ANNUAL SURVEY OF CANADIAN LAW

PART 1

TORTS--I

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Although "[t]he negligence action for personal injuries is on the defensive throughout the common law world", [1] and indeed the very future of tort law is in some doubt, the period since that covered by the previous *Survey* [2] has witnessed developments of considerable interest and novelty, consolidating the growing trend towards independent thought among the Canadian judiciary apparent in the past decade. [3] There follows the first of a two-part account of these recent developments.

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[1] MacKenzie, *Some Reflections on Negligence, Damages and No-Fault Compensation*, 10 U.B.C. L. REV. 27 (1975). For a brief account of recent legislative developments in Canada (and elsewhere), see C. WRIGHT & A. LINDEN, CANADIAN TORT LAW: CASES, NOTES AND MATERIALS ch. 15, s. D, *esp.* at 740-42 (6th ed. 1975), and the No-fault Symposium (articles by Dunlop, Linden, O'Connell, Posner and Green), 13 OSGOODE HALL L.J. 439-500 (1975). For a recent English analysis, see Phillips & Hawkins, *Some Economic Aspects of the Settlement Process: A Study of Personal Injury Claims*, 39 MODERN L. REV. 497 (1976). In Britain the pessimistic view has been expressed that, in view of the Pearson Commission on Liability for injury to Persons and Things, "it would take an inveterate gambler to back the survival for a longer period [than about four years] of anything resembling the present system". WINFIELD AND JOLOWICZ ON TORT vii (10th ed. W. Rogers 1975). *See also* Veitch & Miers, *Assault on the Law of Tort*, 38 MODERN L. REV. 139 (1975). In contrast Professor Street has observed: "Many think that the demise of most of the law of torts is imminent. I do not fully agree. I confidently expect, the Pearson Committee notwithstanding, that most victims of negligence during the normal four years' life of this new edition will be resting their claims on the law set out in this book." H. STREET, THE LAW OF TORTS v (6th ed. 1976). For accounts of the no-fault system recently introduced in New Zealand, see Palmer, *Compensation for Personal Injury: A Requiem for the Common Law in New Zealand*, 21 AM. J. COMP. L. 1 (1973); Harris, *Accident Compensation in New Zealand: A Comprehensive Insurance System*, 37 MODERN L. REV. 361 (1974); Vennell, *L'Indemnisation des Dommages Corporels Par L'Etat: Les Résultats d'Une Expérience d'Indemnisation Automatique en Nouvelle-Zélande*, 28 REVUE INT. DE DROIT COMPARÉ 73 (1976); Szakats, *Community Responsibility for Accident Injuries: The New Zealand Accident Compensation Act*, 8 U.B.C. L. REV. 1 (1973).

Tort law still has its defenders. *See, e.g.*, Stoljar, *Accidents, Costs and Legal Responsibility*, 36 MODERN L. REV. 233 (1973); Green, *The Negligence Action*, [1974] ARIZ. STATE L.J. 369; Green, *No-Fault: A Perspective*, [1975] BRIGHAM YOUNG L. REV. 79.

[2] Binchy, *Annual Survey of Canadian Law: Part 2: Torts*, 6 OTTAWA L. REV. 511 (1974) (covering the period from July, 1971, to July 1974).

[3] This is a repeated theme in A. LINDEN, CANADIAN NEGLIGENCE LAW (1972).

I. DUTY

The Ontario Court of Appeal decision of *Schacht v. The Queen in right of Ontario*,[4] described in the previous *Survey*,[5] was appealed unsuccessfully to the Supreme Court of Canada.[6] Very briefly, the issue was whether a duty should be imposed on the police to protect road users from an unreasonable risk of harm arising from an existing accident.

The Supreme Court, by a majority,[7] held that such a duty existed and that it had been breached. It is not absolutely clear whether the majority did so on the ground of statutory construction or common law principles. The judgment of Spence J., for the majority, must be understood as being based on common law considerations, albeit as affected by the existence of the relevant statutory provisions.[8]

Considerable emphasis was laid on the growing recognition of policy considerations[9] evident in the recent English decisions of *Home Office v. Dorset Yacht Co.*[10] and *Dutton v. Bognor Regis Urban District Council*,[11] from which large extracts were quoted. The decisions of *Haynes v. Harwood*[12] and *Priestman v. Colangelo*[13] offer further support for imposing liability upon the police. The Court of Appeal did so in the present case,[14] for which it was criticized in the previous *Survey*.[15] The dissenting judgment in the Supreme Court, delivered by Martland J., is even more stringently critical.

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[4] [1973] 1 O.R. 221, 30 D.L.R. (3d) 641 (C.A. 1972).

[5] *Supra* note 2, at 515-18.

[6] *Sub nom.* O'Rourke v. Schacht, [1976] 1 S.C.R. 53, 55 D.L.R. (3d) 96 (1974).

[7] Judgment by Spence J.; Laskin C.J., Ritchie, de Grandpré, Dickson and Beetz JJ. concurring; Martland, Judson and Pigeon JJ. dissenting.

[8] In particular, s. 3(3) of the Police Act, R.S.O. 1970, c. 351, which provides:

> The Ontario Provincial Police Force, in addition to performing the policing services prescribed in subsection 1, shall,
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> (a) maintain a traffic patrol,
>
> (i) on the King's Highway, except such portions thereof as are designated by the Minister, and
>
> (ii) on such connecting links, within the meaning of *The Highway Improvement Act*, as are designated by the Minister . . . .

[9] *Cf.* Kamba, *The Concept of "Duty of Care" and Aquilian Liability in Roman-Dutch Law*, 20 JURID. REV. (N.S.) 252, at 256 (1975). The far reaching implications of imposing liability on municipalities for damage resulting from police inaction are discussed by Blatchy in 39 ALBANY L. REV. 599 at 602 ff. (1975). *See also* Ausness, *The Kentucky Law Survey: Torts*, 64 KENTUCKY L.J. 201, at 209 (1974), who states, with some felicity, that resolution of the duty issue "involves not the foresight of the defendant, but the hindsight of the court—hindsight that may involve policy considerations extending beyond the interests of the immediate litigants". For a frank recognition of policy aspects of the duty problem, see Dickson J.'s judgment in Paskivski v. Canadian Pacific Ltd., [1976] 1 S.C.R. 687, at 708, [1975] 5 W.W.R. 640, at 651-52.

[10] [1970] A.C. 1004, [1970] 2 All E.R. 294.

[11] [1972] 1 Q.B. 373, [1972] 2 W.L.R. 299 (C.A. 1971).

[12] [1935] 1 K.B. 146, [1934] All E.R. Rep. 103 (C.A.).

[13] [1959] S.C.R. 615, 19 D.L.R. (2d) 1.

[14] *Supra* note 4, at 226-28, 232, 30 D.L.R. (3d) at 646-48, 652.

[15] *Supra* note 2, at 516-18.

With regard to Maugham L.J.'s reference in *Haynes v. Harwood* [16] to the policy imposing "a discretionary duty to prevent an accident arising from the presence of uncontrolled forces in the street . . .", [17] Martland J. commented:

> It was stated [in *Haynes*] that the police officer was under no positive duty to act as he did. He had a discretionary duty to prevent an accident. It is quite clear that had the police officer failed to attempt to stop the horses he could not have been sued by someone who had been run down by them. [18]

With regard to *Priestman v. Colangelo*, [19] Spence J. quoted the words of Locke J.:

> [T]he action of the [policeman] . . . was reasonably necessary in the circumstances and no more than was reasonably necessary, both to prevent the escape and to protect those persons whose safety might have been endangered if the escaping car reached the intersection. . . . [20]

Spence J. considered that "[i]n these words, Locke J. enunciated a duty not only to the police officers' superiors to capture the fleeing thief but a duty to persons on the highway to protect them from a well-nigh inevitable tragedy had the fleeing car thief not been stopped". [21]

Spence J. did not rely on the passages from Cartwright J.'s judgment in *Priestman*, [22] which had been cited by the Court of Appeal in *Schacht* [23] as evidence of the recognition of a general duty of care on the part of policemen towards the public. Martland J., dissenting, only briefly referred to Cartwright's judgment, stating that in his opinion the case was "not in any way analogous to the present case". [24] Cartwright J.'s remarks were directed toward the situation of an officer's having deliberately elected to fire his weapon from a moving vehicle on a city street. It is respectfully submitted that the remarks of Locke J. quoted by Spence J. must, on any reasonable interpretation, be similarly read in context.

Mr. Justice Martland also criticized the use of the *Dorset Yacht* [25] decision by the majority, [26] making the pertinent comment that that case "would only have been analogous if, in the absence of a finding of a legal duty owed

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[16] *Supra* note 12.

[17] *Id.* at 162.

[18] *Supra* note 6, at 82, 55 D.L.R. (3d) at 104.

[19] *Supra* note 13.

[20] *Id.* at 627, 19 D.L.R. (2d) at 10. Quoted by Spence J. *supra* note 6, at 67, 55 D.L.R. (3d) at 116-17.

[21] *Supra* note 6, at 67, 55 D.L.R. (3d) at 117.

[22] *Supra* note 13.

[23] *Supra* note 4, at 227-28, 30 D.L.R. (3d) at 647-48. *See* my comment in the previous *Survey*, *supra* note 2, at 516-17.

[24] *Supra* note 6, at 82, 55 D.L.R. (3d) at 104.

[25] *Supra* note 10.

[26] *Supra* note 6, at 64, 67-69, 55 D.L.R. (3d) at 114, 117-18.

by the *Home Office*, an individual guard had been sued because he failed to do something which might have prevented the boys from escaping". [27]

The decision of *Millette v. Côté*, [28] discussed in the previous *Survey*, [29] was also appealed to the Supreme Court of Canada. [30] The Court, by a majority, [31] held that the liability of the Department of Highways should be reduced from 75 per cent to 25 per cent and that the liability of the driver of the vehicle that had bumped into the plaintiff's automobile should be increased to 75 per cent. The finding of the Ontario Court of Appeal [32] that no liability should be imposed on the police for lack of causal responsibility was not disturbed. [33] Dickson J., speaking for three members of the majority, stressed:

> Imposition of some measure of liability upon the Minister of Highways does not import recognition of any general duty to salt or sand highways, failure in the discharge of which would expose the Minister to civil claims. Recovery against the Minister in this case rests upon narrower ground, characterized by Aylesworth J.A., in the Court of Appeal as: ". . . a highly special dangerous situation at a certain location in the highway which otherwise, to persons reasonably using the same, was quite passable and usable for traffic." [34]

The Supreme Court decision of *Corothers v. Slobodian* [35] is another

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[27] *Id.* at 85, 55 D.L.R. (3d) at 106. For an important U.S. decision on psychotherapeutical malpractice, raising, *inter alia*, the issue of a duty on the part of the police to warn a potential victim of the danger to him, see Tarasoff v. Regents of the University of California, 529 P.2d 553, 118 Cal. Rptr. 129 (1974), varied on rehearing, 551 P.2d 334, 131 Cal. Reptr. 14 (1976). The rehearing was reported too late for inclusion in this Survey, but has been commented on by Stone, *The Tarasoff Decisions: Suing Psychotherapists to Safeguard Society*, 90 HARV. L. REV. 358 (1976).

[28] [1972] 3 O.R. 224, 27 D.L.R. (3d) 676 (C.A.), *aff'g* [1971] 2 O.R. 155, 17 D.L.R. (3d) 247 (H.C. 1970).

[29] *Supra* note 2, at 517.

[30] *Sub nom.* The Queen v. Côté, [1976] 1 S.C.R. 595, 51 D.L.R. (3d) 244 (1974).

[31] Laskin C.J., Spence, Pigeon, Dickson, Beetz JJ.; Martland, de Grandpré, Judson and Ritchie JJ., dissenting in part.

[32] *Supra* note 28, at 227, 27 D.L.R. (3d) at 679.

[33] *Supra* note 30, at 601, 51 D.L.R. (3d) at 250.

[34] *Id.* at 603, 51 D.L.R. (3d) at 252; quoting Aylesworth J.A. *supra* note 28, at 226, 27 D.L.R. (3d) at 678. For treatment of the foreseeability aspects of the decision, see text *infra* between notes 76 and 87. *See also* Anhorn v. Neithercut, [1975] 4 W.W.R. 428 (Sask. Q.B.), in which liability was imposed on the Department of Highways for having left, in the course of snow-clearing operations, an unnatural and dangerous accumulation of snow on the highway. "The charge against the [defendant] is not non-feasance but rather misfeasance. It is not failure to clear the snow but rather, having 'punched a hole' and widened it slightly, they left an evil trap for [the plaintiff] in the form of the protrusion." *Id.* at 435. *Cf.* Earl v. Bourdon, 65 D.L.R. (3d) 646 (B.C.S.C. 1975), in which two employees of the Department of Highways were held not liable for failure to replace signs marking "S" curves on the ground that this was conduct amounting to non-feasance only; another employee, however, who was responsible for sign maintenance, was held liable on the ground that his deliberate decision not to replace the signs "was essentially an act of commission, or misfeasance . . .". *Id.* at 655.

[35] [1975] 2 S.C.R. 633, 51 D.L.R. (3d) 1 (1974).

liberal Canadian contribution to the law relating to rescuers. [36] The facts, very briefly, were that the plaintiff, who had witnessed a serious accident on the Trans-Canada Highway and was running down the highway to telephone for help, was struck by a trailer driven by Slobodian. When Slobodian saw the plaintiff he braked, but his truck jack-knifed. The original accident had been caused by the negligent driving of one Poupard, who was killed at that time. The plaintiff's action against Poupard's estate and Slobodian failed both at trial and on appeal to the Saskatchewan Court of Appeal. [37] The decision of the Court of Appeal has been criticized by the author elsewhere on the basis that it confused a number of aspects of the basic concepts of duty and foreseeability. [38]

The Supreme Court of Canada reversed the lower courts and awarded damages to the plaintiff. Although the Court divided on the issue of Slobodian's liability, it was unanimous in holding Poupard responsible. Ritchie J.'s judgment contains the most extensive elaboration of Poupard's position. Having referred to a number of the classic decisions on rescuers, [39] and in particular to a passage from the judgment of Lord Denning in *Videan v. British Transport Commission*, [40] his Lordship commented:

> In my opinion there was nothing wanton in Mrs. Corothers' behaviour in face of the peril to the [accident victims] . . . . [H]er actions in going for help as she did and in attempting to flag down the approaching traffic,

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[36] A case dealing with the interesting jurisprudential issue of whether a person is guilty of murder when the victim (a Jehovah's Witness) failed to take the steps necessary to "rescue" herself is Regina v. Blaue, [1975] 1 W.L.R. 1411 (C.A.), criticized by Williams, Comment, [1976] CAMB. L.J. 15. *See, generally*, Byrn, *Compulsory Life-Saving Treatment for the Competent Adult*, 44 FORDHAM L. REV. 1, *esp.* at 29 *ff.* (1975); Zellick, *The Forcible Feeding of Prisoners: An Examination of the Legality of Enforced Therapy*, [1976] PUBLIC L. 153. For an account of recent proceedings in New York in which a Good Samaritan was compensated under Workmen's Compensation Law, see Tanenbaum, *Workmen's Compensation: A Vehicle for Compensating the Good Samaritan*, 24 BUFFALO L. REV. 857 (1975). A stimulating argument in favour of imposing *criminal*, but not *civil*, liability on the "Bad Samaritan" is presented by D'Amato, *The "Bad Samaritan" Paradigm*, 70 NORTHWESTERN U. L. REV. 798 (1975). In favour of imposing a criminal sanction is Kleinig, *Good Samaritanism*, 5 PHILOSOPHY & PUBLIC AFFAIRS 382 (1976). The recent legislation in Quebec establishing the right to assistance when one's life is imperilled is analyzed by Barakett & Jobin, *Une modeste loi du bon samaritain pour le Québec*, 54 CAN. B. REV. 290 (1976). The "Good Samaritan" legislation in the U.S. is discussed in 11 GONZAGA L. REV. 296 (1976).

[37] 36 D.L.R. (3d) 597 (Sask. C.A. 1973).

[38] Binchy, Comment, 52 CAN. B. REV. 292 at 294-97 (1974).

[39] Wagner v. Int'l Ry. Co., 232 N.Y. 176, 133 N.E. 437 (1921); Baker v. T. E. Hopkins & Son Ltd., [1959] 1 W.L.R. 966, [1959] 3 All E.R. 225 (C.A.); Haynes v. Harwood, *supra* note 12; Videan v. British Transp. Comm'n, [1963] 2 Q.B. 650, [1963] 2 All E.R. 860 (C.A.); Horsley v. MacLaren, [1972] S.C.R. 441, 22 D.L.R. (3d) 545 (1971).

[40] *Supra* note 39, at 669, [1963] 2 All E.R. at 868, approved in Horsley v. MacLaren, *supra* note 39, at 444, 22 D.L.R. (3d) at 546-47. Regarding the significance of the "not wanton" formula, in contrast to simple foreseeability, see Binchy, *The Good Samaritan at the Crossroads: A Canadian Signpost?* 25 N. IR. L.Q. 147, at 171-72 (1974).

> were, in my view, perfectly normal reactions to the cry of distress from the injured man and the situation which I have described. [41]

Ritchie J. could not agree with the approach taken by Woods J.A. in the Court of Appeal: the situation of peril had *not* "ended", as Woods J.A. had contended, "so long as Mr. Hammerschmid [a passenger] was seriously injured and apparently helpless and his wife near to death on the floor of the car due to Poupard's negligence". [42] The approach favoured by Woods J.A. appeared to Mr. Justice Ritchie to amount to a finding that the plaintiff's actions constituted a *novus actus interveniens*, reasoning which "runs contrary to the principle now accepted in this country establishing the duty owing by a wrong-doer to the rescuer of a victim of his negligence and that [the plaintiff], having been injured in an attempt to rescue such a victim 'can recover damages from the one whose fault has been the cause of it' ". [43]

In Ritchie J.'s opinion, the potential danger to which the plaintiff had been exposed on account of her presence on the shoulder of the highway gesticulating at Slobodian "was a reasonably foreseeable consequence of Poupard's negligence which in my view was a cause, if not the only cause, of Mrs. Corothers' injury". [44]

Pigeon J., dissenting [45] on the issue of Slobodian's liability, was as emphatic as Ritchie J. regarding the question of Poupard's liability. Taking issue with Woods J.A., he considered that "it could not correctly be said that the situation of peril created by Poupard had ended". [46] The highway had been badly obstructed by the accident and the plaintiff's car "was not a place of safety for her". [47] In any case:

> [The plaintiff, being uninjured] certainly properly felt under a moral, if not a legal duty, to run for help and to signal and flag down any oncoming traffic. To say that she was not then acting in danger nor anticipating any danger created by the acts of Poupard is to ignore the realities of the situation. What she was doing was nothing but the proper reaction to those acts and an attempt to avoid or to mitigate some of their dreadful consequences. [48]

Of some significance is the short [49] judgment of de Grandpré J., the relevant portion of which is as follows:

> On the facts of [the] case, in the light of the evidence that [the plaintiff] was just starting on her errand of mercy at the time of the accident, I share the view that the rescuer is entitled to indemnity from the original wrong-doer. At this time, there is no need for this Court to go any further, I leave to

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[41] *Supra* note 35, at 641, 51 D.L.R. (3d) at 5. *Cf.* Wagner v. Int'l Ry. Co., *supra* note 39, at 180, 133 N.E. at 438 (Cardozo J.).

[42] *Supra* note 35, at 641, 51 D.L.R. (3d) at 5. *Cf.* Binchy, *supra* note 38, at 295.

[43] *Supra* note 35, at 641, 51 D.L.R. (3d) at 5, quoting Videan v. British Transp. Comm'n, *supra* note 39, at 669, [1963] 2 All E.R. at 860.

[44] *Supra* note 35, at 643, 51 D.L.R. (3d) at 6.

[45] Joined by Laskin C.J., Spence and Beetz JJ.

[46] *Supra* note 35, at 656, 51 D.L.R. (3d) at 16.

[47] *Id.*

[48] *Id. Cf.* Binchy, *supra* note 38, at 295-96.

[49] The judgment is only eighteen lines long.

> some other occasion the determination of the wrong-doer's liability should the factors of time and space be different, *e.g.* if [the plaintiff] had been injured two miles further west when approaching the farm towards which she was heading. [50]

A better reason for not analyzing causation on the basis of geographical proximity to the scene of the original accident is that such a consideration is only one among many relevant considerations determining whether the subsequent injury was foreseeable. A similar danger has haunted recent decisions relating to nervous shock, [51] to the detriment of the development of a remedy for that loss.

For the sake of completeness, the one-sentence comment of Chief Justice Laskin may be recorded. His Lordship agreed with Ritchie J. that the liability of Poupard "may properly be assessed in terms of the rescue doctrine, now a well-accepted principle in this Court respecting liability in negligence". [52]

On the less significant issue (so far as this *Survey* is concerned) of Slobodian's negligence, the majority declined to impose liability. "He suddenly came upon an unusual situation not of his own creation. The standards to be applied are not those of perfection. If he made a mistake it is excusable in the circumstances." [53]

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[50] *Supra* note 35, at 637, 51 D.L.R. (3d) at 20.

[51] *Cf.* Abramzik v. Brenner, 62 W.W.R. 332, 65 D.L.R. (2d) 651 (Sask. C.A. 1967), and Brown v. Hubar, 3 O.R. (2d) 448, 45 D.L.R. (3d) 664 (H.C. 1974).

[52] *Supra* note 35, at 636, 51 D.L.R. (3d) at 2.

[53] *Id.* at 649, 51 D.L.R. (3d) at 10, quoting with approval from the judgment of Woods J.A. in the Court of Appeal, *supra* note 37, at 602. For another important decision on the question of duty, see Fairline Shipping Corp. v. Adamson, [1975] 1 Q.B. 180, [1974] 2 All E.R. 967 (1973), where liability was imposed on the defendant company where a director assumed responsibility for the storage of certain perishable goods belonging to the plaintiff. The plaintiff was unable to establish the existence of a contract or of any liability on the part of the defendant as bailee. However, Kerr J. did "not think that the refinements of the concepts of legal possession and bailment are or should be determinative of liability in the tort of negligence". *Id.* at 190, [1974] 2 All E.R. at 975. He imposed liability on the basis of breach of a duty of care which, in the circumstances of the case, had been assumed by the defendant (through its director). *Cf.* Seaspan Int'l Ltd. v. The Ship "Kostis Prois", [1974] S.C.R. 920, 33 D.L.R. (3d) 1 (1973).

An interesting case where the duty of care was imposed on four separate parties is Teno v. Arnold, 11 O.R. (2d) 585 (C.A. 1976). The driver of a car, the operator of an ice-cream truck, the owner of the ice-cream truck, and the mother of a four-year old child shared equally the liability for the injury to the child, who was struck by the passing car when she ran across a street after buying ice-cream from the ice-cream truck. The court held that the driver of the car, who had failed to slow down or sound his horn, owed a duty to watch out for children near the truck and had failed to prove that the collision was not caused by his negligence, as required by s. 133(1) of the Highway Traffic Act, R.S.O. 1970, c. 202; that the operator of the truck breached a duty to supervise the crossing of the street by the children after serving them; that the owner of the truck by sending out only a single operator, breached a duty to run his business in such a way as to avoid an unreasonable risk to children; and that the mother breached a duty of care by giving money to her child and allowing her to cross the road to the truck with no supervision.

II. FORESEEABILITY

A. *Parental Control of Children*

In *Prasad v. Prasad*, [54] the plaintiff, paying a social visit to the defendant's home, was invited to sit down on the chesterfield sofa. When he did so, a sharp-pointed knife pierced his back. The knife was one used for cutting fruit. It had been placed on the sofa by the defendant's four-year-old son, who had taken it from a drawer in the kitchen. The knife had been within the child's reach; the fruit had been placed out of his reach. The defendant had instructed his son not to touch kitchen knives. The court, impressed by the fact that the "forbidden fruit" had been treated with greater care than the knife, imposed liability. On the question of foresight, Rae J. considered:

> [The] harm occasioned the plaintiff . . . was of such a class or general character as to be within the scope of the foreseeable risk. What occurred was but a variant of the foreseeable: Fleming, The Law of Torts, 4th ed., pp. 186-87; *Overseas Tankship (U.K.) v. Miller S.S. Co. Property*, [1967] 1 A.C. 617, [1966] 2 All E.R. 709 at 714. It was not necessary that the precise manner of its occurrence should have been envisioned: *Hughes v. Lord Advocate*, [1963] A.C. 837, [1963] 1 All E.R. 705. [55]

The decision of *Hatfield v. Pearson*, [56] where a father had been exempted from responsibility for injuries caused by his thirteen-year-old son in handling a .22 rifle, was distinguished in *Prasad* on the basis that "[t]here the father had no reason to expect the disobedience and the breaking of [his] promise [by his son]. It had not, to his knowledge, occurred before . . . . But in the case at bar the child was much younger, and the defendant knew that due to his age he could not reasonably be expected to obey the instructions given." [57]

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[54] [1974] 5 W.W.R. 628, 54 D.L.R. (3d) 451 (B.C.S.C.).

[55] *Id.* at 631, 54 D.L.R. (3d) at 454.

[56] 20 W.W.R. 580, 6 D.L.R. (2d) 593 (B.C.C.A. 1956). *Cf.* Bishop v. Sharrow, 8 O.R. (2d) 649 (H.C. 1975), where a father was held liable for rifle wounds inflicted by his son. The father, being aware of his son's delinquent behaviour and propensity to misuse guns, had (inadequately) locked up the son's sporting equipment in a cupboard containing guns. *See also* Ingram v. Lowe, [1975] 1 W.W.R. 78, 55 D.L.R. (3d) 292 (Alta. C.A. 1974), where the court, applying Starr v. Crone, [1950] 2 W.W.R. 560, [1950] 4 D.L.R. 433 (B.C.S.C.), imposed liability on a father who had permitted his nine-year-old child to use a pellet gun unsupervised. In response to the father's contention that he had instructed his children in the use of the gun, Moir J.A. stated: "Surely no matter how thorough the training, children of such tender years cannot be allowed to play with pellet guns. Such conduct amounts to negligence." *Id.* at 80, 55 D.L.R. (3d) at 294.

[57] *Supra* note 54, at 632, 54 D.L.R. (3d) at 455. *Cf.* Amos v. New Brunswick Elec. Power Comm'n, 8 N.R. 537 (S.C.C. 1976) *rev'g* 10 N.B.R. (2d) 644, 60 D.L.R. (3d) 495 (C.A. 1975), where it was held foreseeable that a nine-year-old boy would climb to near the top of a 25-30 foot poplar tree through which high-voltage electric transmission lines passed. *Cf.* Commission Hydroélectrique de Québec v. Thériault, [1971] Que. C.A. 413.

B. *Automobile Collisions*

In *Kennedy v. Hughes Drug (1969) Inc.*,[58] the basement of the plaintiff's home was flooded by water that escaped from a fire hydrant with which a servant of the defendant had negligently collided. Not surprisingly, having regard to principle and precedent,[59] the court rejected the defendant's assertion that the damages were not reasonably foreseeable. The finding that the plaintiff's loss was "a *direct*, probable and foreseeable result of the negligent breaking of the hydrant"[60] might, however, be questioned, since it was surely possible to establish foreseeability without referring to the *Polemis*[61] concept of directness, discredited since *The Wagon Mound (No. 1)*.[62] Another aspect of the *Kennedy*[63] decision worthy of note is the extensive quotation by the court from Professor Linden's recent analysis[64] of the concept of foresight.

C. *Aircraft*

The decision in *Holomis v. Dubuc*[65] involved an unfortunate application of the concept of foreseeability. Very briefly, the facts were that the defendant, in landing an amphibious aircraft on a lake which was shrouded in fog, failed to properly inspect the site of his proposed landing or to call on his passengers to keep a look-out for obstacles on the lake. The result was that the plane hit an unseen obstacle, the collision tearing a large hole

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[58] 5 Nfld. & P.E.I.R. 435, 47 D.L.R. (3d) 277 (P.E.I.S.C. 1974).

[59] Weiner v. Zoratti, 72 W.W.R. 299, 11 D.L.R. (3d) 598 (Man. Q.B. 1970).

[60] *Supra* note 58, at 446, 47 D.L.R. (3d) at 285, adopting the words of Matas J., *supra* note 59, at 304, 11 D.L.R. (3d) at 602 (emphasis added).

[61] *Re* Polemis, [1921] 3 K.B. 560, [1921] All E.R. Rep. 40 (C.A. 1921).

[62] Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co., [1961] A.C. 388, [1961] 1 All E.R. 404 (P.C.). See the previous *Survey*, *supra* note 2, at 518. A case showing that the criterion of directness has still not faded away is Durham v. Carlisle, 10 O.R. (2d) 284 (Cty. Ct. 1975). *Cf.* Menow v. Honsberger, [1970] 1 O.R. 54, at 60-61, 7 D.L.R. (3d) 494, at 500-501 (H.C. 1969), *aff'd* [1971] 1 O.R. 129, 14 D.L.R. (3d) 545 (C.A.), *aff'd, sub nom.* Jordan House Ltd. v. Menow, [1974] S.C.R. 239, 38 D.L.R. (3d) 105 (1973), and Binchy, Comment, 53 CAN. B. REV. 344, at 349-50 (1975).

[63] *Supra* note 58.

[64] Linden, *Foreseeability in Negligence Law*, *in* LAW SOCIETY OF UPPER CANADA, SPECIAL LECTURES: NEW DEVELOPMENTS IN THE LAW OF TORTS 55 (1973). *Cf.* Binchy, Book Review, 12 OSGOODE HALL L.J. 235, at 237-38 (1974), and the author's previous *Survey*, *supra* note 2, at 518, n. 54. *See also* Neufeld v. Landry, 55 D.L.R. (3d) 296 (Man. C.A. 1974), in which the trial judge's finding of 40 per cent contributory negligence was reversed in a case where the plaintiff driver, when he was approached on a highway by the defendant driver, who was drunk and was pursuing an erratic course, was involved in a collision in trying to avoid his (the defendant's) path. The Court of Appeal considered that "[t]he conduct of the plaintiff driver must be assessed in the light of the crisis that was looming up before her. If in the 'agony of the moment' the evasive action she took may not have been as good as some other course of action she might have taken—a doubtful matter at best—we would not characterize her conduct as amounting to contributory negligence. It was the defendant who created the emergency which led to the accident. It does not lie in his mouth to be minutely critical of the reactive conduct of the plaintiff whose safety he had imperilled by his negligence." *Id.* at 298-99.

[65] 56 D.L.R. (3d) 351 (B.C.S.C. 1974).

in the hull, causing water to "beg[i]n to pour in through [the] hole". [66] When the passengers moved towards the exit doors, the aircraft began to go down at the stern, so the deceased and the other passengers leaped into the lake through the port door which had by then become open. The deceased was drowned. In making his sudden departure, he had not availed himself of any of the life-jackets that were openly displayed in racks over the passenger seats.

The "factual" negligence of the defendant was not seriously in question. The only major issues were those relating to foreseeability, contributory negligence and *volenti non fit injuria*—the last being argued by the defendant, one may surmise, more in hope than with conviction. For some unexplained reason the court dealt with these issues in an uncustomary order, [67] deciding the issue of the plaintiff's contributory negligence *before* that of the defendant's negligence. Verchere J., in the very first sentence of substance in his judgment, [68] decided the issue of contributory negligence against the plaintiff. He referred to the decision of the Supreme Court of Canada in *Corothers v. Slobodian*, [69] where the Court, as he understood it, supported the principle "that the standard of perfection should not be applied to a conscious decision made hastily in an emergency", [70] and continued:

> [H]ence it would be quite proper to say here that the deceased's decision to quit the aircraft should not be classified as actionable negligence. But that is not also to say, and it does not seem to me to be said, that the same or any similar principle is applicable to a situation resulting from oversight and not from a conscious decision which has turned out to be a mistake in judgment; and that being so, it seems to me that as I cannot look at the deceased's failure to take up a life-jacket as being due to other than oversight, I cannot apply to it a principle that may, in certain circumstances, excuse a wrong decision but which cannot, as I have said, also apply to excuse such clearly negligent behaviour as an oversight. [71]

With all respect, this argument is not convincing. While it may be that *Corothers* stands for the principle that a conscious decision made hastily in an emergency should not be judged by the standard of perfection, it does not follow, nor could any reasonable reading of that decision [72] lead to the conclusion, that an *oversight* in an emergency constitutes negligence. Moreover, to *define* an oversight as "clearly negligent behaviour" [73] is surely to avoid

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[66] *Id.* at 357.

[67] *Cf.* Anhorn v. Neithercut, *supra* note 34, where a similar "reverse order" approach was adopted. In that case, however, the outcome was less disastrous to the plaintiff's case.

[68] "On turning, as I do now, to consider the matter on its merits, the conclusion that emerges as unavoidable, in my view, is that this is a proper case for the application of the *Contributory Negligence Act* [B.C.] . . . ." *Supra* note 65, at 355.

[69] *Supra* note 35.

[70] *Supra* note 65, at 360.

[71] *Id.*

[72] Indeed, it might be argued that in *Corothers* the plaintiff's conduct in respect to her safety fell into the category of oversight rather than that of conscious decision.

[73] *Supra* note 65, at 360. *Cf.* Haley v. Richardson, 10 N.B.R. (2d) 653 (C.A.

determining the very issue facing the court, namely, whether in the circumstances such oversight is negligent. The weakness of "putting the cart before the horse" by deciding the contributory negligence issue first is, it is submitted, evidenced by his Lordship's finding when he does come to the question of the defendant's liability:

> There is, in my view, nothing improbable in the fact that a person within a ruptured vessel that is rapidly filling with water would seek to get out of it, and neither does it seem improbable to me that such a person might, for some reason peculiar to himself, decline to pause long enough to take up a life-jacket or, alternatively, that he might forget it altogether. In my view, then, the probability that a surprised and frightened passenger would leap from a sinking aircraft is entirely within the foresight of the reasonable man, and as such, it should of course have been foreseeable to the defendant. [74]

If it "should *of course* have been foreseeable" [75] that the deceased would act as he did, surely full recovery by his dependants should not have been frustrated by the highly technical and, it is submitted, misconceived application of the "agony of the moment" concept.

D. *Highway Authorities*

In *The Queen v. Côté*, [76] the defendant Department of Highways had allowed an "extremely treacherous and dangerous" [77] icy condition on a short stretch of a much-travelled highway between Ottawa and Montreal to continue for some hours. Its servants "knew or ought to have known of [the] very dangerous tendency [of this stretch of road] to ice up". [78] Liability to the extent of 75 per cent was imposed on the Department of Highways when the occupants of the plaintiff's automobile were struck lightly from behind by a vehicle travelling in the same direction, the driver of the automobile being unable to control it on the ice after the impact.

The "duty question" has been considered above. [79] The issue of foreseeability caused some disagreement among the members of the Supreme Court of Canada. In the view of Dickson J., who delivered the majority judgment:

> a reasonable person, familiar with Canadian winters, should have anticipated a vehicle collision or collisions as the natural, and indeed probable, result of such a condition of manifest danger. It is not necessary that one foresee the "precise concatenation of events"; it is enough to fix liability if

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1975), Anhorn v. Neithercut, *supra* note 34, and Babineau v. MacDonald, 10 N.B.R. (2d) 715 (C.A. 1975), for correct applications of the "agony of the moment" concept. *See also* Hogan v. McEwan, 10 O.R. (2d) 551 (H.C. 1975).

[74] *Supra* note 65, at 363. *Cf.* the statement of Laskin J. (as he then was) in Horsley v. MacLaren, *supra* note 39, at 470, 22 D.L.R. (3d) at 565, that he did "not think that Horsley [could] be charged with contributory negligence in diving to the rescue of Matthews as he did [without availing himself of the protective equipment that was on board at the time]".

[75] *Supra* note 65, at 363 (emphasis added).

[76] *Supra* notes 28 and 30.

[77] [1971] 2 O.R. 155, at 158, 17 D.L.R. (3d) 247, at 250 (H.C. 1970).

[78] *Id.* at 164, 17 D.L.R. (3d) at 256.

[79] See text *supra* between notes 28 and 34.

> one can foresee in a general way the class or character of injury which occurred. [80]

Pigeon J. also considered that the death and injuries were foreseeable. His Lordship referred to the decision of *Corothers v. Slobodian*, [81] decided by the Supreme Court of Canada eight weeks previously, where liability had been imposed "although obviously Poupard [one of the defendants] could not have foreseen the actual combination of factors which would cause [that] injury". [82]

> [A]pplying the test of foreseeability in a reasonable and realistic way means asking the question whether a fatal head-on collision is a *possible consequence* of an earlier insignificant rear-end impact when a short stretch of an otherwise safe and dry highway is allowed to remain in a slippery condition as described in this case. I cannot see any reason for answering that question in the negative. [83]

De Grandpré J., writing for the minority, came to the opposite conclusion on the facts, adopting a somewhat different formulation of the criterion of liability:

> In order to find against the Department it must be concluded that the latter should have foreseen *every possibility of damage*, in particular the faulty conduct of Côté [the driver of the vehicle which struck the plaintiff's automobile] and its consequences. Put another way, the question is as follows: should the Department, guided by the standards of the reasonable man, have foreseen the combination in time and space of all these factors which, taken together, produced this unfortunate accident? I think not. In matters of delictual liability the conduct of the parties is blameworthy only if the kind of damage was normally and reasonably foreseeable. That was not the case here. [84]

It is suggested that the true test of foreseeability lies between the competing formulae proposed by Pigeon J. and de Grandpré J. It is perhaps significant that the Supreme Court in *Lépine* [85] (cited by de Grandpré) referred only to the decision of *Glasgow v. Muir*, [86] making no reference to the subsequent watershed decision of *The Wagon Mound (No. 1)*. [87]

E. *"Eggshell Skulls"*

In *Marconato v. Franklin*, [88] the defendant's negligent driving caused a

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[80] *Supra* note 30, at 604, 51 D.L.R. (3d) at 252, *citing* Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. (The "Wagon Mound" No. 2), [1967] 1 A.C. 617, [1966] 2 All E.R. 709 (P.C.), and School Div. of Assiniboine S. v. Hoffer, [1971] 4 W.W.R. 746, 21 D.L.R. (3d) 608 (Man. C.A.), *aff'd, sub nom.* Hoffer v. School Div. of Assiniboine S., [1973] S.C.R. vi, [1973] 6 W.W.R. 765.

[81] *Supra* note 35.

[82] *Supra* note 30, at 613, 51 D.L.R. (3d) at 247.

[83] *Id.* at 613-14, 51 D.L.R. (3d) at 247 (emphasis added).

[84] *Id.* at 611, 51 D.L.R. (3d) at 258 (emphasis added), *citing* University Hospital Bd. v. Lépine, [1966] S.C.R. 651, 57 D.L.R. (2d) 701.

[85] *Supra* note 84.

[86] [1943] A.C. 448, [1943] 2 All E.R. 44.

[87] *Supra* note 62.

[88] [1974] 6 W.W.R. 676 (B.C.S.C.).

collision in which the female plaintiff was injured. Her injuries included a restriction of movement in her left arm and strain in the spine and neck. More seriously, the female plaintiff also developed pains and stiffness for which no adequate physical explanation could be given. She became depressed and suspicious of doctors and others, who, she believed, did not accept her sufferings as real. Before the accident, she had been "leading a busy and happy life as a good mother, wife and housekeeper for her family".[89] After it, "[s]he [was] no longer a happy or busy person".[90] Her husband and children took on most of the housework, and "intimate married life . . . virtually came to an end . . .".[91] Medical evidence indicated that before the accident, the female plaintiff had been "a person with a paranoid type of personality",[92] in effect "a hypersensitive, rigid person . . . prone to misinterpret the motives of stress".[93]

Liability was imposed on the defendant for the full extent of the female plaintiff's injuries. Aikins J. of the British Columbia Supreme Court referred to the well-known English decision of *Smith v. Leech Brain & Co.*[94] and to the British Columbia decision of *Elloway v. Boomars*,[95] where schizophrenia following injury in a motor accident was held to be compensable. He reached the following conclusion:

> One would not ordinarily anticipate, using reasonable foresight, that a moderate cervical strain with soft tissue damage would give rise to the consequences which followed for [the female plaintiff]. These arose, however, because of her pre-existing personality traits . . . . It is implicit, however, in the principle that a wrong-doer takes his victim as he finds him, that he takes his victim with all the victim's peculiar susceptibilities and vulnerabilities.[96]

The male plaintiff's claim for loss of *consortium* and *servitium* was also successful.[97]

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[89] *Id.* at 686.
[90] *Id.* at 685.
[91] *Id.* at 692.
[92] *Id.* at 687.
[93] *Id.* (citing expert medical evidence).
[94] [1962] 2 Q.B. 405, [1961] 3 All E.R. 1159.
[95] 69 D.L.R. (2d) 605 (B.C.S.C. 1968).
[96] *Supra* note 88, at 689. See the perhaps unconsciously humorous remark of Reynolds, *Proximate Cause—What if the Scales Fell in Oklahoma?* 28 OKLA. L. REV. 722, at 727 (1975), that "egg-shell skull" decisions "must be taken with a judicious grain of salt".
[97] On the question of extending the scope of the action for loss of consortium (so as, *inter alia*, to enable wives as well as husbands to sue), see a stimulating article by West, *Per Quod Amisit: New life for an Old Tort?* 33 U. TORONTO FAC. L. REV. 76 (1975). In the United States, the courts in recent years have gradually extended recognition of the wife's right to sue for loss of consortium: *see generally* Peterson, *Husband and Wife Are Not One: The Marital Relationship in Tort Law*, 43 U.M.K.C. L. REV. 334, at 348 (1975); Hudson, *The Wife's Right to Consortium*, 14 WASHBURN L.J. 309 (1975); Geer, Comment, 25 BAYLOR L. REV. 495 (1973). The decisions have frequently been based on constitutional grounds (*e.g.*, Hitaffer v. Argonne Co., 183 F. 2d 811 (D.C. Cir. 1950), *cert. denied* 340 U.S. 852 (1950); Duncan v. General Motors Corp., 499 F. 2d 835 (10th Cir. 1974); Hopkins v. Blanco, 457 Pa. 90, 320 A. 2d 139

F. *Negligence On and Near the Highway*

In *Abbott v. Kasza*, [98] one of the defendants parked a large tractor-trailer unit bearing a load of poles on the east side of a north-south road, facing south. The road ran downhill to the south. He remained at this point for about an hour, darkness having fallen after about half an hour. The tractor unit's headlights were on at low-beam, pointing southwards. Since the blinker lights were not working, the defendant parked a smaller vehicle to the north, with its blinker lights working.

The plaintiff, driving a heavy tractor-trailer unit, came upon the scene from the south. He reduced his speed to five miles per hour "because he could not see what was going on where the vehicle was stopped". [99] After passing the defendant's tractor-trailer unit, he found himself unable because of ice on the highway to obtain sufficient grip to continue up the incline. After a further attempt to move forward, [100] the plaintiff decided to back his vehicle down the hill. In doing this he obtained the assistance of the defendant, who placed the small truck that had been used for its warning lights behind the rear of the plaintiff's tractor. However, once the backing had been commenced, it could not be controlled and the plaintiff's vehicle moved westward and rolled over after travelling about 100 to 150 feet.

The plaintiff's action was successful. The court analyzed the decisions of *Wagon Mound (No.1)* [101] and *Wagon Mound (No. 2)*, [102] as well as *Hughes v. Lord Advocate*, [103] on the question of whether the damage was foreseeable. McDonald J. considered:

> The precise manner in which the accident did occur was not itself reasonably foreseeable. Nevertheless, in my opinion, there is nothing fantastic or improbable in the series of happenings that led to the accident here.

(1974)), being strongly influenced by the general breakthrough of equal protection analysis in the area of sexual discrimination: *see* K. DAVIDSON, R. GINSBURG & H. KAY, SEX-BASED DISCRIMINATION: TEXT, CASES AND MATERIALS 171-73 (1974) (and the SUPPLEMENT, 1975, at 71), and B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES 109 n. 33, 188, 643-46 (1975). For an unsatisfactory decision in New Zealand rejecting the female plaintiff's claim for damages for what in effect was loss of consortium, see Marx v. Attorney General, [1974] 1 N.Z.L.R. 164 (1973), criticized by Binchy, *Duty and Foresight in Negligence: The "Control Devices" Out of Control*, 38 MODERN L. REV. 468 (1975).

[98] [1975] 3 W.W.R. 163 (Alta. S.C. 1974).

[99] *Id.* at 166.

[100] "At about this time it appears that a policeman was present for a time, directing the traffic . . . ." A short time previously another policeman had passed the scene, had "noticed that the road was quite icy" and had "considered that the [defendants'] unit was creating a hazard. However, instead of stopping, he called another police car. For some period during the next half hour another police car was present, but appears to have left again. No other policeman testified, and the reason for the departure of the other police vehicle is not in evidence". The possible liability of the police in these circumstances is, on the basis of Schacht v. The Queen, *supra* note 4, and The Queen v. Côté, *supra* notes 28 and 30, worthy of consideration.

[101] *Supra* note 62.

[102] *Supra* note 80.

[103] [1963] A.C. 837, [1963] 1 All E.R. 705.

> The defendants are not absolved from liability because they did not envisage the precise concatenation of circumstances which led up to the accident. [104]

Liability was also imposed on the basis of public nuisance. The defences of *novus actus interveniens* and contributory negligence were rejected on the basis that "[the plaintiff's] decisions throughout were reasonable and within the risk created by the defendant [driver]". [105]

One somewhat unusual aspect of McDonald J.'s judgment is his treatment of the defendants' contention that the plaintiff would have slipped backwards down the hill whether or not the obstruction had been present:

> Whether, had [the plaintiff] not slowed down, he would have been able to reach [the top] without difficulty is a nice question, but I find that if there is an absence of proof of that point . . . the defendant cannot benefit from it. To allow him to do so would be tantamount to allowing him to escape the consequences of his tort by saying that [the plaintiff] might have had the accident in any event, even had the defendant's conduct not intervened. That reasoning cannot be correct. [106]

With respect, there may well be occasions where the defendant, though admittedly negligent—perhaps even grievously so—may be "allow[ed] to escape the consequences of his tort" on the ground that the plaintiff would in any event have sustained the injuries. Principle and precedent require this conclusion. [107] The evidence necessary to support such a finding must of course be strong, perhaps stronger than it was in this case, but that is not to say, as his Lordship did, that "[t]he reasoning *cannot* be correct". [108]

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[104] *Supra* note 98, at 170, quoting from Hughes v. Lord Advocate, *supra* note 103, at 853. McDonald J. also referred, *supra* note 98, at 172, to the following passage from the *Hoffer* case, *supra* note 80, at 752, 21 D.L.R. (3d) at 614: "It is enough to fix liability if one could foresee in a general way the sort of thing that happened. The extent of the damage and its manner of incidence need not be foreseeable if physical damage of the kind which in fact ensues is foreseeable." McDonald J. was "not certain that [this passage] accurately reflects the law as stated in *Hughes v. Lord Advocate*, which is authority for the proposition that the manner in which the damage did occur must be foreseeable in the sense that, although the precise manner in which it occurred was not foreseeable, nevertheless the kind of damage which did occur was foreseeable and the precise manner in which the damage occurred was a variant of the foreseeable or within the risk created by the negligence or not fantastic or highly improbable."

[105] *Id.* at 173. *See also* Hewson v. City of Red Deer, 61 D.L.R. (3d) 168 (Alta. S.C. 1975), where the defence of *novus actus interveniens* was rejected in imposing liability for damage caused to the plaintiff's house when an unknown person smashed into it with the defendant's tractor. The defendant had left the tractor with the cab unlocked and the keys in the ignition while off on a coffee break.

[106] *Supra* note 98, at 167.

[107] *See, e.g.*, Thompson v. Toorenburgh, [1972] 6 W.W.R. 119, 29 D.L.R. (3d) 608 (B.C.S.C.), discussed in the previous *Survey*, *supra* note 2, at 518-19, *aff'd* 50 D.L.R. (3d) 717 (B.C.C.A. 1973): "The harmful [treatment in the hospital] may have hastened the patient's death, but, if [it] did (upon which I express no opinion), [it] did not cause it. Death was the result of acute pulmonary edema and the edema was brought on by the collision. [The patient] would almost certainly have recovered if proper treatment had been applied speedily; the doctors failed to apply that treatment and so failed to save her life, but they did not cause her death. They failed to provide an *actus interveniens* that caused her death." *Id.* at 721. *Aff'd* (without written reasons) [1973] S.C.R. vii.

[108] Emphasis added.

III. STANDARD OF CARE

A. *Aircraft and Boats*

In *Austin Airways Ltd. v. Stewart*,[109] Cromarty J., of the Ontario High Court, relieved the operator of an amphibious Cessna 180 aircraft from liability for his head-on collision, while landing on a lake, with a motor-boat. The court held that the boat operator was liable both to the plane and the occupants of the boat. No liability could be imposed on the pilot since, when he looked down at the area where he intended to land at the time when he ought to have looked, there was no danger; the accident resulted from the fact that the defendant boat operator had changed direction. Moreover, Cromarty J. considered that, even if there *had* been negligence on the part of the pilot, "this is one of the rather rare situations where the last clear chance rule should be applied . . .".[110]

B. *Restauranteurs*

In *Heimler v. Calvert Caterers*,[111] the plaintiff contracted typhoid fever at a wedding feast given at a club where the defendant was a caterer. The evidence disclosed that he caught the fever from a female employee of the defendant who was an unwitting carrier of he disease. The disease could only have been transmitted by the employee's failing to wash her hands after using the washroom. The employee alleged that it was her invariable practice to wash her hands before and after using the toilet, and the evidence showed that there were adequate cleaning facilities on the defendant's premises as well as a sign to remind employees to wash their hands. Nevertheless, the plaintiff succeeded in his action. At trial, Judge Stortine held the defendant liable in negligence on the basis that "[t]he duty of a restauranteur or caterer is no less than the duty imposed upon a manufacturer of foods".[112] The court was greatly influenced by *Shandloff v. City Dairy Ltd.*,[113] in which Middleton J.A. responded to the contention that all possible care had been taken by the defendant manufacturer by stating that "[t]he utmost care was used but that care apparently was not sufficient . . . . Some employee did blunder".[114]

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[109] 7 O.R. (2d) 137, 54 D.L.R. (3d) 501 (H.C. 1973), appeal to C.A. dismissed without reasons Feb. 13, 1974.

[110] *Id.* at 142, 54 D.L.R. (3d) at 506.

[111] 8 O.R. (2d) 1, 56 D.L.R. (3d) 643 (C.A. 1975), *aff'g* 4 O.R. (2d) 667, 49 D.L.R. (3d) 36 (Cty. Ct. 1974).

[112] *Id.* at 675, 49 D.L.R. (3d) at 44.

[113] [1936] O.R. 579, [1936] 4 D.L.R. 712 (C.A.).

[114] *Id.* at 591, [1936] 4 D.L.R. at 720. *Cf.* Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183, at 228 (1949), reprinted in W. PROSSER, SELECTED TOPICS ON THE LAW OF TORTS 302, at 370 (1954): "In all such cases there is common experience which permits the jury to conclude that the defendant's witnesses are not to be believed, that something went wrong with the precautions described, that the full truth has not been told. As the defendant's evidence approaches conclusive proof that such precautions were taken that this accident could not possibly have occurred, it is all the more obviously contradicted by the fact that it did occur."

The trial judge, however, rejected the assertion that the federal Food and Drugs Act [115] imposed civil liability on the defendant, on the ground that the statute was a quasi-criminal one:

> [W]hile such statutes are commonly used in the United States to create civil liability . . . I am not aware of any Canadian Court which has done so. In Canada where the constitutional powers given by the *British North America Act, 1867*, are jealously guarded by both the federal and provincial Legislatures, it appears that a federal statute cannot confer a civil right of action". [116]

However, it was conceded that "the provisions of the federal statute may be relevant in establishing a standard of care in the civil action". [117]

The decision at the trial level is also interesting because the court addressed itself to the issue of strict liability. Having stated that he had "examined some leading United States cases on this issue" [118] and having referred to the *Restatement* [119] and *Prosser*, [120] Judge Stortine concluded:

> In summary, there is no doubt in my mind that the defendant in this case would be held strictly liable in the United States. The Canadian jurisprudence has not yet developed to this extent and the law still proceeds on the basis of negligence, using the doctrine of *res ipsa loquitur* to assist the plaintiff in overcoming the evidentiary burdens. [121]

The Court of Appeal, in a short judgment, [122] upheld the trial judge's finding of negligence, Evans J.A. stating:

> The standard of care demanded from those engaged in the food-handling business, is an extremely high standard and as Middleton, J.A., observed in *Shandloff v. City Dairy Ltd.* . . . the lack of care essential to the establishment of such a claim increases according to the danger to the ultimate consumer, and where the thing is in itself dangerous, the care necessary approximates to and almost becomes an absolute liability. While the facts in the *Shandloff* case are considerably different to the present situation; the same principle is applicable. The degree of care is extremely high. [123]

The Court of Appeal did not "find it either necessary or convenient to deal with the other interesting and intriguing points dealt with by the trial Judge in his judgment. But our failure to comment or our silence with respect to those items is not to be taken as an affirmation of his views on these

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[115] R.S.C. 1970, c. F-27, s. 4.

[116] *Supra* note 111, at 673, 49 D.L.R. (3d) at 42.

[117] *Id.* at 674, 49 D.L.R. (3d) at 43.

[118] *Id.* at 676, 49 D.L.R. (3d) at 45. The U.S. cases were Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P. 2d 897 (1962); Levy v. Horn & Hardart Baking Co., 103 Pa. 282, 157 A. 369 (1931); Meshbesher v. Channellene Oil and Mfg. Co., 107 Minn. 104, 119 N.W. 428 (1909); Doherty v. S. S. Kresge Co., 227 Wis. 661, 278 N.W. 437 (1938); Kenower v. Hotels Statler Co., 124 F. 2d 658 (6th Cir. 1942); Community Blood Bank, Inc. v. Russell, 196 So. 2d 115 (Fla. S.C. 1967).

[119] AMERICAN LAW INSTITUTE, 2 RESTATEMENT OF THE LAW OF TORTS, SECOND § 402 A, comment 9 (1965).

[120] W. PROSSER, HANDBOOK OF THE LAW OF TORTS 638, 653 (4th ed. 1971).

[121] *Supra* note 111, at 677, 49 D.L.R. (3d) at 46.

[122] *Supra* note 111.

[123] *Id.* at 2, 56 D.L.R. (3d) at 644. The *Shandloff* case is cited *supra* note 113.

other issues". [124] This laconic comment seems to hint "between the lines" that the Court of Appeal would not have taken the same approach as the trial judge on the issue of statutory liability. It would, it is suggested, be unduly optimistic to read into the court's reservation evidence of a favourable trend towards strict liability on the American model.

C. *Schools*

During the period since the last *Survey*, a number of decisions have been reported which lend support to the recent observation that "the standard of care owed by teachers to their students is great". [125]

In *James v. River East School Division*, [126] the plaintiff, an eighteen-year-old "above average student", was injured when nitric acid, which she was heating in the course of a laboratory experiment, spattered into her face. Liability was imposed on the school. The instructions for the experiment had not referred to the necessity of wearing goggles. Deniset J. stated:

> Goggles were available. None were recommended on this occasion by the teacher. . . . His excuse that the students knew about the goggles and that none requested them, is not valid. The Greater Winnipeg Minor Hockey Association does not recommend the use of helmets when playing league games. You put on a helmet, or you don't play.
>
> Students must be told, when necessary, "wear goggles". [127]

In *Thornton v. Board of School Trustees*, [128] the plaintiff, a fifteen-year-old student at the defendant's school, was severely injured during gymnastic exercises when he struck his head on inadequate protective matting, after attempting a somersault. The gymnastic equipment had been placed in a configuration which the students, unskilled gymnasts, had never encountered before. The instructor was writing report cards during the exercises and had not investigated the operation of the equipment, despite the fact that another boy had broken his wrist shortly before the plaintiff was injured.

Liability was imposed on the school for the negligence of the instructor. Andrews J. of the British Columbia Supreme Court considered that he had been negligent at two levels. Firstly, with regard to the configuration, he "should have given some advice, some instruction, a word of caution, and at least imposed some limits on what [the students] could or could not do in the circumstances". [129] Secondly, in the discharge of his duty to act

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[124] *Id.*

[125] Vacca, *Teacher Malpractice*, 8 U. RICHMOND L. REV. 447, at 448 (1974).

[126] [1975] 5 W.W.R. 135, 58 D.L.R. (3d) 311 (Man. Q.B.), *aff'd* [1976] 2 W.W.R. 577, 64 D.L.R. (3d) 338 (Man. C.A. 1975). The Court of Appeal decision was based as well on evidence of negligence other than that of the instructor's failure to tell his students to wear goggles.

[127] *Id.* at 139, 58 D.L.R. (3d) at 314-15. For an account of recent decisions in the United States relating to scientific experiments and the use of shop equipment in schools, see Ripps, *The Tort Liability of the Classroom Teacher*, 9 AKRON L. REV. 19, at 26-30 (1975).

[128] [1975] 3 W.W.R. 622, 57 D.L.R. (3d) 438 (B.C.S.C.).

[129] *Id.* at 633, 57 D.L.R. (3d) at 448.

as a "careful parent of a large family", [130] the instructor should have been alerted by the first accident to the risk of further trouble. [131]

D. *Passengers*

In *Morgan v. Airwest Airlines Ltd.*, [132] the husband of the plaintiff was killed when struck by a propeller of a seaplane from which he had just disembarked. The crew had left the plane before the propellers stopped rotating and had not indicated to the passengers either that they were not to leave the plane until it was safe to do so or that they were to watch out for the propeller. Ruttan J. had "no doubt of the negligence of the defendants" [133] in this respect.

The defence of contributory negligence was rejected on the basis that "the only warning that might have alerted [the deceased] to the danger facing him as he walked along the jetty was the whistling noise of the propeller". [134] On balance, the court considered that the deceased had behaved in a reasonable manner and, "in the absence of knowledge of the extreme hazard ahead of him, could not be expected to display a high degree of care". [135] The "last opportunity" rule, which "despite criticism by certain Judges and law teachers . . . is still alive in British Columbia . . .", [136] was rejected on the facts of the case.

In *Mattinson v. Wonnacott*, [137] the plaintiff, a five-year-old child attending a kindergarten, was injured when, having left a school bus without the knowledge of the driver, he was struck by an automobile on the highway. At the time he left the bus there were nine children on board. Liability was imposed on the driver on the basis that if, as alleged, the plaintiff had been "something of a problem" [138] on the bus before the accident, she should have reported him to the principal of the school. More significantly, liability was also imposed on the bus company and the school board. [139] The decision of

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[130] *Id.*, citing Williams v. Eady, 10 T.L.R. 41 (C.A. 1893).

[131] *See also* Magnusson v. Bd. of Nipawin School, 60 D.L.R. (3d) 572 (Sask. C.A. 1975) (school not liable for permitting children to play on patch covered with broken glass, injury to child having arisen from "an unfortunate combination of circumstances"); Bouchard v. Les Commissaires d'Ecoles Pointe-Claire, [1971] Que. C.S. 190; Armlin v. Bd. of Educ. of Middleburgh, 36 App. Div. 2d 877, 320 N.Y.S. 2d 402 (1971); Schnell v. Travelers Ins. Co., 264 So. 346 (La. C.A. 1972).

[132] [1974] 4 W.W.R. 472, 48 D.L.R. (3d) 62 (B.C.S.C.).

[133] *Id.* at 477, 48 D.L.R. (3d) at 66.

[134] *Id.* at 481, 48 D.L.R. (3d) at 70.

[135] *Id.* at 482, 48 D.L.R. (3d) at 71.

[136] *Id.* at 478, 48 D.L.R. (3d) at 67. Examples of such criticism are MacIntyre, *The Rationale of Last Clear Chance*, 18 CAN. B. REV. 665 (1940), and MacIntyre, *Last Clear Chance After Thirty Years Under the Apportionment Statutes*, 33 CAN. B. REV. 257 (1955). For an analysis of the present status of the doctrine in those U.S. states where comparative negligence statutes have been enacted, see Grove, Comment, 28 OKLA. L. REV. 444 (1975), and V. SCHWARTZ, COMPARATIVE NEGLIGENCE, ch. 7 (1874).

[137] 8 O.R. (2d) 654 (H.C. 1975).

[138] Id. at 661.

[139] For an account of the U.S. position, see Mancke, *Liability of School Districts for the Negligent Acts of Their Employees*, 1 J. LAW & EDUC. 109, at 121-23 (1972).

Baldwin v. Lyons, [140] which "would appear to be authority for the proposition that in circumstances where the school board hired a bus company as an independent contractor, the school board was not responsible for the acts of negligence of the bus company", [141] was distinguished on the basis that in the present case "the bus company and the [school] board emphasized the substantial element of control which could be exercised by the school board over the bus company. For all intents and purposes, during the time that the bus company was transporting the pupils to and from school, it was acting as a servant of the board". [142]

In *McMillan v. Pawluk*, [143] four persons were travelling to work in a car pool when their car was involved in a collision, and liability was imposed on the driver of the car for one third of the damages suffered by its passengers. The Supreme Court of Canada, drawing a distinction between transportation that is provided for social purposes only and transportation that is provided for commercial or business purposes, held that where transportation is provided pursuant to a mutual understanding to repay by providing further transportation, it is not "social" only. Thus the fact of the car pool took the passengers' claim outside of the provision of the Highway Traffic Act [144] which specifies that passengers transported by the owner of a car "as his guest and without payment" cannot claim damages for any injury suffered unless gross negligence on the driver's part has contributed to the injury.

E. *Children's Welfare*

In *Bryant v. Burgess*, [145] the brother-in-law of the two plaintiffs, who were aged eleven and twelve years respectively, had assumed temporary custody of them, and permitted them to be towed by himself in a "rusted out" vehicle along the road at a speed of 25 to 30 miles per hour. After travelling a distance of about a mile and a half, the right rear wheel of the vehicle came off and the vehicle crashed into a hydro pole, causing the plaintiffs serious injuries. Liability was imposed on the following basis:

[140] [1961] O.R. 687, 29 D.L.R. (2d) 290 (C.A.), *aff'd* [1962] S.C.R. vii, 36 D.L.R. (2d) 244.

[141] *Supra* note 137, at 664-65.

[142] *Id.* at 665. The Supreme Court of Canada decision in Bd. of Educ. for Toronto v. Higgs, [1960] S.C.R. 174, 22 D.L.R. (2d) 49 (1959), which, together with McKay v. Bd. of Govan School, [1968] S.C.R. 589, 68 D.L.R. (2d) 519, placed some qualification on the universality of the "careful father" criterion espoused in the classic decision of Williams v. Eady, *supra* note 130, was distinguished in *Mattinson* on the basis that the plaintiff had established failure on the part of the "individual supervisor" (*supra* note 137, at 666) and that "[i]n direct contrast to the *Higgs* case where it was found that the system of supervision was adequate and proper, there is here a real question of the adequacy of the system in this case . . .". On the general question of school liability, see Ripps, *supra* note 127, *esp.* at 31-33. *See also Educational Malpractice*, 124 U. PA. L. REV. 755 (1976), for a comprehensive analysis of possible legal and policy arguments in favour of imposing liability on schools for substandard teaching.

[143] 7 N.R. 114, 61 D.L.R. (3d) 338 (1976).

[144] R.S.A. 1970, c. 169, s. 214(1).

[145] 7 O.R. (2d) 671, 56 D.L.R. (3d) 335 (H.C. 1974).

> [I]t was the duty of the defendant to act as a reasonable and careful parent would have acted in the circumstances. . . . The defendant made no effort to ascertain the [vehicle's] adequacy and safety for use on the highway. . . . I am of opinion that a reasonable and careful parent with knowledge of [the] risk would not have permitted his own son to ride the [vehicle] while he was towing it along a gravel road at 25-30 m.p.h. [146]

In *Poulton v. Notre Dame College*, [147] the plaintiff was a seventeen-year-old grade 11 student, who was potentially an excellent hockey player. He was attending a school where a sporting regime prevailed, with what was graphically described as a "two aspirin and walk it off philosophy". When injuries to the plaintiff's toe and hip, sustained while playing hockey, grew progressively worse, he requested one of the defendants, who was his teacher, coach and Dean of Men in his residence, for permission to visit his physician. The defendant, who was displeased with the plaintiff's poor academic performance, refused permission. The plaintiff's condition worsened. After the defendant had again refused to permit the plaintiff to see his physician, the other students "then took matters in their own hands" and drove him to a hospital. The plaintiff's condition seriously deteriorated, [148] but he eventually made a good recovery. The plaintiff's action against his teacher and the school was successful. The court considered that, on the evidence, the teacher's conduct was such that "he did not give the proper general protection from the exacerbation of the illness of which he knew or ought to have known". [149]

F. *Medical Malpractice*

1. *Causation*

In *Parsons v. Schmok*, [150] the plaintiff suffered a stroke as a result of atherosclerosis. He had for some time, to the knowledge of his physician, been suffering from mild hypertension. The defendant had not, however, given the plaintiff therapy for his condition. The court considered that the evidence adduced "simply supports the conclusion that as yet medical knowledge is extremely limited as to the effect of anti-hypertensive drug therapy on persons with a diastolic reading of below 104". [151] Accordingly, in the face of medical testimony by experts who "were firm in their views that the stroke suffered by the plaintiff would not have been averted by anti-hypertensive drug therapy", [152] the plaintiff's action was dismissed.

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[146] *Id.* at 675-76, 56 D.L.R. (3d) at 339-40.

[147] 60 D.L.R. (3d) 501 (Sask. Q.B. 1975).

[148] "The illness was never satisfactorily identified. It was described as an infection localized in the hip region . . . ." However, at one stage the plaintiff "was placed under intensive care, there was a threat of amputation of his leg and he was near death". *Id.* at 504.

[149] *Id.* at 506.

[150] 58 D.L.R. (3d) 662 (B.C.S.C. 1975).

[151] *Id.* at 630. The plaintiff's reading was below this figure at the critical periods.

[152] *Id.* at 631.

2. *Error of Judgment or Negligence?*

In *Serre v. De Tilly*, [153] the wife of the plaintiff died as a result of a brain hemorrhage. Her condition consisted initially of tiredness, dizziness and urinary discomfort, for which her family doctor prescribed conventional treatment. The following day her condition worsened, and she complained of inability to use her legs. When brought to the Emergency Department of a hospital, she was examined by a doctor, who diagnosed hysteria. And yet, "[s]he still claimed an inability to walk, appeared frightened and very pale". The following day the lady experienced difficulty in breathing. She was taken by ambulance to another hospital. Her family doctor, who attended at the hospital and examined her, also diagnosed hysteria and advised that she should be discharged, which was done. The following day, she was still not walking, and her family doctor, when consulted by telephone, contemplated referring her to a psychiatrist if her condition persisted. Two days later the plaintiff found his wife dead in her bedroom.

The evidence disclosed that a brain hemorrhage of the type affecting the wife was "most unusual and rare in a person like [the deceased], only 21 years of age at the time of her death". [154] The only symptoms observable in the first three days were consistent with hysteria. Stark J. held that neither the family doctor nor the hospital doctor was liable for negligence:

> There was no evidence to suggest that the actions of either . . . were not in conformity with the standards and recognized practice followed by the members of their profession, that is, in the general practice of medicine. The diagnosis which each of them reached provided a reasonable explanation to them of the particular complaints with which they were presented. It may have been an error of judgment on their part not to have taken the patient's complaints more seriously and not to have pursued other lines of inquiry, including the taking of routine blood tests. But an error of judgment alone does not constitute negligence. [155]

Moreover, the hospitals were held not to be liable for the conduct of their nurses since, on the evidence, the nurses had displayed considerable solicitude for the welfare of the plaintiff's wife. Even if the doctors had been held negligent, Stark J. considered:

> [T]hat would not have been sufficient to attach liability to the hospitals. Here the patient herself had selected the family doctor . . . and when he was not available he was represented by [the doctor in the first hospital]. That being so, the hospitals could not be made liable for their negligence,

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[153] 58 D.L.R. (3d) 362 (Ont. H.C. 1975).

[154] *Id.* at 365.

[155] *Id.* at 366. The court's mention of the failure to take blood tests is somewhat surprising, since the evidence had disclosed that such tests would only have been useful if a platelet defect had existed, and the court held that, "[o]n the balance of probabilities, the evidence is insufficient to support the platelet theory . . .".

As to the standard of care required of general practitioners, the court endorsed Ostrowski v. Lotto, [1973] S.C.R. 220, at 230-31, 31 D.L.R. (3d) 715, at 722-23.

> if any had been found. Neither doctor was in any sense acting as an employee or agent of the hospital. [156]

The court, following the trial judge and Court of Appeal in *Villeneuve v. Sisters of St. Joseph*, [157] could not accept the argument that

> if any of the nurses or the hospital servants disagreed with the findings or direction of the family doctor they should have acted independently or called in other medical advice. Diagnosis is surely not a function of the nurse; and less [*sic*] there were clear and obvious evidences [*sic*] of neglect or incompetence on the part of the family doctor, it would be unthinkable that the hospital or its agents should interfere with or depart from his instructions. [158]

3. *Standards of the Time and Place*

In *Tiesmaki v. Wilson*, [159] the plaintiff, aged five, developed a throat illness and was brought to hospital. The doctor treating her initially diagnosed her ailment as "acute upper respiratory infection", and subsequently as "acute laryngo-tracheal bronchitis". After some hours in hospital, the plaintiff's condition seriously deteriorated. She suffered a convulsion and lapsed into a coma. The doctor performed a tracheotomy. Very severe damage was caused to the plaintiff's brain as a result of anoxia following the convulsion. The evidence disclosed that the convulsion had been caused either by epiglottitis or by encephalitis. Since "[e]ncephalitis is an ailment for which no treatment is available . . . [a] diagnosis of encephalitis by [the doctor] would have been to no avail as he would have been powerless to prevent its development and the eventual collapse which occurred. It is an affliction which is entirely beyond the control of medicine". [160] Epiglottitis "is a rare disease and in 1960 [when the plaintiff became ill] it would not be known to a general practitioner. Indeed, the specialists who testified had rarely encountered the disease. To a general practitioner in 1960 it would be categorized as a form of croup." [161]

At trial, Lieberman J. dismissed the plaintiff's claim on the basis that she had failed to establish either that the defendant had been negligent or that the defendant's conduct had "caused or contributed to the injuries . . .". [162]

On appeal, the trial judge's finding was upheld. Haddad J.A. laid emphasis on the well-known decision of the Supreme Court of Canada in

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[156] *Id.* at 367. The judgment is unclear as to the precise relationship between the hospital doctor and the family doctor, though, as the passage indicates, the former was in some way *representing* the latter.

[157] [1971] 2 O.R. 593, 18 D.L.R. (3d) 537 (H.C.), *aff'd* [1972] 2 O.R. 119, 25 D.L.R. (3d) 35 (C.A. 1971), *rev'd* [1975] 1 S.C.R. 285, 47 D.L.R. (3d) 391 (1974).

[158] *Supra* note 153, at 367. *Cf.* MacDonald v. York County Hospital Corp., [1972] 3 O.R. 469, 28 D.L.R. (3d) 521 (H.C.) (discussed in the previous *Survey*, *supra* note 2, at 527), *aff'd* 1 O.R. (2d) 653, 41 D.L.R. (3d) 321 (C.A. 1973), *aff'd, sub nom.* Vail v. MacDonald, 66 D.L.R. (3d) 530 (S.C.C. 1976).

[159] [1975] 6 W.W.R. 639, 60 D.L.R. (3d) 19 (Alta. C.A.), *aff'g* [1974] 4 W.W.R. 19 (Alta. S.C. 1974).

[160] *Id.* at 647, 60 D.L.R. (3d) at 27.

[161] *Id.* at 646, 60 D.L.R. (3d) at 26.

[162] [1974] 4 W.W.R. 19, at 48 (Alta. S.C. 1974).

Wilson v. Swanson,[163] in which it had been stated that "the medical man must possess and use that reasonable degree of learning and skill ordinarily possessed by practitioners in similar communities in similar cases".[164] Applying this criterion to the facts before him, Haddad J.A. observed:

> The evidence shows . . . that [the doctor] did exhibit the degree of learning expected of a general medical practitioner in Banff in 1960. Epiglottitis was not commonly known as a separate infection in 1960 so as to distinguish it from croup. . . . The trial Judge was careful to observe that the relevant standards of professional conduct are the standards which prevailed in 1960. As pointed out be Meredith . . . what was considered good practice several years ago may not be accepted as good practice today.[165]

4. *Informed Consent*[166]

In *Gorback v. Ting*,[167] the plaintiff suffered damage to her natural teeth and bridge when, as a result of a muscle spasm, she bit down upon tubing while recovering from a general anaesthetic. She had received the anaesthetic in preparation for a dental operation.[168] The evidence disclosed that the likelihood of such an injury, although small, was increased by the particular formation of the plaintiff's teeth. Since there was "nothing [on the facts of the case] to suggest that the general anaesthetic was particularly necessary or that a local anaesthetic would not have been just as effective",[169] liability was imposed on the anaesthetist for having performed the general anaesthetic without having consulted the plaintiff on this matter which, according to the evidence, was "basically up to the patient to decide . . .".[170]

5. *Nurses*

In *Dowey v. Rothwell*,[171] the plaintiff, an epileptic, had been treated

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[163] [1956] S.C.R. 804, 5 D.L.R. (2d) 113.

[164] *Id.* at 817, 5 D.L.R. (2d) at 124.

[165] *Supra* note 159, at 651, 60 D.L.R. (3d) at 31, *citing* W. MEREDITH, MALPRACTICE LIABILITY OF DOCTORS AND HOSPITALS 64 (1956).

[166] For a brief comparative account of this topic, see Giesen, *Civil Liability of Physicians for New Methods of Treatment and Experimentation*, 25 INT. & COMP. L.Q. 183-88 (1976).

[167] [1974] 5 W.W.R. 606, 52 D.L.R. (3d) 134 (Man. Q.B.).

[168] In fact the operation could not be performed under general anaesthetic, since the necessary intubation of the patient proved impossible. It was, however, performed the following day under local anaesthetic.

[169] *Supra* note 167, at 609, 52 D.L.R. (3d) at 138. The anaesthetist's argument that to have given the plaintiff a choice between a general and a local anaesthetic would have created anxiety on her part was rejected. "All the evidence indicates that [the] plaintiff's state of mind was good and would not have been adversely affected by discussion and the giving of an option of the kind suggested."

[170] *Id.* *See also* Koehler v. Cook, 65 D.L.R. (3d) 766 (B.C.S.C. 1975), in which an operation to cure the plaintiff's migraine headaches resulted in loss of his sense of smell. Given the surgeon's assurance that the operation would have no complications, the patient's consent was held not to be an informed consent. The test was said to be not whether a prudent man would have accepted the risk, but whether *this* plaintiff, if correctly apprised of the risk, would have accepted it. *Cf.* Canterbury v. Spence, 464 F. 2d 772 (D.C. Cir. 1972). *See also* Girard v. Royal Columbian Hospital, 66 D.L.R. (3d) 676 (B.C.S.C. 1976) (contention as to lack of consent to a certain type of anaesthetic rejected on the evidence).

[171] [1974] 5 W.W.R. 311, 49 D.L.R. (3d) 82 (Alta. S.C.).

since the age of 25 by one of the associates of the defendant medical partnership. At the age of 35 she stopped taking her prescribed anti-convulsant as a result of associating with persons subscribing to the tenets of Christian Science. Shortly thereafter, she experienced a forewarning of a seizure (which is a common experience for one in two epileptics). She went to the defendant's offices where she explained the situation to, among others, a graduate nurse. The nurse escorted the plaintiff to an examining room and placed her on an examining table, then left the room to obtain the plaintiff's files. About a minute later, the plaintiff fell in an epileptic seizure from the table onto the tiled floor.

Liability was imposed on the defendant. Cullen J. of the Alberta Supreme Court referred to a number of "standard texts" [172] on nursing as well as to the evidence of an expert witness who, "[w]hen specifically asked . . . stated that if a person had not been taking the prescribed drugs she would expect 'a dandy—a grand mal seizure' . . .". [173] Cullen J. considered that "we can apply to nurses as well as to doctors . . ." [174] the well known statement of the standard of care in medical negligence expressed in *Crits v. Sylvester*. [175] Liability was imposed on the basis that the nurse should have placed the plaintiff on the floor rather than on the table:

> In breach of what would be regarded as a minimal standard of care [the nurse] left the plaintiff in a position where she could do harm to herself for a period of time in which such harm could occur, and that which was reasonably forseeable [*sic*] happened due to the negligence of the personnel in the defendant's office. [176]

6. *Medical Operations*

In *Fizer v. Keyes*, [177] the plaintiff consulted the defendant doctor regarding a cyst in his shoulder. The defendant recommended removal and performed the operation shortly afterwards. The operation was not a suc-

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[172] *Id.* at 314-16.

[173] *Id.* at 316, 49 D.L.R. (3d) at 87.

[174] *Id.* at 318, 49 D.L.R. (3d) at 89.

[175] [1956] O.R. 132, at 143, 1 D.L.R. (2d) 502, at 508 (C.A. 1955), *aff'd, sub nom.* Sylvester v. Crits, [1956] S.C.R. 991, 5 D.L.R. (2d) 601. Cullen J. also referred to University Hospital Bd. v. Lépine, *supra* note 84, at 579, 57 D.L.R. (2d) at 718, where, in his view, the legal principles had been "beautifully expressed". *Supra* note 171, at 321, 49 D.L.R. (3d) at 91.

[176] *Supra* note 171, at 321-22, 49 D.L.R. (3d) at 92. The decision in Sisters of St. Joseph v. Villeneuve, [1972] 2 O.R. 119, 25 D.L.R. (3d) 35 (C.A. 1971), *varying, sub nom.* Villeneuve v. Sisters of St. Joseph, [1971] 2 O.R. 593, 18 D.L.R. (3d) 537 (H.C.) (discussed in previous *Survey, supra* note 2, at 525-26), was appealed to the Supreme Court of Canada, [1975] 1 S.C.R. 285, 47 D.L.R. (3d) 391 (1974). The Court, by a majority, restored the trial judge's finding that the nurses had not been negligent. Spence J.'s strong dissent (in which he was joined by Laskin C.J.) is worthy of note. In Elverson v. Doctors Hospital, 4 O.R. (2d) 748, 49 D.L.R. (3d) 196 (C.A. 1974), nurses were held not to have been negligent in placing bricks under a patient's bed without calling an orderly to assist them, the patient herself having rendered assistance and, in so doing, aggravating a pre-existing back condition. The nurses were said to have made, at worst a simple error in judgment.

[177] [1974] 2 W.W.R. 14 (Alta. S.C. 1973).

cess; the plaintiff experienced pain in his shoulder and a reduction in his capacity to move his arm above eye level. The evidence disclosed that the cyst had been close to the spinal accessory nerve and that an infected cyst would increase the risk of damaging this nerve.

Kirby J. of the Alberta Supreme Court made a wide review of the authorities which establish the general principle that "[e]very medical practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care" [178] as well as clarifying the "distinction between an error in judgment and an act of unskilfulness or carelessness due to lack of knowledge". [179] On the facts of the case, the court found the defendant negligent on the basis that, if the cyst was grossly infected when the operation was performed, "[i]n the face of the medical evidence of the dangers inherent in removing [it] . . . it seems to me that more than a mere error in judgment was involved; that the doctor should have been aware of [the] dangers and deferred surgery until the infection had been treated". [180] Even though the cyst was not actively infected at the time of the operation, the defendant was nevertheless held negligent, since "[t]he tenor of [his] evidence . . . and his attitude towards his patient [after the operation] . . . suggest a lack of sensitivity to the danger inherent in the close proximity of the spinal accessory nerve to the trapezius muscle in the posterior triangle, the area in which the cyst was located". [181]

In *Chubey v. Ahsan*, [182] the defendant, an orthopaedic surgeon who had "performed hundreds of disc operations with acknowledged results", operated on the wife of the plaintiff for the removal of her disc. During the operation the patient lost an unusually large amount of blood, but her pulse was maintained at a normal level. After the operation, while the patient was still unconscious, she was moved to the recovery room, and shortly afterwards the defendant "left the hospital to attend to other duties in another hospital". [183] Within a very short time the patient's condition deteriorated rapidly. It transpired that the aorta artery had been ruptured during the operation. [184] Corrective surgery was performed but was not successful, and the patient died that night.

The plaintiff's action for negligence was unsuccessful. Evidence was given that "[d]espite the great risk of damage to the aorta artery during disc

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[178] *Id.* at 21, quoting Schroeder J.A. in Crits v. Sylvester, *supra* note 175, at 143, 1 D.L.R. (2d) at 508. Kirby J. also referred *inter alia*, to statements made in Rex v. Bateman, 41 T.L.R. 557, at 559, 19 Cr. App. R. 8, at 12 (1925), statements approved in the Canadian cases of Gent v. Wilson, [1956] O.R. 257, 2 D.L.R. (2d) 160 (C.A.), Johnston v. Wellesley Hospital, [1971] 2 O.R. 103, 17 D.L.R. (3d) 139 (H.C.) (discussed in previous *Survey*, *supra* note 2, at 523-25), and Ostrowski v. Lotto, [1971] 1 O.R. 372, 15 D.L.R. (3d) 402 (C.A.).

[179] *Supra* note 177, at 22.

[180] *Id.* at 25.

[181] *Id.*

[182] [1975] 1 W.W.R. 120, 56 D.L.R. (3d) 231 (Man. Q.B. 1974).

[183] *Id.* at 122, 56 D.L.R. (3d) at 233.

[184] The defendant in evidence "accept[ed the] testimony . . . that such damage must have happened during surgery . . . ." *Id.* at 123, 56 D.L.R. (3d) at 234.

surgery, such damage rarely happens because of the care taken by orthopaedic surgeons. According to statistics only one aorta is damaged in seven thousand disc operations and only 50 per cent of such damage to aorta [*sic*] results in death". [185] Although the blood loss during the operation had been high, the court considered that the defendant had not been negligent, having regard to the patient's ability to maintain normal pulse and blood pressure, in not discovering that her aorta had been ruptured and in leaving her after the operation. Solomon J. of the Manitoba Queen's Bench referred to the well-known statements regarding the liability of doctors expressed in *Wilson v. Swanson* [186] and *Roe v. Ministry of Health.* [187] Of some importance are his remarks on the issue of medical custom. He stated that he "would like to point out . . . that even had [the defendant] followed accepted practice of the profession, he could not escape liability if such practice did not meet the legal requirement of care for the patient". [188]

7. *Injections*

In *Wilcox v. Cavan,* [189] the plaintiff claimed damages for the amputation of parts of his left hand as a result of developing a gangrenous condition after an injection of bicillin in his arm by the defendant nurse. The facts, briefly, were that the plaintiff, who had upper lobar pneumonia, was given an injection by the defendant, "a registered nurse of some ten years' standing" who "had been giving injections at the rate of six to eight a day for many years". [190] Since the plaintiff would not co-operate with the defendant in her intention to inject the bicillin in his buttock, the defendant decided to give him the injection in the deltoid muscle of the upper left arm, a generally accepted alternative site. Somehow, the bicillin entered the circumflex artery, causing gangrene, although "neither the [defendant] nor any of the distinguished doctors called at the trial were able to explain exactly how". [191] The evidence of the plaintiff's wife that three weeks after the injection she had seen the site where the injection had been made—at a dangerous position on the arm—and that the defendant had drawn blood during the injection

[185] *Id.* at 124, 56 D.L.R. (3d) at 235.

[186] *Supra* note 163.

[187] [1954] 2 Q.B. 66, at 83, [1954] 2 All E.R. 131, at 137 (C.A.) (Denning L.J.).

[188] *Supra* note 182, at 129, 56 D.L.R. (3d) at 240. *See also* Kangas v. Parker, [1976] 5 W.W.R. 251 (Sask. Q.B.), where liability was imposed on both the anaesthetist and the dental surgeon when a patient, under a general anaesthetic during an operation for the removal of eleven teeth, was asphyxiated by blood entering his throat. The court found that their negligence consisted in failing to advise the patient that the operation could be performed in a hospital under a local anaesthetic; failing to be prepared to deal with an emergency in the office; failing to conduct a physical examination before the operation; and, in general, falling far below the standard of care required.

[189] [1975] 2 S.C.R. 663, 50 D.L.R. (3d) 687 (1974), *rev'g, sub nom.* Cavan v. Wilcox, 7 N.B.R. (2d) 192, 44 D.L.R. (3d) 42 (C.A. 1973).

[190] *Id. at* 665, 50 D.L.R. (3d) at 688.

[191] *Id.* at 675, 50 D.L.R. (3d) at 696 .

was rejected at trial [192] and on ultimate appeal to the Supreme Court of Canada.

The finding of *res ipsa loquitur*, which the New Brunswick Court of Appeal [193] found not to have been displaced by the defendant, was held by a unanimous Supreme Court of Canada not to defeat the defendant's explanation. Ritchie J. stated:

> It appears to me that in medical cases where differences of expert opinion are not unusual and the sequence of events often appears to have brought about a result which has never occurred in exactly the same way before to the knowledge of the most experienced doctors, great caution should be exercised to ensure that the rule embodied in the maxim *res ipsa loquitur* is not construed so as to place too heavy a burden on the defendant. [194]

Having regard to the emphasis placed by the Court of Appeal on *Martel v. Hotel-Dieu St-Vallier*, [195] Ritchie J. was anxious to show that "[e]ach such case must of necessity be determined according to its own particular facts and it seems to me that the rule should never be applied in such cases by treating the facts of one case as controlling the result in another, however similar those facts may be". [196]

Mr. Justice Ritchie referred to the recent Supreme Court of Canada decision of *Finlay v. Auld*, [197] in which the famous *Thetis* [198] decision had been invoked, for the proposition that "even where [*res ipsa loquitur*] applies the defendant is not to be held liable because he cannot prove exactly how the accident happened". [199] The evidence in the instant case "afforded an explanation consistent with no negligence on the part of [the defendant]", [200] and accordingly the plaintiff's action failed. [201]

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[192] 7 N.B.R. (2d) 208 (S.C. 1973).

[193] *Supra* note 189.

[194] *Supra* note 189, at 674, 50 D.L.R. (3d) at 695.

[195] [1969] S.C.R. 745, 14 D.L.R. (3d) 445.

[196] *Supra* note 189, at 674, 50 D.L.R. (3d) at 695.

[197] [1975] 1 S.C.R. 338, 43 D.L.R. (3d) 216 (1973).

[198] Woods v. Duncan, [1946] A.C. 401, [1946] 1 All E.R. 420.

[199] *Supra* note 197, at 343, 43 D.L.R. (3d) at 219.

[200] *Supra* note 189, at 676, 50 D.L.R. (3d) at 696.

[201] *Cf.* Girard v. Royal Columbian Hospital, *supra* note 170, another injection case in which the applicability of the maxim *res ipsa loquitur* was rejected on the facts of the case. Andrews J. stated:

> The human body is not a container filled with a material whose performance can be predictably charted and analysed. It cannot be equated with a box of chewing tobacco or a soft drink. Thus, while permissible inferences may be drawn as to the normal behaviour of these types of commodities the same kind of reasoning does not necessarily apply to a human being. Because of this medical science has not yet reached the stage where the law ought to presume that a patient must come out of an operation as well or better than he went into it. From my interpretation of the medical evidence the kind of injury suffered by the plaintiff could have occurred without negligence on anyone's part. Since I cannot infer there was negligence on the part of the defendant doctors the maxim of *res ipsa loquitur* does not apply.

Id. at 691. With all respect to Mr. Justice Andrews, in his anxiety to do justice to the

8. *Developments in the United States.*

In the United States, considerable controversy has been engendered by the Washington Court of Appeals decision of *Helling v. Carey*,[202] in which the familiar rules[203] of judicial deference to the standard of the profession have apparently been set aside. Liability was imposed on opthalmologists for having failed to administer an eye pressure test, which would have disclosed a condition of glaucoma in a 32-year-old patient. It was the universal practice of opthalmologists not to give this test to persons under the age of forty because of the low incidence[204] of the disease in that age category. The lack of expense in performing the test as well as the absence of any judgment factor in assessing its results weighed heavily[205] with the court. The precise basis of the court's decision and the extent to which it goes beyond the conventional scope of judicial scrutiny of medical practice is subject to differing interpretations.[206] The considerable commentary that the decision has evoked has generally been critical.[207]

A second major controversial decision in the United States on the law regarding doctors is *Tarasoff v. Regents of the University of California.*[208] In that case the Supreme Court of California imposed an obligation on psychotherapists who believe that a patient may do harm. A student who had become severely depressed at being rejected by a girl with whom he was in love informed the hospital psychotherapist, whom he was consulting as an outpatient, that he intended to kill her when she returned from abroad. Apart from detaining the patient for a brief period, the hospital authorities did nothing to warn or otherwise protect the intended victim, who was in fact murdered by the patient.

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non-material aspect of humankind, he fell into the error of asserting that we human creatures are to some degree free from the dominion of physical laws and scientific investigation. *Cf.* G. RYLE, THE CONCEPT OF MIND (1946).

[202] 82 Wash. 2d 514, 519 P. 2d 981 (1974).

[203] *See* Note, 44 WASH. L. REV. 505 (1969), and Johnson, *An Evaluation of Changes in the Medical Standard of Care*, 23 VAND. L. REV. 729 (1970).

[204] One in 25,000 persons: *supra* note 202, at 518, 519 P. 2d at 983.

[205] *Id.* at 519, 519 P. 2d at 983.

[206] *See* an excellent Comment by Peizer, 51 WASH. L. REV. 167 (1975), who, at 175-84, analyzes four possible interpretations of varying breadth. *Cf.* Hamilton, Comment, 11 WILLAMETTE L.J. 152, at 155-57 (1974); Crombie, Comment, 44 U. CINN. L. REV. 361 at 364-68 (1975).

[207] "*Helling* is probably a classic case of hard facts making bad law." King, *In Search of a Standard of Care for the Medical Profession: The "Accepted Practice" Formula*, 28 VAND. L. REV. 1213, at 1248 (1975). *See also* Wharton, Comment, 6 TEXAS TECH. L. REV. 279, at 283-84 (1974).

The move in the U.S. towards strict liability for the medical profession, following the same lines as strict liability for products, has not been rapid and has been accompanied by some rather dubious categorizations: *see* Comment, 41 TENN. L. REV. 392 (1974), regarding Johnson v. Sears Roebuck & Co., 355 F. Supp. 1065 (Wis. E.D. 1973). For helpful bibliographies of the recent literature, see *Symposium: The 1975 Indiana Medical Malpractice Act; Introduction, The Indiana Act in Context*, 51 INDIANA L.J. 91, at 97, n. 28 (1975), and Segar, *Is Malpractice Insurable?* 51 INDIANA L.J. 128, at 129, n. 4 (1975).

[208] *Supra* note 27.

The court recognized the general rule that there is no obligation to control the conduct of another or to warn the person endangered by such conduct. However, in two cases—both of which applied here—a duty should be imposed:

> (1) cases in which the defendant stands in some special relationship to either the person whose conduct needs to be controlled or in a relationship to the foreseeable victim of the conduct . . . and (2) cases in which the defendant has engaged, or undertaken to engage, in affirmative action to contest the anticipated dangerous conduct or protect the prospective victim. [209]

The *Tarasoff* decision, following by three years a decision which had restricted the limits of patient-therapist confidentiality, [210] has caused considerable alarm. [211] Clark J., dissenting in *Tarasoff*, [212] argued that the destruction of confidentiality would discourage patients from seeking treatment or from making the full disclosure necessary for effective treatment. Furthermore, to avoid liability therapists might tend to resolve their doubts either in favour of giving a warning or of committing a patient for a longer period than they would otherwise have done. [213] The further implications of the decision are just beginning to unfold. [214]

IV. Occupiers' Liability

That Canadian courts are not as willing as they once were to endorse unduly rigorous categorizations simply because English Courts have done so is evidenced by *Thorburn v. Badalato*. [215] In that case the court rejected (at least in part) the former English jurisprudence under which the invitee of a tenant was categorized as the licensee of the tenant's landlord in respect of that part of the premises retained under the landlord's control. The

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[209] *Id.* at 186, 529 P. 2d at 557 (citations omitted). For a general account of recent developments in the liability of psychiatrists, see Margulies, *Psychiatric Negligence*, 23 Drake L. Rev. 640 (1974), and Stone, *supra* note 27.

[210] *In re* Lifschutz, 2 Cal. 3d 415, 467 P. 2d 557 (1970).

[211] *See, e.g.*, Burns, Comment, 9 Akron L. Rev. 190, at 198 (1975). *Cf.* Pendley, Note, 10 Land & Water L. Rev. 593, at 606 (1975), who describes the case's extension of the law as "a natural step [and] a logical progression of previous case law . . .", and Daley, Comment, 12 San Diego L. Rev. 932, at 951 (1975), who states: "It remains to be seen if the new duty to warn will result in an increase in warnings. A dramatic increase is unlikely simply because it is doubtful that the threat of financial liability adds a significantly greater incentive for action than saving a life, especially in a profession dedicated to humanitarian goals." For development of this point, see N. Leigh-Taylor, Doctors and the Law 94 *ff.* (1976).

[212] *Supra* note 27.

[213] *See* Daley, *supra* note 211, at 940-45.

[214] For example, the argument is made that "*Tarasoff* is weighty authority" for imposing liability on doctors who breach a statutory obligation to report child abuse: Isaacson, *Child Abuse Reporting Statutes: The Case for Holding Physicians Civilly Liable for Failing to Report*, 12 San Diego L. Rev. 743, at 770, n. 114 (1975).

[215] 4 O.R. (2d) 41, 47 D.L.R. (3d) 36 (Small Cl. Ct. 1974).

plaintiff's automobile had been damaged on the parking lot in front of a shopping centre, one store of which was owned by one of the defendants and leased by him to a furniture company. Judge Killeen, in holding that this defendant was an invitor, considered:

> [T]he English Courts [in *Fairman* and *Jacobs*[216]] were there dealing with what may be characterized as domestic or non-commercial arrangements which differ in substance from the *entirely* commercial and public character of either a small shopping plaza, as here, or the larger shopping centres which have mushroomed across North America. . . . The defendant . . . has a direct and definite material interest in access by members of the buying public over its area of the parking lot to the stores comprising the plaza, including its own premises leased to the [furniture company].[217]

A. *Invitees*

The law concerning invitees has been least affected by recent changes in the area of occupiers' liability. Most of the reported cases raise the straightforward issue of whether the "danger" that resulted in injury to the plaintiff was "unusual", and, if so, whether the defendant "ought to have known" of it.[218] Thus, in *Thorburn v. Badalato*, a structural rod which was a remnant of a cement signpost that had been removed several years previously and which protruded upwards about five or six inches from the asphalt in a shopping centre parking lot was held to be an "unusual danger" when it damaged the plaintiff's automobile.[219]

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[216] Fairman v. Perpetual Investment Bldg. Soc'y, [1923] A.C. 74, 92 L.J.K.B. 50 (H.L.); Jacobs v. London County Council, [1950] A.C. 361, [1950] 1 All E.R. 737 (H.L.).

[217] *Supra* note 215, at 44, 47 D.L.R. (3d) at 39. Killeen Co.Ct.J. referred to Foster v. Canadian Interurban Properties Ltd., 35 D.L.R. (3d) 248 (Sask. Q.B. 1972). *See also* Cannon v. S.S. Kresge Co., 223 Mo. App. 173, 116 S.W. 2d 559 (1938); Alexander v. Candy, 8 O.R. (2d) 270, 57 D.L.R. (3d) 654 (H.C. 1974), where the tenant rather than the landlord was held to be the occupier of the landing outside his apartment. The evidence disclosed that the tenant "used the landing to shake out his rugs and to place pails of food for his two St. Bernard dogs thereon". He also sat outside "from time to time". *Id.* at 275, 57 D.L.R. (3d) at 659. *Cf.* Albert v. Pelletier, 66 D.L.R. (3d) 536 (N.B.C.A. 1976); St. Pierre v. Harrison, 13 N.B.R. (2d) 527 (C.A. 1976); and Bate v. Kileel Enterprises Ltd., 12 N.B.R. (2d) 215 (S.C. 1975) (where a plaintiff who entered the defendant's building in search of a tenant and fell down an unlighted stairway was characterized as the defendant's invitee).

[218] Indermaur v. Dames, L.R. 2 C.P. 311, 36 L.J.C.P. 181 (Ex. Ct. 1867), *aff'g* L.R. 1 C.P. 274, 35 L.J.C.P. 184 (C.P. 1886).

[219] *See also* Thompson v. Lions Club of Weston, 8 O.R. (2d) 162, 57 D.L.R. (3d) 354 (H.C. 1975) (an unlocked gate in a hockey arena not an unusual danger); Cashin v. Canada Safeway Ltd., [1975] W.W.D. 96 (B.C.S.C.) (difference in level between rubber mat and sidewalk an unusual danger); Bate v. Kileel Enterprises, *supra* note 217 (unlighted staircase an unusual danger); Arsenault v. Magasins Continentals Ltee, 12 N.B.R. (2d) 639 (S.C. 1975) (glass door from which push-bar had been removed an unusual danger); Rafuse v. Lunenburg County Exhibition Assn., [1975] 15 N.S.R. (2d) 343 (S.C.) (rotted wooden railing on stage an unusual danger); St. Pierre v. Harrison, 13 N.B.R. (2d) 527 (C.A. 1976) (unguarded stairwell near entrance to office building an unusual danger); Cyr v. Bon Accord, 10 N.B.R. (2d) 130 (C.A. 1975) (low balcony railing painted black an unusual danger at night; plaintiff contributorily negligent); Kaldma v. The Queen (F.C.T.D. May 18, 1976) (poorly marked excavation outside mess hall an unusual danger; plaintiff contributorily negligent).

In *Houle v. S.S. Kresge Co.* [220] a more complex legal issue arose out of parking lot injuries. The plaintiff, when walking from her automobile to the defendant's store, stepped into a hole in the pavement which was approximately one foot square and one or two inches in depth. The plaintiff testified that "she had seen numerous pot-holes in the paving on her many visits there including a large hole near the front door of the store", but that she had "not see[n] the hole which caused her to fall". [221] The court held that the pot-hole constituted an unusual danger. [222] Previous decisions holding that slush, ice and snow were not unusual dangers [223] were distinguished on the following basis:

> In each of those cases the plaintiff was aware of the particular defect which caused the accident . . . [while in] the case at bar, the plaintiff had knowledge of the pot-hole conditions of the parking lot but was not aware of this particular pot-hole or pot-holes in this immediate area. [224]

The defence of *volenti* received a somewhat bland discussion. The only aspect of the case which "somewhat concerned" the court was whether the defendant had "taken *all* reasonable precautions to inspect the parking lot area to protect customers from injury from unusual dangers", [225] and although the evidence disclosed that the defendant company had a fairly wide-ranging inspection and repair system, the court held against the defendant for not having provided "a complete and adequate repair system of sufficiently high a quality to protect customers from unusual danger, the kind which the plaintiff met". [226]

The adequacy of a signpost in giving warning of the existence of a railroad crossing was in issue in *Stewart v. Routhier.* [227] The husband of the

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But see Sturdy v. The Queen, 47 D.L.R. (3d) 71 (F.C.T.D. 1974) (bear near dump in National Park not an unusual danger); Donahoe v. Heritage Properties Ltd., 13 N.B.R. (2d) 651 (S.C. 1975) (unmarked glass panel at entrance to apartment building not unusual or concealed danger to adult).

[220] 7 O.R. (2d) 271, 55 D.L.R. (3d) 52 (Dist. Ct. 1974).

[221] *Id.* at 272, 55 D.L.R. (3d) at 53. *Cf.* Indermaur v. Dames, *supra* note 218.

[222] *See also* Irving v. Chisolm, 11 N.S.R. (2d) 420 (C.A. 1975) (where a four-inch bumper imbedded in a parking lot outside a store was not an unusual danger; plaintiff not contributorily negligent

[223] Such v. Dominion Stores Ltd., [1963] 1 O.R. 405, 37 D.L.R. (2d) 311 (C.A.); Cosgrave v. Busk, [1967] 1 O.R. 59, 59 D.L.R. (2d) 425 (C.A.). *Cf.* Linden, *A Century of Tort Law in Canada: Whither Unusual Dangers, Products Liability and Automobile Accident Compensation*, 45 CAN. B. REV. 831, at 848 (1967): "The ice and snow cases seem to wander aimlessly in a nonman's [*sic*] land, sometimes being unusual dangers and other times not."

[224] *Supra* note 220, at 274, 55 D.L.R. (3d) at 55.

[225] *Id.* (emphasis added). *Cf.* Indermaur v. Dames, *supra* note 218: "the occupier shall take . . . reasonable care to prevent damake".

[226] *Supra* note 220, at 275, 55 D.L.R. (3d) at 56. *See also* Stuckless v. The Queen, 63 D.L.R. (3d) 345 (F.C.T.D. 1975), where the defendant was held liable to the plaintiff who was injured when she slipped on an icy ramp in front of the defendant's air terminal; the ice constituted an unusual danger and the defendant's precautions were inadequate.

[227] [1975] 1 S.C.R. 566, 45 D.L.R. (3d) 383 (1974), *rev'g* 4 N.B.R. (2d) 332, 26 D.L.R. (3d) 752 (C.A.), *aff'g* 4 N.B.R. (2d) 340 (S.C.).

plaintiff, who was driving to the defendant's motel along a private road owned by the defendant early on a summer's morning, was killed when struck by a train at a crossing on the defendant's property. A warning sign [228] had been placed some distance from the crossing, but its height from the ground—a mere 26 inches—meant that "it would be difficult to understand how he could have noticed it on [the] particular morning", [229] which was a dark one. Moreover, a four-foot bank, topped by three feet of bush growth, obscured a view of the track until the plaintiff's husband was about forty-two feet away from the rails. For some reason, however, he did slow down gradually as he neared the crossing, so that he was travelling at less than 10 miles per hour, and as he reached the track the automobile was "almost stopped".

The Supreme Court of Canada held by a majority that "when [the deceased] drove north on that private road he faced a most unusual danger and . . . no reasonable care to prevent damage had been taken by the occupier". [230] The damages were, however, reduced by 25 per cent since the deceased ought to have responded to the sight of the rails before him, considering his slow speed, without allowing his vehicle to drift onto the track in the path of the train. Ritchie J., dissenting, laid great stress on the fact that the deceased ought to have heard the oncoming train; his Lordship considered that it was the deceased's mode of driving rather than the absence of a warning that was the true cause of the accident. Ritchie J. stated the defendants' duty as being "to *warn* the [defendant] against any unusual danger that [he] might encounter on the private road". [231] This indulgence to the defendant savours somewhat strongly of the *Horton* [232] decision of the House of Lords, which was (in part) the catalyst for the statutory reform in England [233] three years later.

The decision of *Miller v. Unity Union Hospital Board* [234] demonstrates again [235] how difficult it may be for a plaintiff to prove his case against an invitor. The plaintiff, an elderly patient at the defendant's hospital, slipped on a hallway floor and sustained injuries. She could establish that there

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[228] There was also a sign about fifteen feet from the truck but its lettering "had been weathered so . . . that it was difficult to read . . . unless one were within fifteen feet of it". *Id.* at 577, 45 D.L.R. (3d) at 391.

[229] *Supra* note 227, at 582, 45 D.L.R. (3d) at 394.

[230] *Id.* at 584, 45 D.L.R. (3d) at 395.

[231] *Id.* at 571, 45 D.L.R. (3d) at 386. *Cf.* Doucette v. Island Trustees Ltd., 7 Nfld. & P.E.I.R. 367 (P.E.I.S.C. 1975). The plaintiff, a customer in a store owned by the first defendant and operated by the second, was hit on the head by a falling ceiling tile. The defendant retailer was held liable for failing to warn customers away from the area of unusual danger, of which he had previous knowledge. The action against the owner of the premises was dismissed; the tenant was found to have possession and control of the premises.

[232] London Graving Stock Co. v. Horton, [1951] A.C. 737, [1951] 2 All E.R. 1 (H.L.).

[233] Occupiers Liability Act, 1957, 5 & 6 Eliz. 2, c. 31.

[234] [1975] 6 W.W.R. 121, 55 D.L.R. (3d) 475 (Sask. C.A.), *aff'g* [1974] 6 W.W.R. 49, 54 D.L.R. (3d) 228 (Sask. Q.B.).

[235] *Cf.* Molish v. Clark's Gamble of Canada Ltd., [1973] 1 W.W.R. 477 (Man. Q.B.); MacNeil v. Sobeys Stores Ltd., 29 D.L.R. (2d) 761 (N.S.S.C. 1961).

had been a small amount of moisture on the ground where she had slipped, but she was unable to convince the court that the defendant "ought to know" [236] of the danger. Without disputing the correctness of the decision, it is submitted that some of the trial judge's reasons lack conviction. The fact that "[t]he plaintiff, unknown to her, travelled safely through or around [the danger]" [237] on her way through the hallway shortly before the accident was hardly significant. And the suggestion that the defendant should be excused for failing to notice the moisture since "its amount can be considered as minute" [238] flies in the face of the evidence that it was sufficiently alarming to the plaintiff to cause her to attempt to cross to the other side of the hall in order to avoid it. [239]

In *Maimy v. Canada Safeway Ltd.*, [240] the plaintiff was most fortunate in her litigation. She had been purchasing groceries in the defendant's store when her feet were caught in a plastic band on the floor of the store, causing her to fall and injure herself severely. The plastic band was one in which magazines had been packed for delivery at the store. Not surprisingly, the plaintiff succeeded in her action. Unlike the plaintiff in *Miller*, she had been injured directly as a result of the defendant's operations. In effect, although Estey J. did not use the term, the doctrine of *res ipsa loquitur* would appear to have been tacitly applied. [241]

The question whether a danger might be unusual to a child but not to an adult arose in *Peters v. H. W. MacLaughlan Ltd.* [242] The plaintiff, an eight-year-old child, injured himself by running through a window in the defendant's motel, thinking it was an open door. The glass was unmarked except for a small black insert with the room number printed on it "far above the eye level of young children". Holding that the child was an invitee, the court imposed liability on the defendant. Following the *Sombach* case, [243] where MacDonald J., referring to the age of the plaintiff in the case—

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[236] *Supra* note 234, at 61, 54 D.L.R. (3d) at 240. The trial judge, who "lean[ed] very much to the view that the hospital-patient relationship properly belongs to this category [of contract]", held against the plaintiff on that basis. The Court of Appeal did not express an opinion on the correctness of this interpretation but, assuming that it was correct, upheld the trial judge's finding.

[237] *Id.* at 69, 54 D.L.R. (3d) at 247.

[238] *Id.*

[239] *Cf.* Tokar v. Selkirk, [1974] 3 W.W.R. 612 (Man. Q.B.). Melting ice cubes on the floor underneath and around a table where drinks were being dispersed was held to constitute an unusual danger from which the occupier had not protected the plaintiff.

[240] [1975] 6 W.W.R. 612, 57 D.L.R. (3d) 152 (Sask. Q.B.).

[241] *Cf.* Pearson v. Fairview Corp., 55 D.L.R. (3d) 522 (Man. Q.B. 1974). *See also* Dulhunty v. J. B. Young Ltd., 7 A.L.R. 409 (H.C. 1975); Hoyte v. Kirpalant Ltd., 19 West Indies Rep. 310 (H.C. Trinidad & Tobago 1971); Ward v. Tesco Stores, [1976] 1 All E.R. 219, [1976] 1 W.L.R. 810, noted by Barrett, 39 MOD. L. REV. 724 (1976).

[242] 8 Nfld. & P.E.I.R. 182, 58 D.L.R. (3d) 294 (P.E.I.S.C. 1975).

[243] Sombach v. Regina Roman Catholic Separate H.S. Bd., 72 W.W.R. 92, 9 D.L.R. (3d) 707 (Sask. Q.B. 1969), *varied on other grounds*, [1971] 1 W.W.R. 156, 18 D.L.R. (3d) 207 (Sask. C.A. 1970).

fourteen years—had stated that "the question of whether or not there was an unusual danger must be considered in the light of that fact",[244] Nicholson J. concluded:

> The same situation applies here: there was an unusual danger in the light of the age of the infant plaintiff. . . . Even though [he] ran up the stairs and mistook the glass panel for an open door, I do not find any contributory negligence on his part.[245]

Peters is also interesting from the point of view of contract. There is respectable authority[246] that the relationship between a hotel and a paying guest is one of contract and does not bring occupiers' liability into play at all. But here the plaintiff was not a paying guest. Nevertheless, Nicholson J. held:

> Applying the principles laid down in *MacLenan v. Segar* . . . to the case at bar, the Plaintiffs should succeed, as their [*sic*] has been a breach of the implied warranty that the premises were as safe as reasonable care and skill could make them. It may be said that there was no contract between the Defendant and the . . . Plaintiff and [that] therefore the contractual obligations would not extend to [him]. I do not think such a contention can be successfully made. In my opinion the obligations of the Defendant in such circumstances extend to the Plaintiff and all members of his family, each of whom was a "paying guest" at the Defendant's motel.[247]

This is a broad approach to the nature of the contractual relationship; the capacity of the infant plaintiff was not even discussed by the court.[248]

In *Legacy v. Chaleur Country Club Ltd.*,[249] the plaintiff's car was damaged by a portion of the roof of the motel where he was staying. It was blown off "during a wind storm of near gale force".[250] At trial,[251] Richard J. held against the plaintiff on the basis that he had failed to establish that the roof had been negligently constructed; the wind, on the other hand, was of such force "that the mishappening was due to an act of God or 'force majeure' ".[252]

On appeal, the plaintiff was again unsuccessful, but for different reasons.

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[244] *Supra* note 243, at 99-100, 9 D.L.R. (3d) at 714.

[245] *Supra* note 242, at 193, 58 D.L.R. (3d) at 302-303.

[246] Maclenan v. Segar, [1917] 2 K.B. 325, 117 L.T. 376. *Cf.* Campbell v. Shelbourne Hotel, Ltd., [1939] 2 K.B. 534, [1939] 2 All E.R. 351. *See also* Legacy v. Chaleur Country Club Ltd., 9 N.B.R. (2d) 8, 53 D.L.R. (3d) 725 (C.A. 1974) (plaintiff was a visitor to defendant's motel bar; defendant owed a contractual duty in respect of the person but not in respect of his automobile in defendant's car park); Beaudry v. Fort Cumberland Hotel Ltd., 3 N.S.R. (2d) 1, 24 D.L.R. (3d) 80 (C.A. 1971) (defendant hotel owed to guests staying at hotel a contractual duty in regard to the condition of the steps); Butler v. Scott, 9 N.B.R. (2d) 541, 65 D.L.R. (3d) 692 (C.A. 1975).

[247] *Supra* note 242, at 193, 58 D.L.R. (3d) at 302.

[248] Another decision imposing a contractual duty on an occupier is Morice v. Magill, [1974] 5 W.W.R. 77 (Sask. Q.B.).

[249] *Supra* note 246.

[250] *Id.* at 9-10, 53 D.L.R. (3d) at 727.

[251] 9 N.B.R. (2d) 12 (Cty. Ct. 1974).

[252] *Id.* at 17.

The Appeal Division considered the defence of Act of God inapplicable, despite the structural damage to other properties: "To amount to an act of God the wind must not merely be exceptionally strong but must be of such exceptional strength that no one could be reasonably expected to anticipate such strength or provide against it." [253] The Appeal Division also came to a different conclusion regarding the construction of the motel roof, holding that the carpenter had been negligent. However, the motel was exempted from negligence on the basis that the carpenter was an independent contractor. [254] Nor had it breached its duty as invitor: "[Although] [t]he danger resulting from a roof being blown off by wind action is clearly an unusual danger . . . [it cannot be] conclude[d] that either the defendant or its servants or agents knew of the existence of such a danger or ought to have known of it even if they had made a careful inspection of the roof structure." [255]

In *Wilson v. Blue Mountain Resorts Ltd.*, [256] the plaintiff, a former Olympic skier, age sixty, was injured when skiing on the defendant's property. He had been skiing down a trail which "could be described as easy", but at the bottom, virtually without warning, [257] he was projected over the brow of a gully into a stream. Holland J., of the Ontario High Court, imposed liability on the basis that the defendant had failed in its duty as invitor. Stating that "[t]he duty of an occupier to those coming on his lands has been governed by what to some may well seem to be somewhat complex, artificial and archaic rules", [258] his Lordship invoked the criterion set out in *Indermaur v. Dames*, [259] and reached the conclusion that "the gully running as it did across part of the access hill constituted a hidden and unusual danger. That being the case there therefore existed an obligation on the occupier who knew of the dangerous situation to warn skiers of the danger". [260] The defence of *volenti* was rejected:

> [Although] [s]kiing is well recognized as a dangerous sport and anyone taking part in such sport must . . . accept certain dangers which are inherent in such sport in so far as such dangers are obvious and necessary . . . [t]he gully, in the case at hand, was not such an obvious or necessary danger and

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[253] *Supra* note 246, at 10-11, 53 D.L.R. (3d) at 726: Hughes C.J. refers to Cushing v. Walker & Son, [1941] 2 All E.R. 693, at 695.

[254] The issue of possible negligence regarding the selection of the carpenter was not discussed by the court, although the carpenter "admitted he did not hold a tradesman's certificate of competency and failed to testify as to the extent and kind of his experience in the trade". For recent developments in regard to negligence in the selection of contractors, *see* Riney, Comment 28 OKLA. L. REV. 450 (1975), noting Hudgns v. Cool Industries Inc., 521 F. 2d 813 (Okla. 1973); Wein, Comment, 21 N.Y.L. FORUM 121 (1975), noting Misiulus Milbrand Maintenance Corp., 52 Mich. App. 494, 218 N.W. 2d 68 (1974).

[255] *Supra* note 246, at 12, 53 D.L.R. (3d) at 728.

[256] 4 O.R. (2d) 713, 49 D.L.R. (3d) 161 (H.C. 1974).

[257] Holland J. described the warning, which consisted of a few branches and sticks planted in the snow, as "quite inadequate". *Id.* at 717, 49 D.L.R. (3d) at 165.

[258] *Id.* at 719, 49 D.L.R. (3d) at 167.

[259] *Supra* note 218.

[260] *Supra* note 256, at 720, 49 D.L.R. (3d) at 168.

> [the plaintiff] without knowledge of the existence of the gully across his path cannot be taken to have accepted the risk of injury. . . .[261]

In *Sword v. Toronto*,[262] the plaintiff, age thirteen, sustained serious injuries in an accident in the defendants' school playground. She had been sitting on a "teeter totter", which had been placed on a wooden slide, when the slide toppled over as a result of a fourteen-year-old boy jumping on the teeter-totter. The slide was capable of being overturned relatively easily and the evidence disclosed that the company which had designed it clearly envisaged that it would only be used when anchored in cement.

Liability was imposed on the defendant city and on the boy. O'Driscoll J., of the Ontario High Court, considered that the plaintiff was an invitee: "she was entitled to be at that school playground, she was entitled to go in, she was entitled to use the equipment."[263] The City "was negligent in erecting a 350-375-lb. eight-foot high portable slide. In my view, the initial negligence was aggravated by the fact that it was planked atop an asphalt surface and left unattended in a playground situated in an elementary school yard".[264] Of major importance is O'Driscoll J.'s reference to passages in the decisions of *Veinot v. Kerr-Addison Mines Ltd.*[265] and *Pannett v. P. McGuinness Ltd.*[266] He stated: "I realize that the factual situation was different and that the Court was dealing with the question of 'trespassers', but it seems to me that if the passages are referable to trespassers then, *a fortiori*, they are applicable to invitees . . . ."[267] The fact that the court could call in aid criteria relevant to trespassers is striking proof of the great change in the nature of occupiers' liability in recent years.

A number of recent American decisions have attempted to balance the interests of businessmen (in protecting their property against robbery) and the interests of customers (in being protected during the robbery). The

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[261] *Id.* at 718, 49 D.L.R. (3d) at 166.

[262] 9 O.R. (2d) 215, 60 D.L.R. (3d) 57 (H.C. 1975).

[263] *Id.* at 220, 60 D.L.R. (3d) at 62. *See also* J. FLEMING, THE LAW OF TORTS 387-88 (4th ed. 1971), for citation of English decisions holding visitors to public parks to be licensees; and Schiller v. Mulgrave Shire Council, 129 C.L.R. 116 (H.C. Austl. 1972).

[264] *Id.*

[265] [1975] 2 S.C.R. 311, 51 D.L.R. (3d) 533 (1974).

[266] [1972] 3 All E.R. 137, [1972] 3 W.L.R. 386 (C.A.).

[267] *Supra* note 261, at 221, 60 D.L.R. (3d) at 63. *Cf.* Brown v. Wilson, 66 D.L.R. (3d) 295, at 304 (B.C.S.C.). The passage referred to occurred in Pannet, *supra* note 266, at 141, [1972] 3 W.L.R. at 390-91, where Lord Denning enunciated the four criteria describing an occupier's duty to a trespasser. This passage was cited with approval by Dickson J. in *Veinot*, *supra* note 265, at 317, 51 D.L.R. (3d) at 551. The English Law Commission has stated that Lord Denning's sentence "seemed tantamount to saying that [the occupier] must behave reasonably to the trespasser having regard to all the circumstances". REPORT OF THE ENGLISH LAW COMMISSION ON LIABILITY FOR DAMAGE OR INJURY TO TRESPASSERS AND RELATED QUESTIONS OF OCCUPIERS' LIABILITY 4 (Cooke J. Chairman 1976). The test of reasonable foresight has been endorsed in Ireland: McNamara v. Electricity Supply Bd., [1975] I.R. 1 (S.C. 1974), noted by McMahon, 91 L.Q.R. 323 (1975).

ratios of these cases differ. In *Kelly v. Kroger Co.*,[268] a strong trend towards imposing liability is discernible. The Court of Appeals reversed the trial court's withdrawal of the case from the jury on the following facts. The plaintiff's wife was a customer in the defendant's department store when armed robbers entered the premises and forced the manager to open a safe. This automatically activated a silent alarm which brought the police to the store. No alarm was given by the employees of the company to the customers for fear of exciting the robbers. After the police had arrived, the plaintiff's wife was taken hostage by a robber and was later killed.

The Court of Appeals held that the issue of the defendants' negligence should have beeen left to the jury. The court referred to a number of cases[269] involving the liability of taverns to their patrons, cases in which the social considerations were arguably far more strongly against the defendant. The decision has been criticized for "leav[ing] business proprietors stranded between the Scylla of strict liability and the Charybdis of uncertainty as to what measures may legitimately be taken to protect their patrons".[270]

By contrast, in *Boyd v. Racine Currency Exchange, Inc.*,[271] the Supreme Court of Illinois denied recovery to the dependants of a person killed in the following circumstances. A teller of the defendant company refused to comply with an order to hand over money made by a gunman who was holding a gun to a customer's head and who had threatened to kill the customer unless the money was handed over. The teller, who was separated from the robber by a bullet-proof glass, ducked under the counter, and the gunman shot the customer. The court stated strongly that to impose liability on the defendant in such circumstances would result in more social harm than good, since it would encourage the practice of using hostages:

> [The proprietor] would have little choice in determining whether to comply with the criminal demand and surrender the money or to refuse the demand and be held liable in a civil action for damages brought by . . . the hostage. The existence of this dilemma and knowledge of it by those who are disposed to commit such crimes will only grant to them additional leverage to enforce their criminal demands. The only persons who will clearly benefit from the imposition of such a duty are the criminals.[272]

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[268] 484 F. 2d (10th Cir. 1973), noted in 2 FORDHAM URBAN L.J. 661 (1974); and *Kelly v. Kroger Co. and the Duty Owed to Business Invitees: An Alarming Definition of Negligence*, 59 IOWA L. REV. 1351 (1974).

[269] Including Kimple v. Foster, 205 Kan. 415, 469 P. 2d 281 (1970), and Coca v. Arceo, 71 N.M. 186, 376 P. 2d 970 (1962).

[270] *Kelly v. Kroger Co. and the Duty Owed to Business Invitees, supra* note 268, at 1364.

[271] 56 Ill. 2d 95, 306 N.E. 2d 39 (1973), noted in 6 ST. MARY'S L.J. 517 (1974).

[272] *Id.* at 42. *Cf.* Goldenhersh J. (dissenting); "The majority polemic on the subject of the hazards which would be created by an application of established legal principles to this case finds little support in logic and none whatsoever in the legal authorities". *Id. See also* Thomas v. General Electric Co., 494 S.W. 2d 493 (Tenn. S.C. 1973), criticized by King, Comment, 41 TENN. L. REV. 375 (1974) (employer not liable to female plaintiff either as employer or invitor in resepct of assault in car parking lot of defendant company, guarded by security guards). *Cf.* Taylor v. Centennial Bowl Inc., 53 Cal. Rptr. 561, 416 P. 2d 793 (1966). Two Americans who were

B. *Licensees*

The decision of the Supreme Court of Canada in *Mitchell v. C.N.R.*,[273] handed down just within the deadline for consideration by the previous *Survey*,[274] has since been reported. The precise scope of the new liability imposed by *Mitchell* on licensors is problematic, but as the dust from that decision begins to settle, the broad principles are beginning to emerge with a reasonable degree of clarity.

In *Bartlett v. Weiche Apartments Ltd.*,[275] the plaintiff, age three, was injured when she fell, while cycling on her tricycle, from an unfenced landing of an apartment building owned by the defendant company. It was common ground that at the time of the accident the plaintiff was a licensee. The plaintiff's action had been conducted on the basis that the danger was not a concealed one. The Court of Appeal, which was prepared to concede that "[o]n the law as it then stood . . . the nonsuit was properly granted",[276] was obliged to review the issue in the light of *Mitchell*. However, the new duty imposed by that case was differently interpreted by the members of the court.

In the view of Jessup J.A., with whom Brooks J.A. concurred, "it must be now taken that the duty of an occupier to a licensee arises with respect to both obvious and concealed dangers".[277] To assist the trial judge—since a retrial was thus required—Jessup J.A. stated what he conceived to be the principle, arising from *Mitchell* and *Hanson*,[278] governing the liability of an occupier to a licensee:

> It is to take reasonable care to avoid foreseeable risk of harm from any unusual danger on the occupier's premises of which the occupier actually has knowledge or of which he ought to have knowledge because he was aware of the circumstances. The licensee's knowledge of the danger goes only to the questions of contributory negligence or *volenti*.[279]

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in the aircraft hijacked to Entebbe last June were reported to be suing Air France in New York for gross negligence in permitting Arab terrorists to board the plane with hand grenades and dynamite. They wanted damages in the region of $1,000,000.00: The Observer (London), Nov. 7, 1976, at 1, col. 6.

[273] [1975] 1 S.C.R. 592, 46 D.L.R. (3d) 363 (1974).

[274] The following decisions have been reported subsequent to *Mitchell* and in apparent ignorance of its having been handed down (since, although decided on February 12, 1974, it was not reported until much later): Cormier v. Moncton, 7 N.B.R. 589, 48 D.L.R. (3d) 291 (C.A. 1974); Langlois v. Barlow, 55 D.L.R. (3d) 233 (B.C.S.C. 1974); Berg v. Victoria, [1975] W.W.D. 3, 55 D.L.R. (3d) 369 (B.C.S.C. 1974); Bryant v. Burgess, 7 O.R. (2d) 671, 56 D.L.R. (3d) 335 (H.C. 1974); Alexander v. Candy, 8 O.R. (2d) 270, 57 D.L.R. (3d) 654 (H.C. 1974); Willey v. Cambridge Leaseholds Ltd., 8 Nfld. & P.E.I.R. 20 (P.E.I.C.A. 1975), *rev'g in part* 5 Nfld. & P.E.I.R. 473, 48 D.L.R. (3d) 589 (P.E.I.S.C. 1974).

[275] 7 O.R. (2d) 263, 55 D.L.R. (3d) 44 (C.A. 1974).

[276] *Id.* at 265, 55 D.L.R. (3d) at 46.

[277] *Id.* at 266-67, 55 D.L.R. (3d) at 47-48.

[278] Hanson v. St. John, [1974] S.C.R. 354, 39 D.L.R. (3d) 412 (1973), analyzed in the previous *Survey*, *supra* note 2, at 536-37. *See also* Steen v. Hudson's Bay Co., [1976] W.W.D. 126 (B.C.S.C.) (duty to licensee under Occupiers Liability Act, S.B.C. 1974, c. 60, s. 3, same as that owed to invitee).

[279] *Supra* note 275, at 267, 55 D.L.R. (3d) at 48.

In contrast, Arnup J.A. approached the issue with considerably more caution than his colleagues, understandably having great difficulty in harmonizing the language used by Laskin C.J. in *Mitchell* with accepted terminology. His Lordship's difficulties were "not lessened by the fact that Laskin, C.J.C., does not refer to any authorities at all in reaching the conclusion that liability attached to the railway. Accordingly, I am unsure whether any of the previous cases in the Supreme Court are still binding, even on facts similar to those on which the earlier cases were decided". [280] Arnup J.A. stressed that there was an "awareness" [281] on the part of the defendant in *Mitchell* of certain facts regarding the icy path. Since the *Mitchell* case has nothing to do with what the occupier "ought to know", he considered that "[t]hat part of the statement of principle by Jessup J.A., in which he uses the expression 'of which [the occupier] ought to have knowledge because he was aware of the circumstances' is not derived from the *Mitchell* case. It comes from the judgments of Spence and Ritchie, J.J., in the *Hanson* case". [282]

Jessup J.A. considered that until the uncertainties of *Mitchell* were clarified by the Supreme Court of Canada, it would not be possible to formulate, as he himself had attempted to do, a general principle stating the duty owed to licensees. This is the furthest he was prepared to commit himself:

> In the case before us, the legal issue on the present state of the authorities can only be stated thus:
>
> > Did there exist, at the time and place of the accident, a combination of circumstances, known to the defendant, which when taken together created an unusual danger, resulting in a foreseeable risk of harm to children in the position of this infant plaintiff? [283]

A considerably less complicated interpretation of *Mitchell* was proposed by Judge Killeen in *Lynch v. Brewers Warehousing Co.*, [284] decided only a fortnight after the Supreme Court decision. Judge Killeen praised the Chief Justice for having departed "from the incantatory language of older cases and establish[ing] what I conceive to be an orderly confluence of the streams of modern negligence principles with occupiers' liability law". [285] In the learned judge's view, Laskin C.J. had established that "[t]he determinant of liability is whether, on the facts of the case, there was a '*foreseeable risk of harm*'". [286] On the facts of the case, which concerned an accident at the rear of a store in which an eight-year-old girl injured her hand in hoisting machinery, the defendant was held liable as licensor, although the damages were reduced by 40 per cent having regard to the child's contributory negligence.

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[280] *Id.* at 270, 55 D.L.R. (3d) at 51.

[281] *Supra* note 273, at 616, 46 D.L.R. (3d) at 379, quoted by Arnup J.A., *supra* note 275, at 269, 55 D.L.R. (3d) at 50.

[282] *Supra* note 275, at 270, 55 D.L.R. (3d) at 51.

[283] *Id.*

[284] 3 O.R. (2d) 157, 44 D.L.R. (3d) 677 (Cty. Ct. 1974).

[285] *Id.* at 161, 44 D.L.R. (3d) at 681.

[286] *Id.*

In *Alaica v. Toronto*,[287] Galligan J. of the Ontario High Court had to choose between the differing viewpoints expressed in *Bartlett* and *Lynch*. With respect, his Lordship's resolution of the problem is not entirely convincing.

> The only difference that I see between Jessup, J.A.'s statement of the principles governing the liability of an occupier to a licensee, and Arnup, J.A.'s statement of the legal issue in the case, is whether the occupier's knowledge of the unusual danger may be constructive or whether it must be actual.[288]

The difference is at least arguably somewhat deeper. Arnup J.A., unlike Jessup J.A., was clearly troubled by the meaning and effect of many aspects of *Mitchell*. His formula for legal liability did not purport to apply to *all* cases relating to licensees[289] but merely to "the case before us".[290] Mr. Justice Galligan was in any event "also prepared to rest [his] judgment"[291] on the principles of liability set out in previous case law, so his decision is not an unambiguous endorsement of the "liberal" interpretation of *Mitchell*.

The facts in *Alaica*, very briefly, were that the plaintiff, a licensee, was seeking to skate on the defendant's ice-skating rink when he fell on a concrete surface at the entrance to the rink. The snow that covered the concrete surface was usually either hard-packed or very soft. On the day in question it appeared to be hard-packed but in fact broke under the weight of the plaintiff. Liability was imposed on the basis that the snow condition, of which the defendant through its servants was aware,[292] constituted an unusual danger that "caused a foreseeable risk of harm of exactly the type of casualty that did occur".[293] Moreover, applying the pre-*Mitchell* principle, the snow condition could, in the view of Galligan J., be considered to be a concealed danger of which the defendant was aware and of which the defendant ought to have warned the plaintiff.

In *Willey v. Cambridge Leaseholds Ltd.*,[294] Nicholson J., of the Prince Edward Island Supreme Court, invoked the "current operations" doctrine, as enunciated by the English Court of Appeal in *Slater v. Clay Cross Co.*,[295]

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[287] 7 O.R. (2d) 536, 55 D.L.R. (3d) 656 (H.C. 1974).

[288] *Id.* at 542, 55 D.L.R. (3d) at 662.

[289] *See* Jessup J.A., *supra* note 275, at 267, 55 D.L.R. (3d) at 48: "I think I should state what I conceive to be the principle arising from the *Mitchell* and *Hanson* cases governing the liability of an occupier to a licensee."

[290] *Id.* at 270, 55 D.L.R. (3d) at 51.

[291] *Supra* note 287, at 543, 55 D.L.R. (3d) at 663.

[292] In fact it was also held that the defendant in any event *ought to have been* aware of the danger. The specific holding that the defendant *was* aware of the danger would suggest that the court was not disposed to accept unquestioningly Arnup J.A.'s approach to this question. However, since no clear indication is given as to how the case would have been decided if the defendant had not in fact been aware, this is not a matter capable of definite resolution.

[293] *Supra* note 287, at 543, 55 D.L.R. (3d) at 663.

[294] 5 Nfld. & P.E.I.R. 473, 48 D.L.R. (3d) 589 (P.E.I.S.C. 1974).

[295] [1956] 2 Q.B. 264, [1956] 2 All E.R. 625 (C.A.). *See also* Kaslo v. Hahn, 36 Wis. 2d 87, 153 N.W. 2d 33 (S.C. 1967).

in holding the defendant shopping complex liable for the death of the plaintiff's husband when he was struck by a snowplough which was in the complex's car park. The deceased, a university professor, was taking a short cut to work at the time. The snowplough was not equipped to give a clear rear view when being driven backwards, and no audible warning of its approach was given.

Nicholson J. was willing to hold that, in spite of the store's not being open at the time, "[m]embers of the general public of whom the deceased was one, when they enter upon this defendant's land . . . fall into the class of invitees and in any event should be treated as licensees". [296] With respect, a finding that the deceased was an invitee would, on the facts of the case, not be warranted by previous authority or by well established legal principles.

On appeal, [297] the Prince Edward Island Court of Appeal reduced the damages by 35 per cent on account of the deceased's contributory negligence in not having "repeatedly look[ed] out for approaching traffic". [298] Of more general interest is the Court of Appeal's finding [299] that the deceased was a *licensee*, as well as its interpretation of *Slater* as *abolishing* the distinction between the duty owed to invitees and licensees respectively. Trainor C.J. concluded that "there rested upon the [defendant] a duty to take reasonable care not to injure anybody lawfully walking on its property". [300]

C. *Trespassers*

In *Veinot v. Kerr-Addison Mines Ltd.*, [301] the Supreme Court of Canada was called upon to resolve the question whether the philosophy of the *Herrington* [302] case should be received into Canadian jurisprudence. The facts of the case and the judgment of the Ontario Court of Appeal [303] have been set out in the previous *Survey*. [304] The Supreme Court of Canada, by a

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[296] *Supra* note 294, at 484, 48 D.L.R. (3d) at 597.

[297] 8 Nfld. & P.E.I.R. 20, 57 D.L.R. (3d) 550 (P.E.I.C.A. 1975).

[298] *Id.* at 31, 57 D.L.R. (3d) at 560.

[299] *Id.* at 27-28, 57 D.L.R. (3d) at 557-58.

[300] *Id.* at 28-29, 57 D.L.R. (3d) at 559-59. *See also* Auffrey v. New Brunswick, 9 N.R. 249 (S.C.C. 1976), *rev'g* 7 N.B.R. (2d) 634 (C.A. 1974), where the plaintiff was injured when he drove into a cable strung across a public road and maintained by the respondent. In a unanimous decision, the Supreme Court of Canada held the owner-respondent to be in breach of its duty to warn users of the road of hidden dangers, notwithstanding that the cable had been strung up that night by someone other than the occupier's servant and that the plaintiff may not have been on the road for the purpose of using the garbage dump to which it led. *See also* Amos v. New Brunswick Electric Power Comm'n, 8 N.R. 537 (S.C.C. 1976), *rev'g* 10 N.B.R. (2d) 644 (C.A. 1975), *rev'g* 9 N.B.R. (2d) 358 (S.C. 1975), where high tension wires running through untrimmed trees were held to be a concealed danger in the nature of a trap for small boys.

[301] *Supra* note 265, noted by Wayand, 22 McGILL L.J. 287 (1976); Armitage, 13 OSGOODE HALL L.J. 345 (1975); and Hunter, 41 SASK. L. REV. 125 (1976). *See also* Fridman, *The Supreme Court and the Law of Obligations*, 14 ALTA L. REV. 149, at 151, and the Commentary by McDonald, *id.* at 161-62.

[302] British Rys. Bd. v. Herrington, [1972] A.C. 877, [1972] 1 All E.R. 749 (H.L.)

[303] [1973] 1 O.R. 411, 31 D.L.R. (3d) 275 (C.A.).

[304] *Supra* note 2, at 530.

majority, [305] reversed the Court of Appeal and restored the judgment at trial. Dickson J. delivered the principal majority judgment, referring at the outset to the unsettled state of the law in relation to occupiers' liability, which, according to his Lordship, was

> due in part to the Procrustean and often vain attempt in an infinite variety of fact situations to fit a plaintiff neatly into the category of invitee, licensee or trespasser and then allow the category to be the conclusive determinant of landowner liability. It has not been found easy to reconcile the Victorian landowner's unbridled rights with the modern law of negligence. Nowhere are the uncertainties more apparent than when one comes to consider the position in law of a trespasser, one who enters the land of another without consent or privilege. [306]

Mr. Justice Dickson traced the historical development of the law in England and Australia, and, proceeding to analyze the facts of the case before the Court, concluded that the jury findings that the plaintiff had had implied permission to be on the land in question and that the pipe constituted a concealed danger should not have been disturbed by the Ontario Court of Appeal. Of more general importance, however, is Dickson J.'s statement that "[e]ven if [the plaintiff] is regarded as a trespasser his appeal to this Court should succeed. If he was a trespasser, the inquiry might be as to whether his presence on the ploughed road could reasonably have been anticipated for; if so, the company owed him a duty and that duty was to treat him with ordinary humanity". [307]

This is a clear endorsement of *Herrington*. However, Pigeon J., [308] while concurring with Dickson's conclusions on the basis that there was evidence to support the jury's findings, "prefer[red] to express no opinion on the other questions". [309] Martland J., "in a long and carefully reasoned dissent", [310] was of the opinion that "there was no evidence of implied permission having been given by the [defendant] for the use of its private road by the drivers of snowmobiles". [311] His Lordship proceeded to provide a comprehensive analysis of *Herrington*, *Quinlan*, [312] *Southern Portland Cement Ltd. v. Cooper*, [313] and *Cardy*. [314] He concluded:

> I have reviewed these recent cases, at perhaps unnecessary length, because we find in the *Herrington* and *Cooper* cases an extension of the scope of

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[305] Judgment delivered by Dickson J.; Laskin C.J., Spence, Pigeon, and Beetz JJ. concurring; Martland, Judson, Ritchie and de Grandpré JJ. dissenting.

[306] *Supra* note 301, at 313, 51 D.L.R. (3d) at 548-49.

[307] *Id. at* 321, 51 D.L.R. (3d) at 554.

[308] Beetz J. concurred with Pigeon J.: Laskin C.J. and Spence J. concurred with Dickson J.

[309] *Supra* note 301, at 343, 51 D.L.R. (3d) at 548.

[310] Armitage, *supra* note 301, at 352.

[311] *Supra* note 301, at 329, 51 D.L.R. (3d) at 538. *See* Armitage, *supra* note 301, at 352.

[312] Commission for Rys. v. Quinlan, [1964] A.C. 1054, [1964] 1 All E.R. 897 (P.C.).

[313] [1974] A.C. 623, [1944] 1 All E.R. 87 (P.C. 1943).

[314] Commissioner for Rys. (N.S.W.) v. Cardy, 104 C.L.R. 274 (Austl. 1960).

> the duty owed by an occupier toward a trespasser beyond the limits defined in the *Addie* case. This extension has permitted the elimination of the theory of implied licence, a device which has been used in the past, especially in cases involving children, to avoid the strict application of the *Addie* case. I am in agreement with, and would favour the adoption of this approach, which recognizes that, in certain circumstances, the conduct of an occupier of land may require him to take steps to enable a person who has entered on his land, without his actual consent, to avoid a danger of which the occupier is aware. The question is as to what is the extent of such duty. [315]

Following further analysis of *Herrington* and *Cooper*, Martland J. stated:

> The effect of these cases might be summarized as being that an occupier who knows of the existence of a danger upon his land which he has created, or for whose continued existence he is responsible, may owe a duty to persons coming on his land, of whose presence he is not aware, if he knows facts which show a substantial chance that they might come there. This is, in essence, the duty stated by Dixon, C.J., in the *Cardy* case. Such duty, when it exists, is limited, in the case of adults, to a duty to warn. In the case of children something more may be required. The existence of a duty will depend on the special circumstances of each case. [316]

In *Sfyras v. Kotsis*, [317] the post-*Veinot* law relating to trespassers was applied in a case where the plaintiff, one month short of six years old, fell from the flat roof of a bowling alley owned by Bulucon, one of the defendants. The plaintiff had gained access to the roof from a fire-escape which was positioned very close to the roof. The fire-escape belonged to an apartment building owned by Mr. and Mrs. Kotsis (who also resided on the second floor). The plaintiff was the daughter of the tenant of the third floor apartment. The evidence disclosed that the plaintiff had been warned a number of times by Bulucon's agent and by neighbours not to trespass on the roof, and that her father had also been told that she had done so. However, the father's response to being so informed was that "he merely laughed and walked away". [318] The father gave evidence that, although he was concerned with the safety of his children, "he could see no reason why he should put up a barrier himself as 'this was costly' ". [319]

The plaintiff's action against Mr. and Mrs. Kotsis failed because:

> [T]he law has not yet gone so far as to constitute the landlord a *pater familias*, so as to place the onus on him to prevent children who are occupying the leased premises from wandering on to adjacent premises where danger may lurk.
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> The father of the infant plaintiff was fully aware of all the circum-

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[315] *Supra* note 301, at 338-39, 51 D.L.R. (3d) at 545.

[316] *Id.* at 341, 51 D.L.R. (3d) at 546-47.

[317] 10 O.R. (2d) 27, 62 D.L.R. (3d) 43 (Cty. Ct. 1975). Two other cases applying post-*Veinot* law to trespassers involved children on railway property: Phillips v. C.N.R., [1975] 4 W.W.R. 135, 61 D.L.R. (3d) 253 (B.C.C.A.); Wade v. C.N.R., 14 N.S.R. (2d) 541 (C.A. 1976).

[318] *Id.* at 29, 62 D.L.R. (3d) at 45.

[319] *Id.* at 30, 62 D.L.R. (3d) at 46.

> stances, and I find he made not the slightest effort, in spite of warnings from others, to prevent his children from using the flat roof. Very little effort on his part such as the placing of a barricade between the fire stairs and the flat roof would surely have prevented the serious injury to his child for which he now seeks to throw the blame on others. [320]

The case against Bulucon also failed, though the trial judge admitted that recent English decisions, [321] together with *Mitchell* and *Veinot*, "make this issue more complicated". [322] After a review of these decisions, including a reference to the differing interpretations of *Mitchell* apparent in *Bartlett*, the relevant legal principles were stated in a passage which is important enough to merit extended quotation:

> If the warning to a nine-year-old child would have been sufficient in *Mitchell*, were warnings given to a child only a month or two short of six years . . . sufficient to exonerate the defendant Bulucon? In my view they were sufficient. The child had been warned not only by [Bulucon's agent] on two occasions, but also by [two neighbours]. That she was a reasonably intelligent child is apparent from the few answers which she gave to counsel on her examination for discovery and which were read into evidence. That a danger existed at the east side of the roof is apparent, but the danger there was not at all unusual or concealed. It was completely obvious and there was nothing about it in the nature of a trap. Because of the number of times the infant plaintiff had been on the roof, the lack of anything in the nature of a barricade on the east edge of it would have been abundantly apparent to her even at her tender age. . . . [323] While the test of common humanity is the test which now must be applied, the words of Lord Wilberforce in *Herrington's* case are applicable here . . .:
>
> > . . . . it must be remembered that we are concerned with trespassers, and a compromise must be reached between the demands of humanity and the necessity to avoid placing undue burdens on occupiers. What is reasonable depends on the nature and degree of the danger.
>
> In all the circumstances of this case, I am unable to find liability on the part of the defendant Bulucon. . . . [324]

It is submitted that the decision was a reasonable one on the facts. However, the quoted passage shows the strong influence of criteria and language normally appropriate (at all events before *Mitchell*) to the duty owed to licensees rather than trespassers.

Law reformers seeking a legislative solution to the problem of occupiers' liability might perhaps cast a wary eye on the Draft Bill recommended by the English Law Commission in its recent report. [325] It does not grasp the nettle arising from the failure of the House of Lords in *Herrington* to enunciate "a

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[320] *Id.* at 33, 62 D.L.R. (3d) at 49.

[321] British Rys. Bd. v. Herrington, *supra* note 302; Pannett v. McGuinness & Co., *supra* note 266; Southern Portland Cement Ltd. v. Cooper, *supra* note 313.

[322] *Supra* note 317, at 33, 62 D.L.R. (3d) at 49.

[323] With respect, the relevance of the plaintiff's apparent intelligence, almost two years after the accident, to the determination of her intelligence *at the time of the accident* was at best tenuous, considering that children may mature in irregular stages.

[324] *Supra* note 317, at 36, 62 D.L.R. (3d) at 52.

[325] *Supra* note 267.

clear principle applicable to the generality of cases". [326] Rather than impose a broad "common duty of care" towards trespassers, as Scotland did in 1960, the report, strongly influenced by moralistic considerations, recommends a duty arising "if, but only if, the danger is one against which, in all the circumstances of the case, the occupier can reasonably be expected to offer him some protection". [327] Only if that is the case should consideration be given to the duty issue. Section 2(2) of the Draft Bill provides:

> The duty owed by an occupier in accordance with subsection (1) above is a duty to take such care as is reasonable in all the circumstances of the case to see that the entrant does not suffer personal injury or death by reason of the danger. [329]

The authors of the report state: "we do not think that the duty of care towards trespassers should in any case extend to the taking of steps to safeguard his [*sic*] property", [330] and the provision in the Draft Bill quoted above gives effect to this sentiment. The Draft Bill also proposes [331] that, except to "the extent that it is shown that, in all the circumstances of the case, it would not be fair or reasonable to allow reliance on it", [332] a term in a contract or a notice excluding or restricting an occupier's liability should be effective, even if this would have the effect of reducing the occupier's liability below the level set out in *Addie v. Dumbreck*. [333]

The authors also recommend [334] that the defence of voluntary assumption of risk should be retained against trespassers, and section 2(3) of the Draft Bill provides accordingly.

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[326] *Id.* at 3. *See* McMahon, *Occupiers' Liability in Scotland*, 9 IR. JUR. (1973).

[327] *E.g.*: "[I]t is argued that there is no case for the introduction of a general duty of care which might alleviate for the trespasser the consequences of his own *wrongdoing*." *Id.* at 10 (emphasis added).

[328] *Id.* at 36 (s. 2(1) of the Draft Occupier's Liability Bill).

[329] *Id.*

[330] *Id.* at 14.

[331] *Id.* at 38 (s. 3(1) of the Draft Bill).

[332] *Id.* (s. 3(2) of the Draft Bill).

[333] [1929] A.C. 358, [1929] All E.R. Rep. 1, 45 T.L.R. 267 (H.L.).

[334] *Supra* note 267, at 29-30. The proposal to abolish the defence was "met with considerable misgivings".