreseeability of consequences" test of liability. The damage, caused by an explosion arising from defendants' negligent rupture of a gas line, came about in a rather unusual way: gas from the fractured line seeped through porous soil to the surface, where it was blown by the wind through an open basement window of plaintiff's house some twenty feet away, the explosion occurring when the mixture of gas and air thus blown into plaintiff's basement was ignited by a pilot light. Applying the *Wagon Mound* [108] and *Hughes v. Lord Advocate* [109] decisions, the court held that as the injury complained of was of a class or character foreseeable as a result of the negligence, *i.e.*, an explosion resulting from the escape of gas, the defendants must be held liable notwithstanding any unpredictability in the precise way the injury came about.

The thorny issue of "last clear chance" arises when it is claimed that a chain of injury causation involving the negligence of more than one party

---

[103] Cohen v. Coca-Cola, [1967] Sup. Ct. 469, 62 D.L.R.2d 285. The Court's judgment (per Abbott, J.) held that the trial evidence "created a presumption of fact under Art. 1238 of the *Civil Code*, that the explosion of the bottle which caused injury to appellant was due to a defect for which respondent was responsible and that the latter failed to rebut that presumption." 62 D.L.R.2d at 289. Article 1238 provides simply, "Presumptions are either established by law or arise from facts which are left to the discretion of the courts." The basic principle of this Civil Code "presumption of fact" provision is similar to that of *res ipsa*: "Toute présomption fait appel au raisonnement. On procède par déduction pour en arriver à des conséquences tirées de ce qui arrive communément et ordinairement." A. NADEAU & L. DUCHARME, TRAITÉ DE DROIT CIVIL DU QUÉBEC, 435-36.

[104] Hart v. Dominion Stores Ltd., [1968] 1 Ont. 775 (Ont. High Ct.).

[105] *Id.* at 780.

[106] Cohen v. Coca-Cola, 62 D.L.R.2d at 288.

[107] *See supra* note 71 and accompanying text.

[108] Overseas Tank Ship (U.K.) Ltd. v. Morts Dock & Engineering Co. (The Wagon Mound No. 1), [1961] A.C. 388, [1961] 1 All E.R. 404 (P.C.); Overseas Tankship (U.K.) Ltd. v. The Miller S.S. Pty. Ltd., [1967] 1 A.C. 617, [1966] 2 All E.R. 709 (P.C.).

[109] [1963] A.C. 837, [1963] 1 All E.R. 705.

has been interrupted, the effect of one's negligence having been exhausted at some point, and that in consequence the other's supervening fault is substantially the sole cause. [110] This issue arose in at least two recent cases involving the typical highway collision, with differing results. [111] In one, the court relied to deny application of "last clear chance" upon the Saskatchewan statutory provision prohibiting a direction to the jury in respect of last clear chance unless one act of negligence was clearly subsequent to and severable from the other. [112]

E. *Nervous shock*

It was held in a recent English case that a railway owner should foresee that if through its negligence it causes a train wreck in which many people are killed and injured, persons assisting in rescue operations may suffer nervous shock and consequent injury although physically unhurt and in no fear for their own or any one else's safety; the court therefore held defendant railway liable to such a plaintiff rescuer. [113] Combining as it does the rule that the test of liability in a nervous shock case is simply foreseeability of nervous shock, with the rule that the rescuer is himself foreseeable, the case goes further than prior authority in rejecting accepted limitations on liability in this class of case and, in particular, appears to contravene the principle of *Bourhill v. Young*. [114] Whether its tentative approach to an expanded orbit of protection in this significant branch of negligence liability will survive in England or be followed in Canada, is a question whose resolution will be followed with interest. [115]

F. *Voluntary assumption of risk*

The defence of *volenti non fit injuria*, or consent, is often referred to as voluntary assumption of risk in the context of a negligence action, as distinct from an action for intended harm. [116] It can safely be said that this defence is but a shadow of its former self, and its substantial attrition in current negligence law is borne out by the recent cases. As noted above,

---

[110] *See generally* MacIntyre, *The Rationale of Last Clear Chance*, STUDIES IN CANADIAN TORT LAW at 160. As to the general question of proximity and remoteness, *see* Smith, *The Limits of Tort Liability in Canada: Foreseeability and Proximate Cause*, STUDIES IN CANADIAN TORT LAW at 88; Gibson, *A New Alphabet of Negligence*, STUDIES IN CANADIAN TORT LAW at 189.

[111] Ficko v. Thibault, 59 W.W.R. (n.s.) 500 (Sask. 1967); Fischer v. Manitoba Hydro, 62 W.W.R. (n.s.) 241 (Man. 1967). In *Fischer*, a fatal collision was the end-product of a rapid chain of events involving the movements of four vehicles at a highway intersection. The court held that even if the conduct of the first-acting driver had been negligent, its effect was spent before there occurred the separate and severable negligent acts of the last-acting driver, which directly caused the collision.

[112] Ficko v. Thibault, *supra* note 111. The Contributory Negligence Act, SASK. REV. STAT. c. 91, § 5 (1965). Similar provisions are in effect in Prince Edward Island, Newfoundland, and Alberta: *see* C. WRIGHT, CASES ON THE LAW OF TORTS 612 (4th ed. 1967).

[113] Chadwick v. British Transp. Comm'n, [1967] 2 All E.R. 945 (Q.B.); see McCann, Note, 2 OTTAWA L. REV. 494 (1968).

[114] [1943] A.C. 92, [1942] 2 All E.R. 396 (1942).

[115] *See* McCann, *supra* note 113; Williams, *Tort Liability for Nervous Shock in Canada*, STUDIES IN CANADIAN TORT LAW at 156.

[116] *See* J. FLEMING, *supra* note 39, at 256.

the Supreme Court of Canada reaffirmed, as to this defence, its acceptance of Glanville Williams's distinction between physical and legal risk, and of the requirement that for a good *volenti* defence, "there must have been an express or implied bargain between the parties whereby the plaintiff gave up his right of action for negligence." [117]

A Manitoba court, in a recent case again exemplifying the drunken driver-guest passenger situation in which the Supreme Court first accepted this distinction, applied the Supreme Court precedent in rejecting the *volens* defence. [118] Yet it can readily be seen that acceptance of this distinction still permits the survival of the defence against an expert repairman injured by an appliance, defectively maintained by the defendant, which he has been called upon and assumed to repair. [119]

It must be borne in mind, however, that the diminished availability of the *volens* defence as against a foolhardy plaintiff does not mean that such a plaintiff may completely escape, on the ground of the defendant's negligence, the legal consequences of his own folly; as shown by the decisions above referred to, his recovery is often diminished on the ground of his contributory negligence. [120]

G. *Ex turpi causa non oritur actio*

This relatively rare defence was sustained by the Manitoba Court of Appeal in dismissing an action by an infant plaintiff who knowingly accepted a ride in a stolen automobile. While the court agreed with the trial court's findings that the defendant had been grossly negligent and the plaintiff contributorily negligent, it held that plaintiff had been part and parcel of a continuing act of theft, and that his action in warning the driver of the apparent approach of a police vehicle had directly contributed to his injury. [121]

H. *Hospital liability*

The problem of the vicarious liability of a hospital for the negligence of its professional servants, and more particularly its doctors, has in England in recent years received quite a different answer from that of sixty years ago. [122] The movement has been from the "right of control" test under which it was held in 1909 that hospitals are not liable for their doctors' negligence [123], to the more recent holdings that they are, on general principles

---

[117] Harris v. Toronto Transit Comm'n, [1967] Sup. Ct. 460, 63 D.L.R.2d 450, at 453-4. See text accompanying notes 17-20 *supra*.

[118] Lillie v. Sanderson, 60 W.W.R. (n.s.) 535, at 539-40 (Man. Q.B. 1967), applying Stein v. Lehnert, [1963] Sup. Ct. 38, 40 W.W.R. (n.s) 616, at 621 (1962).

[119] Thiessen v. A.K. Penner & Sons, *supra* note 58.

[120] *Supra* note 118.

[121] Randos v. Warwin, 64 W.W.R. (n.s.) 690 (Man. 1968).

[122] J. FLEMING, *supra* note 39, at 342-43.

[123] Hillyer v. Governors of St. Bartholomew's Hospital, [1909] 2 K.B. 820 (C.A.).

of vicarious liability, or in terms of what has been called an "organization" test [124]. The question has been an open one in Canada, but a judgment of the Ontario High Court [125] has now adopted the modern English position in a case complicated by the additional factor that the negligent doctor, an anaesthetist employed by the hospital, had been assigned to assist the plaintiff patient's own privately employed anaesthetist, who was in charge of anaesthesia for the operation.

The court held the hospital liable, applying the holding of the *Mersey Docks* case [126] that a general permanent employer has a heavy burden of proof to shift to a hirer responsibility for the negligent acts of its servants. It ruled that the defendant hospital had not turned over the direction and control of its anaesthetist to the patient's own anaesthetist, since the former was a highly skilled trained professional who was obviously expected to use his own training and abilities aside from following the latter's direct orders; the question of his, and hence the hospital's liability, was therefore not to be decided by analogy to the law relating to the liability of a nurse, who must accept complete direction by the doctor. [127]

One can, it is submitted, but approve such a decision, since it is in accord with the common sense of the patient's situation: he has put himself in the hospital's hands, and to the extent he is injured by the negligence of the hospital's own employees, professional or no, as distinct from one employed by the patient himself, why should the hospital not be liable? [128]

I. *Negligent misrepresentation*

The *Hedley Byrne* principle continues to be applied in Canada, although given a narrow interpretation. [129] Its application against a careless real estate agent who misrepresents property to a relying purchaser was exemplified in a recent British Columbia case. [130] The misrepresentation was that the property was "apartment zoned," and the decision for liability followed an earlier similar decision in the same jurisdiction where the misrepresentation had been as to the income-earning capacity of a building. [131] Both decisions applied *Hedley Byrne*.

---

[124] Gold v. Essex County Council, [1942] 2 K.B. 293, [1942] 2 All E.R. 237 (C.A.); Cassidy v. Ministry of Health, [1951] 2 K.B. 343, [1951] 1 All E.R. 574 (C.A.). *See* J. FLEMING, *supra* note 39, at 342; Linden, *Hospital Liability*, 5 ALTA. L. REV. 212 (1967).

[125] Aynsley v. Toronto General Hospital, [1968] 1 Ont. 425 (High Ct.).

[126] Mersey Docks & Harbour Board v. Coggins & Griffiths (Liverpool) Ltd., [1947] A.C. 1.

[127] *Supra* note 125, at 440-41.

[128] "What possible difference in law . . . can there be between hospital authorities who accept a patient for treatment, and railway or shipping authorities who accept a passenger for carriage?" Lord Justice Denning in *Cassidy*, [1951] 2 K.B. at 350.

[129] Hedley Byrne & Co. v. Heller & Partners, [1964] A.C. 465, [1963] 2 All E.R. 575. *See* Glasbeek, *Limited Liability for Negligent Misstatement*, STUDIES IN CANADIAN TORT LAW at 115

[130] Hopkins v. Butts, 65 D.L.R.2d 711 (B.C. Sup. Ct. 1967).

[131] Dodds v. Millman, 47 W.W.R. (n.s.) 690, 45 D.L.R.2d 472 (B.C. Sup. Ct. 1964).

The potential of *Hedley Byrne* as an innovative precedent was perhaps more clearly indicated in cases where its applicability was assumed without being decided, and liability was rejected on the facts. In one such case, [132] defendant insurance agency, a stranger to plaintiffs, negligently advised plaintiffs that their house was "presently insured" against fire under temporary coverage when it was not. While assuming that a *Hedley Byrne* duty of care to give accurate information might have existed, the court found there was no causal link between the assumed negligence and plaintiffs' loss, since the evidence was that at the time plaintiffs' house was destroyed by fire, plaintiffs erroneously believed that their previous policy had not expired, and so had not relied upon defendant's misstatement. In another case, [133] plaintiffs suffered personal injuries and property damage from an explosion of propane gas which had leaked from the heating system in their premises and been ignited in an undetermined manner. Plaintiffs had complained to the defendant fuel company, for some time prior to the explosion, of a persistent propane smell, which would indicate either a leak or a low supply in the storage tank. Defendant, through its manager, erroneously attributed the odour to a low supply in the tank and so advised plaintiffs. The court assumed that *Hedley Byrne* would apply, but found that defendant had not been negligent on the basis of the information it had been given and available to it, and further, that plaintiffs should have been put on notice by subsequent events that the manager's explanation was incorrect.

J. *Damages*

For the most part, the recent cases of interest on tort damages have to do with issues of aggravation, punitive damages, and mitigation. [134] Preliminarily, however, we may note a substantial award for such items as loss of the amenities and enjoyment of life, and adverse personality change, to a thirty-two year old woman who suffered permanent brain damage owing to defendant's negligence in an operation, which reduced her mental age to that of a seven-year-old child. [135]

Since the 1964 House of Lords decision in *Rookes v. Barnard* [136] radically limiting the classes of tort cases in which exemplary or punitive damages may be granted, strong judicial expressions (albeit not holdings)

---

[132] Benson v. Ibbott-Seed Ins. Agencies Ltd., 60 D.L.R.2d 166 (B.C. 1966).

[133] Kleine v. Canadian Propane Ltd., 64 D.L.R.2d 338 (B.C. Sup. Ct. 1967). It should be noted that the court's assumption that liability had to be based on the *Hedley Byrne* principle is questionable. Since plaintiffs' injuries were physical (*i.e.*, personal injury and property damage) rather than strictly pecuniary, it would seem that the principle of liability could be that of *Donoghue v. Stevenson*, [1932] A.C. 562. *See* Glasbeek, *supra* note 129, at 122-29.

[134] *See also* text accompanying notes 41 (conversion), and 160, 161 (nuisance), as to decisions on other damage issues.

[135] Aynsley v. Toronto General Hospital, *supra* note 125, at 442-43.

[136] [1964] A.C. 1129, [1964] 1 All E.R. 367.

have rejected such a limitation for Canada [137]. In 1967 the Privy Council held *Rookes v. Barnard* inapplicable in Australia in a libel case [138] on the ground that Australia's punitive damages policies in such cases, involving "a sphere of the law where its policy calls for decision," had been developed by judicial decision prior to *Rookes* and on proper principles should not be disturbed. This would seem to strengthen the unlikelihood that the *Rookes* decision will be followed in Canada.

However, in a recent British Columbia decision, [139] the court awarded aggravated damages. After a minor car accident between plaintiffs' and defendant's cars, defendant without provocation punched the male plaintiff and stepped on the hand of the female plaintiff, his wife. The court, while holding that the facts did not warrant an award of punitive damages, ruled that defendant's conduct had aggravated the damage "to the extent that the plaintiffs should be compensated for the humiliation of the assault," and accordingly awarded a relatively substantial sum for such humiliation, included under the head of general damages.

In a Supreme Court of Canada case, [140] defendant set up in mitigation of damages the fact that the services required by plaintiff's disablement would be rendered gratuitously by plaintiff's mother or mother-in-law. The Court rejected this claim on the ground that to allow the value of such gratuitous services in mitigation of damage would be to conscript plaintiff's said relations into the service of the defendant wrongdoer. Where, on the other hand, a woman widowed through defendant's negligence had remarried, and her new spouse was a man whose economic status and expectations were remarkably similar to those of her late husband, defendant's mitigation claim succeeded. [141]

A different type of mitigation claim was unsuccessful in a medical malpractice case. [142] Defendant doctor's radical treatment cured plaintiff's knee infection as intended, but had the side effect of causing plaintiff deafness. The court held defendant negligent in having failed to make recommended tests which would have warned of the onset of hearing impairment. Defendant claimed the benefits of the treatment in mitigation of damages for the deafness. The court, while considering that benefits directly resulting from the wrongdoing would be taken into account in mitigation, rejected the claim, among other grounds, because the benefit was not a direct result of

---

[137] *See* Gouzenko v. Lefolii, [1967] 2 Ont. 262, at 268. *See also* note 168 *infra*; Unrau v. Barrowman, 59 D.L.R.2d 168, at 186-88 (Sask. Q.B. 1966); McElroy v. Cowper-Smith, [1967] Sup. Ct. 425, 60 W.W.R. (n.s.) 85, at 92-94 (Spence, J., dissenting in part).

[138] Australian Consolidated Press Ltd. v. Uren, [1967] 3 All E.R. 523 (P.C.).

[139] Golnik v. Geissinger, 64 D.L.R.2d 754 (B.C. Sup. Ct. 1967).

[140] Vana v. Tosta, [1968] Sup. Ct. 71, 64 D.L.R.2d 97 (1967) (per Spence, J.).

[141] Ball v. Kraft, 60 D.L.R.2d 35 (B.C. Sup. Ct. 1967).

[142] Male v. Hopmans, [1967] 2 Ont. 457. See text accompanying notes 34 and 75 *supra*.

the wrong since it resulted from the non-negligently adopted course of treatment itself, while the deafness resulted from defendant's negligent failure to carry out that treament with proper care.

In a British Columbia libel case, [143] defendant's claim in mitigation of damages because of plaintiff's failure to demand an apology was rejected. The court held that the law of the province did not require a libeled plaintiff to demand an apology, although his failure to do so may in some circumstances help to show that he is bringing the action more for monetary compensation than to restore his good name. The court found that under the circumstances such an inference was unwarranted since defendant should have known without a demand that retraction was in order.

V. Occupiers' Liability [144]

There have been no significant recent developments on occupiers' liability. The basic duty owed to a trespasser remains simply not to inflict intentional, wilful or maliciously reckless injury upon him. An infant may be a trespasser without knowing it, but if he is "allowed" onto the land, he becomes a licensee, entitled to recovery if injured by a "concealed danger." In a recent Manitoba case [145] the court considered that a smouldering fire could hardly be an allurement to a four-year-old child, but that even if it were it could not be termed a concealed danger.

Two appellate court licensee decisions are of interest. In a British Columbia case, [146] plaintiff, a swimming examiner, dove into shallow water at low tide and was injured. To the contention that the language of the leading cases precluded liability to all licensees except those who use reasonable care for their own safety, the court replied that the provincial Contributory Negligence Act applied in all cases of contributory fault, whatever its classification. It was further contended that the danger was not really "concealed," but was unknown to plaintiff only because of his contributory negligence in failing to see it. The court replied, however, that the act applied to apportion the liability according to fault in any case of unintentional harm, and that contributory negligence of this type did not per se preclude the existence of a "concealed" danger. It is interesting that the court apportioned liability for the negligence of defendant in failing to warn of the concealed danger, and of plaintiff in failing to notice it. In an Ontario case, [147] the infant plaintiff licensee, a child of six, was struck and injured by a hockey puck while on a city skating rink during a free skating period

---

[143] Grabarevic v. Northwest Publications Ltd., 67 D.L.R.2d 748 (B.C. 1968).

[144] See Harris, *Occupiers' Liability in Canada*, Studies in Canadian Tort Law at 250.

[145] Bonne v. Toews, 64 W.W.R. (n.s.) 1 (Man. Q.B. 1968).

[146] Bisson v. District of Powell River, 66 D.L.R.2d 226 (B.C. 1967), appeal from this decision was dismissed from the bench of the Supreme Court, June 20, 1968.

[147] Moran v. Sault Ste. Marie, 62 D.L.R.2d 452 (Ont. 1967).

when there was supposed to be no hockey playing. The defendant admitted in its statement of defence that it had an employee, one of whose duties was to see to it that, for the safety of other skaters, no hockey was played during certain periods. The court interpreted this as an admission of a "duty of care," and based liability on its breach.

As for invitees, we have already noted that the Supreme Court of Canada has recently reaffirmed its adherence to the "classic" definition of the invitor-occupier's liability as stated in the *Indermaur* case, and applied the "objective" definition of "unusual danger" as set forth by Lord Porter in the *London Graving Dock* case. [148] Dangers recently held "unusual" include a patch of ice in a store entrance in mid-January [149] and a puddle on a supermarket floor. [150] Held not unusual were a regularly cleaned terrazzo floor in an airport terminal building, just moistened by the shoes of passengers walking through slush from a plane, [151] ice on the doorsill of a fire station selling water (to one who regularly bought water there), [152] a glass door with a visible handle, [153] and a golf ball straying onto a parallel contiguous fairway. [154]

Two recent decisions [155] applied against a defendant occupier a higher standard of duty than that owed to an invitee, on the ground that plaintiff's payment of an admission fee had created a contractual relationship between the parties, including an implied warranty by the occupier that the premises were as safe as reasonable care and skill could make them.

Finally under this head, we may consider an example of downward rather than upward status mobility on the part of an entrant upon an occupier's premises. A patron of a beverage room in a hotel, leaving to go home, took a short cut through a hall not authorized for use by patrons, unbolted a door, and fell down a stairway. He was held not entitled to recover against the occupier, because although an invitee while in the beverage room, he became at most a licensee in the hall, and a trespasser when he opened the bolted door. [156]

---

[148] Brandon v. Farley, [1968] Sup. Ct. 150, 66 D.L.R.2d 289. *See also* text accompanying notes 4-8 *supra*.

[149] Joubert v. Davidner, 61 W.W.R. (n.s.) 402 (Sask. Q.B. 1967).

[150] Irwin v. O.K. Economy Stores Ltd., 62 W.W.R. (n.s.) 321 (Sask. Q.B. 1967).

[151] Goldman v. Regina, 63 D.L.R.2d 470 (Sask. Q.B. 1967).

[152] Brandon v. Farley, *supra* note 148.

[153] Piket v. Monk, 64 W.W.R. (n.s.) 63 (B.C. Sup. Ct. 1968).

[154] Ellison v. Rogers, 67 D.L.R.2d 21 (Ont. High Ct. 1967).

[155] McCarthy v. Royal American Shows Inc., 61 W.W.R. (n.s.) 45 (Man. Q.B. 1967), and Finigan v. Calgary, 62 W.W.R. (n.s.) 115 (Alta. 1967), both applying Maclenan v. Segar, [1917] 2 K.B. 325, and Brown v. B. & F. Theatres Ltd., [1947] Sup. Ct. 486. *See also* Roine, Note, 1 OTTAWA L. REV. 239 (1966).

[156] Stephens v. Corcoran, 65 D.L.R.2d 407 (Ont. High Ct. 1967).

VI. OTHER

A number of recent cases falling outside the above major categories merit brief mention.

A. *Strict liability*

The horse, it has again been held, is a domestic animal of normally gentle disposition, for whose actions its owner may not be held liable unless for negligence or knowledge of its particular harmful or vicious propensity. Moreover, even in the latter case, a plaintiff who provoked the animal and thus caused his own injury may not recover. [157] And an attempt to enforce *Rylands v. Fletcher* liability against the City of Regina for a burst water main failed, on the ground that the doctrine does not apply to a work authorized by legislation, so that defendant could not be held liable unless guilty of negligence. [158]

B. *Nuisance*

The burdensome contemporary problem of oil fouling coastal waters arose in a British Columbia case, [159] where the court held an oil leak into the bay water to be a public, or rather a "statutory" nuisance. Under the statute, defendant was held liable to plaintiff, a public body charged by the statute with removing the oil from the harbour waters.

The court in each of two Ontario cases granted an injunction against offensive odours held to involve a continuing private nuisance. In one, [160] involving defendant's "caged hen-laying business," the court rejected several defences : that defendant had taken all reasonable care; that the nuisance antedated plaintiff's presence; that it was a public nuisance not enjoinable at the suit of plaintiff, who had not suffered more than any of the other landowners in the area; and that the injury could be fully compensated by money damages. The other [161] involved smoke and odour from defendant's open-air garbage-burning operations adjacent to plaintiff's farm, which caused plaintiff discomfort and prevented proper pollination of his crops, resulting in their failure. While the dump was statute-authorized, the court held the authorization confined to non-nuisance garbage burning, and awarded plaintiff damages for the crop failure, although it refused them for personal annoyance or diminution of property value.

---

[157] Dowler v. Bravender, 67 D.L.R.2d 734 (B.C. Sup. Ct. 1968).

[158] Regina Cartage & Storage Co. v. Regina, 61 W.W.R. (n.s.) 443 (Sask. Dist. Ct. 1967).

[159] National Harbours Bd. v. Hildon Hotel (1963) Ltd., 61 W.W.R. (n.s.) 75 (B.C. Sup. Ct. 1967). *Cf.* Alexander v. Harrison, [1967] 2 Ont. 318, where the Court of Appeal held defendant liable for nuisance (*i.e.*, public nuisance) for having violated a municipal by-law and having allowed mud to be tracked from an excavation site on his land onto the road; he was held liable for damage done to plaintiff's vehicle injured when another vehicle slid on the mud into its rear. *See generally* McLean, *Nuisance in Canada*, STUDIES IN CANADIAN TORT LAW at 320, 324, 327 in respect of public nuisance.

[160] Atwell v. Knights, 61 D.L.R.2d 108 (Ont. High Ct. 1967).

[161] Plater v. Town of Collingwood, 65 D.L.R.2d 492 (Ont. High Ct. 1967). *See also* McLean, *supra* note 159, at 324, 333 in respect of private nuisance.

C. *Deceit*

The familiar requirements for a deceit action as laid down in *Derry v. Peek* [162] were applied in at least two recent cases in which defendants were held liable. In one case, [163] a bank and its manager were held liable in deceit for the manager's representation to an intending investor in a company banking with the manager's branch office, that there would be no risk involved in putting up a guarantee of the company's overdraft with the bank on the strength of the equity disclosed in financial statements prepared by the company for the manager and the intending investor, which the manager knew to be false. In the other, [164] it was held to be fraud for defendant vendors of an apartment building to represent to intending purchasers, with knowledge of the falsehood of the representation, that "a fair and accurate estimate" of the building's monthly expenses was 2,200 dollars when the accounts actually disclosed expenditures of 4,600 dollars. In both cases it was held sufficient reliance that plaintiffs would not have so acted had they known the truth, and it was no defence that they could have found the truth elsewhere (*i.e.*, were negligent), or that the fraud was only one of the reasons inducing their action.

D. *Indemnity between husband and wife*

In an interesting decision [165] of the British Columbia Court of Appeal, a wife, as owner, was sued jointly with her husband who, while driving her car without her consent, struck and injured plaintiff. It was held that the wife could properly claim indemnity from the husband in respect of any judgment which might be given against her by virtue of a statutory provision making her liable on the basis that she and her husband were living as members of the same household. It was so held notwithstanding a provision of the provincial Married Women's Property Act barring suit by one spouse against the other "for a tort" except that the wife would have the same remedies against her husband as well as others "for the protection and security of her own separate property as if such property belonged to her as a feme sole." The court held that even assuming the wife's indemnity claim was "for a tort" it was not barred by the quoted provision because it was a remedy for the protection of the wife's separate property, which it could be assumed would be available to satisfy any judgment of the plaintiff against her. Further, the court held, the indemnity claim was not for a tort or based upon tort, but arose from the application of a statutory provi-

---

[162] 14 A.C. 337 (1889).

[163] Goad v. Canadian Imperial Bank of Commerce, [1968] 1 Ont. 579.

[164] Parna v. G. & S. Properties Ltd., 67 D.L.R.2d 279 (Ont. High Ct. 1968).

[165] Allen v. Nolet, 60 W.W.R. (n.s.) 247 (B.C. 1967). The last-mentioned ratio applied Lister v. Romford Ice & Cold Storage Co., [1957] A.C. 1955. See Mendes da Costa, *Husband and Wife in the Law of Torts*, STUDIES IN CANADIAN TORT LAW at 470, 485, 532.

sion which created an irrebuttable provision of agency or employment, and the indemnity claim arising out of vicarious liability is based on contract, not tort.

E. *Inducing breach of contract*

In a case in which the Supreme Court of Canada unanimously dismissed, without opinion, an appeal from a judgment [166] of the British Columbia Court of Appeal, the facts were briefly these: Defendant, a wholesale grocery, became interested in a developer's plan for a shopping centre and guaranteed the developer's bank loan to provide the down payment on the property. The developer having been unable to obtain further financing, defendant, pursuant to its agreement with the developer, paid the next installment of the purchase price of the property and obtained from the developer an assignment of the latter's rights under the purchase agreement, and a further agreement that it might acquire title should the developer not repay the money within a specified time. The developer then retained plaintiff architects to design the centre. Defendant later elected, with the developer's agreement, to exercise its right to acquire title, and plaintiffs sued for wrongful interference with their contract for architectural services. The Court of Appeal, over a strong dissent, held defendant not liable, and it was the appeal from this judgment which was unanimously dismissed by the Supreme Court of Canada, in an oral judgment expressing agreement with the conclusions of the majority below. The prevailing opinion in the Court of Appeal held that the elements of the cause of action were a wrongful act, knowledge of the contract, and the intention to inflict harm, but that defendant's act was not unlawful but rather was justified on the facts and under its agreement with the developer. Furthermore, it was held, defendant did not intend to inflict harm in the required sense, but was acting to protect its legitimate interests even though the natural and probable consequence may have been to affect plaintiff's interest. The principal controverted point in the Court of Appeal was whether the wrongful intent required must be an intent to procure the breach of contract, or whether it is sufficient that it was to do a voluntary act which resulted in the breach. The Supreme Court's affirmance indicates its approval of the former view.

F. *Defamation*

We have already noted the recent judgment of the Supreme Court of Canada in an important slander case. [167] In another recent judgment of the Supreme Court in a libel case, [168] the Court held that the trial judge's charge had been improper in belittling plaintiff's damages and mentioning

---

[166] Dirassar v. Kelly, Douglas & Co., 59 D.L.R.2d 452 (B.C. 1966), *appeal dismissed*, 64 D.L.R.2d 456 (Sup. Ct. 1967).

[167] *Jones v. Bennett*, 66 W.W.R. (n.s.) 419 (Sup. Ct. 1968); text accompanying notes 22-26.

[168] Lefolii v. Gouzenko, Supreme Court, Oct. 1, 1968. The Supreme Court dismissed the appeal, but varied the Ontario Court of Appeal judgment ordering a new trial, [1967] 2 Ont. 262, by restricting the new trial to the issue of damages.

his doubts as to whether the words in question could be defamatory, the trial result having been a verdict for plaintiff, with an award of one dollar in damages. And we may note again here the British Columbia libel case [169] rejecting defendant's claim in mitigation of damages because of plaintiff's failure to demand an apology.

G. *Crown liability*

At common law, the Crown was not liable in tort. The Crown Liability Act, section 3(1) makes the Crown liable in tort for damages in respect of (a) torts committed by its servants, or (b) "breach of duty attaching to the ownership, occupation, possession or control of property." Section 6 excepts acts exercisable by virtue of Crown prerogative or authority conferred by statute. [170]

In respect of section 3(1)(b), the Supreme Court of Canada in *The Queen v. Breton* [171] held that the use of the word "duty" in the singular indicated that the reference was only to "the clearly identified and well-known duty established by the general law, and common in all territorial jurisdictions to all persons owning, occupying, possessing or controlling property," [172] and not to all duties created by specific enactment by way of exception to the general law. This interpretation was reached in the light of the strict construction which must be given the Crown Liability Act provisions because they affect the rights and prerogatives of the Crown. Therefore, the Court held, a Quebec City Charter provision requiring land owners to maintain their adjoining sidewalks or pay the city the cost of repair did not impose liability on the Crown for its breach, which caused plaintiff's injury, since it is by way of exception to the general law. [173] The Court also held the charter provision a tax provision not binding on the Crown, by virtue of section 125 of the B.N.A. Act. [174]

In another Supreme Court of Canada case [175] the Court, in holding that section 19 of the Patent Act [176] precluded a patent infringement action against the defendant, a Crown corporation and agent of the Crown, refused to adopt or base its decision upon "the general proposition that an action in tort will not lie as against an agent of the Crown."

---

[169] Grabarevic v. Northwest Publications Ltd., *supra* note 143; *see also* accompanying text.

[170] Can. Stat. 1952-53 c. 30.

[171] [1967] Sup. Ct. 503, 65 D.L.R.2d 76.

[172] *Id.*, 65 D.L.R.2d at 79.

[173] *Cf.* Commerford v. Board of School Comm'rs, [1950] 2 D.L.R. 207 (N.S. Sup. Ct.).

[174] *See* O'Brien, Note, 2 OTTAWA L. REV. 490 (1968).

[175] Formea Chemicals Ltd. v. Polymer Corp., [1968] Sup. Ct. 754.

[176] CAN. REV. STAT. c. 133 (1952).

In another recent decision [177] in this field, the Supreme Court of Canada held that the National Harbours Board, a Crown agent, was not protected by the doctrine of Crown immunity against an action for an injunction to restrain it from committing an allegedly wrongful act. In its judgment the Court reviews at length the position of Crown servants or agents at common law with respect to tort claims.

Finally, in an interesting guest passenger case, [178] the Supreme Court of Canada rejected a contention that the relevant Manitoba statutory provision could not be applied to limit the Crown's recovery for loss of the services of a member of the armed forces injured in an automobile accident because to do so would be to permit provincial legislation to impose a liability on the federal Crown or to derogate from its prerogatives, privileges or rights. The member of the armed forces, while riding as a guest passenger without payment, had been injured in a two-vehicle collision in which his driver had been held seventy-five per cent at fault. Under the Manitoba statute in question, the liability of the owner of the other vehicle, whose servant had been driving it, was prima facie limited to twenty-five per cent. The Court held that the fact that liability may not be imposed upon the Crown except by legislation naming it, or that no other prerogative rights may be extinguished unless the intention to do so is made manifest by naming the Crown, does not mean that the extent of the liability of a subject may be extended, in a case of a claim by the Crown, beyond the liability limit properly declared by law, in this case by the Manitoba statute.

---

[177] Conseil des Ports Nationaux v. Langelier, Sup. Ct., Oct. 1, 1968.

[178] The Queen v. Murray, [1967] Sup. Ct. 262.