ANNUAL SURVEY OF CANADIAN LAW
PART 2
TORTS - II *

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V. Economic Loss

A. *Policy Considerations*

McCrea v. White Rock [1] represents a very important judicial retrenchment in respect of both liability for economic loss and liability for failure to act. The defendant municipality, which had made by-laws [2] relating, *inter alia,* to the construction and repair of buildings, empowered its building inspector to take certain steps necessary for ensuring that the by-laws were carried out. The builder failed to notify the inspector at a particularly important stage of the construction—when a beam was being placed in the roof—as he was required to do by the by-laws. The inspector, although he had inspected the construction three times previously at the builder's request, failed to inspect the beam. The roof subsequently collapsed, causing substantial loss to the plaintiffs, who had bought the building from the original owner after the repairs had been carried out.

At the trial the building inspector [3] was held liable on the following basis:

> The building inspector must enforce the by-law. Enforcement means what it says. There can be no meaningful enforcement if there is no positive duty of inspection. To say that the inspector need only wait for calls would be to construe his duty as a very limited duty. The effect would be to leave enforcement in the hands of the contractors. The dishonest contractor and the incompetent contractor will not be hasty to invite the building inspector to make an inspection. [4]

Heavy reliance was placed on the English Court of Appeal decision of *Dutton*

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* This concludes a two-part account of recent developments in the law of torts. For Part 1, *see* page 192 *supra.*

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[1] [1975] 2 W.W.R. 593, 56 D.L.R. (3d) 525 (B.C.C.A. 1974), *rev'g* [1973] 1 W.W.R. 542, 34 D.L.R. (3d) 227 (B.C.S.C. 1972).

[2] The City was empowered to do so by virtue of the Municipal Act, R.S.B.C. 1960, c. 255, s. 714.

[3] The case against the owner-builder had been settled for a small sum a long time previously. For an account of recent developments in the United States regarding liability of owner-builders, see Wise, Comment, 26 Okla. L. Rev. 418, at 419-24 (1973).

[4] [1973] 1 W.W.R. 542, at 549, 34 D.L.R. (3d) 227, at 233 (B.C.S.C. 1972). Section 13(b) of the by-law provided that "[t]he Building Inspector shall . . . enforce this Bye-law".

v. Bognor Regis Urban District Council, [5] one of those cases which "have not shrunk from stating quite openly in cases arising on the frontiers of negligence that they depend upon policy considerations". [6] Berger J. conceded that "[i]n some cases it might be reasonable for the building department to take into account the reputation of the builder, and not to inspect except on call", [7] but considered that the evidence did not justify such reliance in the instant case. His Lordship would have been willing to impose liability on the municipality "[i]f [it] had been properly joined", [8] since in that event the conduct of its inspector could not be described as "a failure to exercise a power" (he having "embarked upon the exercise of his power" by his previous visits). [9] Moreover, the passage of the by-law by the municipality was an exercise of its power, "and any failure to inspect thereafter, if it was negligent, was misfeasance". [10]

Mr. Justice Berger was mindful of the troublesome decision of *East Suffolk Rivers Catchment Board v. Kent,* [11] in which Lord Romer had stated: "Where a statutory authority is entrusted with a mere power, it cannot be made liable for any damage sustained by a member of the public by reason of a failure to exercise that power." [12] He distinguished the instant case on the basis that the inspector had "made three inspections . . . [One] cannot say that he refrained from exercizing his powers of inspection . . . . This is not a case of failure to exercise a power." [13]

On appeal, [14] the British Columbia Court of Appeal unanimously reversed the trial court's decision. Maclean J.A. considered that, on the facts, the inspector had been neither in breach of the provisions of the by-law nor negligent. "In my view, the by-law should be interpreted to require inspection only as the various stages of construction described in [it] are reached and as the building inspector is notified . . . . [T]he inspector had every right to expect that he would be called upon to make his fourth inspection when the building was 'ready for lathing'." [15] Even assuming that the inspector had been at fault, "his fault was one of nonfeasance at the worst, rather than misfeasance". *Dutton* was therefore distinguishable as being "clearly a case of misfeasance". Finally, Maclean J.A. also cautioned

[5] [1972] 1 Q.B. 373, [1972] 2 W.L.R. 299 (C.A. 1971).

[6] *Supra* note 4, at 552, 34 D.L.R. (3d) at 236, citing Symmons, *Duty of Care in Negligence: Recently Expressed Policy Elements,* 34 MODERN L. REV. 394, at 528 (1971).

[7] *Id.* at 554, 34 D.L.R. (3d) at 237-38.

[8] *Id.* at 556, 34 D.L.R. (3d) at 239-40.

[9] *Id.* at 555, 34 D.L.R. (3d) at 238.

[10] *Id.* at 556, 34 D.L.R. (3d) at 239.

[11] [1941] A.C. 74, [1940] 4 All E.R. 527 (H.L.).

[12] *Id.* at 102, [1940] 4 All E.R. at 239 (H.L.).

[13] *Supra* note 4, at 555, 34 D.L.R. (3d) at 238. *Cf.* Slutsky, *The Liability of Public Authorities for Negligence: Recent Canadian Developments,* 36 MODERN L. REV. 656, at 659, n. 21 (1973), where the author considers that "[u]nfortunately, Berger J.'s treatment of the misfeasance-nonfeasance dichotomy and *East Suffolk* was rather confusing and unsatisfactory".

[14] [1975] 2 W.W.R. 593, 56 D.L.R. (3d) 525 (B.C.C.A. 1974).

[15] *Id.* at 597, 56 D.L.R. (3d) at 529.

that "[l]iability was imposed [in *Dutton*] by the law of England, but in my view, the same result does not necessarily follow here".

Robertson J.A. in his concurring judgment quoted extensively from *Dutton,* stating that these passages:

> make it clear that what the Court of Appeal did in *Dutton* was to make new law by saying that the law was what, in their opinion, as a matter of policy, it should be and, in so doing and in order to give effect to that policy, to overrule, or distinguish almost to extinction some earlier authorities . . and to introduce a new element, that is, control. In effect, it seems to me, the law has been tailored to suit Mrs. Dutton (and others like her) because, *inter alia* . . . 'she suffered a grievous loss. The house fell down without any fault of hers. She is in no position herself to bear the loss'. With the English Court of Appeal doing what I have indicated for England I can, of course, have no quarrel, but it does not follow that the new law that they have declared there is the law for British Columbia. [16]

His Lordship did not dispute "the right and duty of this Court to adapt the law to altering social conditions and standards", but he was "not . . . aware" of any change that would justify the Court in taking the same "drastic step" as had been taken in *Dutton.*

Noting Ritchie J.'s remark in *Rivtow Marine Ltd. v. Washington Iron Works,* [17] that he did "not find it necessary to follow the sometimes winding paths leading to the formulation of a 'policy decision' ", Robertson J.A. stated that he was "not prepared to follow *Dutton* in so far as it has declared new law as a matter of policy". [18] A major objection was that his Lordship "doubted his capacity—particularly without any evidence—to reach accurate conclusions on the 'considerations of policy' that may arise in any case". Trenchant criticism of the broad implications and loose analysis of *Dutton* was made. [19] A further objection to following that case was that "if

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[16] *Supra* note 14, at 603, 56 D.L.R. (3d) at 534. For another instance of judicial criticism of the *Dutton* approach in British Columbia (having regard to Lord Denning's broad statements in Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors) Ltd., [1973] Q.B. 27, [1972] 3 All E.R. 557 (C.A.)) see Cari-Van Hotel Ltd v. Globe Estates Ltd., [1974] 6 W.W R. 707, at 714-15 (B.C.S.C.). A New Zealand case criticizes Lord Denning's approach as involving "[a] sweeping and Utopian view of liability at law for which I suggest with the greatest of respect the learned Master of the Rolls cited no authority": Bowen v. Paramount Builders (Hamilton) Ltd., [1975] 2 N.Z.L.R. 546, at 556-57 (S.C.). *See also* Rutherford v. Attorney-General, [1976] 1 N.Z.L.R. 403, at 410 (S.C. 1975). *See also* Harlow, *Fault Liability in French and English Public Law,* 39 MODERN L. REV. 516, at 535 (1976) and Wallace, *From Babylon to Babel, or a New Path for Negligence?,* 93 L.Q. REV. 16 (1977).

[17] [1974] S.C.R. 1189, at 1215, 40 D.L.R. (3d) 530, at 547 (1973). *Rivtow* is noted by Harvey, Comment, 37 MODERN L. REV. 320 (1974); Harvey, Comment, 9 U.B.C.L. REV. 170 (1975); and Binchy, Comment, 90 L.Q.R. 181 (1974).

[18] *Supra* note 14, at 603, 56 D.L.R. (3d) at 534.

[19] *Cf.* Cane, *The Liability of Builders and Surveyors for Negligence Dutton v. Bognor Regis United Building Co.,* 7 SYDNEY L. REV. 284, at 289 (1973-74). "It is unrealistic to draw too sharp a substantive distinction between 'legal' arguments and 'policy' arguments. In the end all legal formulae reflect some policy whether or not they are merely masks of respectability to cover up the reality underlying them. More important is clarity, certainty and predictability in the law. To give no other reason for a decision than a bald assertion of 'public policy' seems to open the way for uncertainty and lack of clarity and predictability."

this action was unique in Canada . . . it might be appropriate to decide it simply as a matter of policy", [20] but "we are far from lacking authorities that are of assistance". [21] In "considering the case in the traditional fashion", [22] Robertson J.A., referring, *inter alia,* to the two recent decisions of *Schacht,* [23] and *Rivtow,* [24] observed that "[b]efore there can be liability there must be a duty": [25]

> Was there then a duty of care resting upon the inspector here? I have already shown that the by-law imposed no duty on him and there is nothing that puts a person called a building inspector in the same category as constables, whose duties . . . stem not only from the relevant statutes but from the common law; consequently there was no duty at common law to inspect. [26]

This analysis is not totally convincing. The foreseeability of reliance being placed on persons carrying out particular occupations, and the likelihood of persons relying on persons called "building inspector[s]", [27] is at least as great as with police officers. The fact that the by-law (under his Lordship's interpretation) imposed no duty of inspection upon the inspector is not, of course, determinative of the issue of common law liability, though the use of the word "consequently" above might appear to suggest this. [28]

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[20] *Supra* note 14, at 604, 56 D.L.R. (3d) at 535.

[21] Robertson J.A. distinguished *Dutton* on three bases: (1) the by-law, in the circumstances, cast no duty upon the inspector to inspect the beam; (2) the inspector (unlike the one in *Dutton*) had not in fact inspected or passed the beam; (3) "the regulation by the inspector that was contemplated by the by-law was far less comprehensive than that of the local authority in *Dutton*". *Id.* at 609, 56 D.L.R. (3d) at 540. Seaton J.A., for similar reasons, "did not find the [Dutton] decision much help". *Id.* at 616, 56 D.L.R. (3d) at 546.

[22] *Supra* note 14, at 610, 56 D.L.R. (3d) at 541.

[23] Schacht v. The Queen in right of Ontario, [1973] 1 O.R. 221, 30 D.L.R. (3d) 641 (C.A. 1972), *aff'd, sub nom* O'Rourke v. Schacht, [1976] 1 S.C.R. 53, 55 D.L.R. (3d) 96 (1974).

[24] *Supra* note 17.

[25] *Supra* note 14, at 613, 56 D.L.R. (3d) at 543.

[26] *Id.* at 614, 56 D.L.R. (3d) at 544-45.

[27] Seaton J.A.'s concurring judgment held that, on the facts of the case and on the interpretation of the by-law, no duty had been imposed on the inspector to inspect the beam. Moreover, on the question of causation, his Lordship considered that the *East Suffolk* decision could "not be distinguished and that there has been no damage caused by the exercise of a power. The failure to inspect did not cause the injury complained of. There was no 'green light' as Stamp, L.J. described the approval in *Dutton*". *Id.* at 621, 56 D.L.R. (3d) at 551.

[28] *See also* Attorney General for Ontario v. Crompton, 1 C.C.L.T. 81 (Ont. H.C. 1976), where Haines J. appeared to view sympathetically the possibility of a rescuer claiming damages in negligence "for expenses incurred in responding to [the] emergenc[y]", *id.* at 86.

A more restrictive decision is Hunt v. T.W. Johnstone Co. Ltd., 12 O.R. (2d) 623, 69 D.L.R. (3d) 639 (H.C. 1976), where the "directness" criterion was invoked to deny a sales and distribution company recovery for economic loss sustained by it

B. *Negligent Misrepresentation* [29]

The parameters of this head of liability have been discussed in a number of recent decisions. In *Peters v. Parkway Mercury Sales Ltd.*, [30] the plaintiff purchased a defective used car from the defendant company. The Appellate Division of the New Brunswick Supreme Court had "no doubt that the plaintiff would not have bought the car had he known of these defects". He had been induced to do so by the negligent misrepresentations of the defendant company's salesman, who had described the vehicle as being "in good shape", when in fact he had very little knowledge of its condition. However, the plaintiff had signed a guarantee which contained a very widely-drawn exclusion clause, providing that the guarantee was "expressly in lieu of all other guarantees, warranties, or representations, express or implied". [31]

The Appellate Division, affirming the trial judge, [32] held that the plaintiff's action should not succeed. [33] The court considered that the expression "guarantees, warranties or representations" included "any representation inducing the purchaser to purchase the car". [34] Although referring to a range of authorities, the court did not mention the important decision of *J. Nunes Diamonds Ltd. v. Dominion Electric Protection Co.*, [35] where Pigeon J.,

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as the result of damage caused by the negligence of the company supplying it with materials, both companies being owned by the same person and carrying on business in the same premises. The court's reluctance to look behind the corporate veil was unfortunate since the issue before it was essentially one of negligence law, with its distinctive legal and social policies, rather than one of company law.

In MacMillan Bloedel Ltd. v. The Foundation Company of Canada Ltd., [1977] 2 W.W.R. 717 (B.C.S.C.), a very wide interpretation of *Rivtow Marine* was adopted, the criterion of reasonable foreseeability being applied without apparent hesitation although the loss sustained was entirely economic. Since, however, the plaintiff had framed its claim for damages as the loss of the wages paid to its employees, the court (erroneously, it is respectfully submitted) held the defendant not to be liable, since the wages were paid pursuant to the plaintiff's previous contractual obligations towards its employees and did not therefore result from the negligent act of the defendant. An equally wide interpretation of *Rivtow Marine* was adopted in Star Village Tavern v. Nield, [1976] 6 W.W.R. 80 (Man. Q.B.), where the court somewhat unconvincingly held that the plaintiff's loss of business was not a reasonably foreseeable result of the defendant's negligent damaging of a bridge which forced patrons from the nearest town to drive 15 miles instead of 1½ miles if they wished to go to the plaintiff's tavern.

[29] *See generally*, Fridman, *Negligent Misrepresentation*, 22 McGILL L.J. 1 (1976) and Fridman, *Negligent Misrepresentation: A Postscript*, 22 McGILL L.J. 649 (1976). For a perceptive analysis of recent decisions in England, the United States and Canada, see Craig, *Negligent Misstatements, Negligent Acts and Economic Loss*, 92 L.Q.R. 213 (1976). For a Hohfeldian analysis of *Hedley Byrne, see* Marsh, *Hedley Byrne & Co. v. Heller & Partners Diagrammed*, 14 WESTERN ONT. L. REV. 205 (1975).

[30] 10 N.B.R. (2d) 703, 58 D.L.R. (3d) 128 (C.A. 1975).

[31] *Id.* at 713, 58 D.L.R. (3d) at 137.

[32] 9 N.B.R. (2d) 288 (S.C. 1974).

[33] The court also rejected claims for breach of implied warranty and fundamental breach of contract.

[34] *Supra* note 29, at 713, 58 D.L.R. (3d) at 137.

[35] [1972] S.C.R. 769, 26 D.L.R. (3d) 699.

speaking for the majority, had stated that "the basis of tort liability considered in *Hedley Byrne* is inapplicable to any case where the relationship between the parties is governed by a contract, unless the negligence relied on can properly be considered as 'an independent tort' ". [36]

In *Hodgins v. Hydro-Electric Commission of Nepean,* [37] the defendant had in 1967 given an estimate of the cost of electrically heating a proposed addition to the plaintiff's home, which was to include an indoor swimming pool. The estimate was only half the actual cost. In 1967, "the science [of estimating likely costs] had not sufficiently progressed to permit an accurate estimate of the cost of heating a room containing a swimming pool . . . and . . . in fact, even at the date of the trial [in 1972], experimentation and possible formulae were still being worked out". [38]

The trial judge, following the *Hedley Byrne* [39] principle, imposed liability in negligence. [40] The Ontario Court of Appeal, however, reversed the decision on the basis that the defendant's employee had "prepared his estimate according to the skill and knowledge available to those engaged [at that time] in that particular field. If [the employee] met the standard then he was not negligent and no liability can be imputed to the defendant." [41] The plaintiff's appeal to the Supreme Court of Canada was rejected by an eight-to-one majority. Ritchie J. could find:

> no evidence that [the defendant's employee] acted carelessly or failed to live up to the ascertainable standard of competence and diligence existing in the electrical heating field in 1967 as described by the expert . . . . On the contrary, the evidence appears to me to indicate that [he] complied with

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[36] *Id.* at 777-78, 26 D.L.R. (3d) at 727-28. *See also* Hedley Byrne & Co. v. Heller & Partners Ltd., [1964] A.C. 465, [1963] All E.R. 575 (H.L.); Elder, Dempster and Co. v. Paterson, Zochonis and Co., [1924] A.C. 522, at 548 (H.L.); Sealand of the Pacific Ltd. v. Robert C. McHaffie Ltd., [1974] 6 W.W.R. 724, at 726-27, 51 D.L.R. (3d) 702, at 705-06 (B.C.C.A.). *Cf.* Capital Motors Ltd. v. Beecham, [1975] 1 N.Z.L.R. 576 (S.C. 1974). However, in *Capital Motors* the defendant relied on the exclusion clause only "rather faintly". *See also* Esso Petroleum Co. v. Mardon, [1975] Q.B. 819, [1975] 2 W.L.R. 147 (1974) noted by Sealy, Comment, [1975] CAMB. L.J. 194. *Esso Petroleum* was reversed, [1976] Q.B. 801, [1976] 2 All E.R. 5 (C.A.), noted by Gravells, Comment, 39 MODERN L. REV. 462 (1976). *See also* Dillingham Constr. Pty. v. Downs, [1972] 2 N.S.W.L.R. 49 (S.C.); Presser v. Caldwell Estates Pty., [1971] 2 N.S.W.L.R. 471 (C.A.); Fine's Flowers Ltd. v. General Accident Assurance Co. of Canada, 5 O.R. (2d) 137, 49 D.L.R. (3d) 641 (H.C. 1974); Porky Packers Ltd. v. The Pas, [1974] 2 W.W.R. 673, 46 D.L.R. (3d) 83 (Man. C.A.) *rev'd* 7 N.R. 569, 65 D.L.R. (3d) 1 (S.C.C. 1976); Northwestern Mutual Ins. Co. v. J.T. O'Bryan & Co., [1974] 4 W.W.R. 322, 51 D.L.R. (3d) 693 (B.C.C.A.); Manitoba Sausage Co. v. Winnipeg, 1 C.C.L.T. 221 (Man. C.A. 1976); Zahara v. Hood, [1977] 1 W.W.R. 359 (Alta. Dist. Ct. 1976). The divergence of authority is incisively analyzed by Blom, Comment, 10 U.B.C. L. REV. 145 (1975-76). The approach of French and German law to *Hedley Byrne*-type problems is analyzed by Markesinis, *The Not so Dissimilar Tort and Delict,* 93 L.Q. REV. 78, at 91-94 (1977).

[37] 60 D.L.R. (3d) 5, 6 N.R. 451 (S.C.C. 1975), *aff'g* 60 D.L.R. (3d) 1 (Ont. C.A. 1975).

[38] *Id.* at 13-14, referring to the evidence of an expert witness

[39] [1964] A.C. 465, [1963] All E.R. 575 (H.L.).

[40] [1972] 3 O.R. 332, 28 D.L.R. (3d) 174 (Cty. Ct.).

[41] *Supra* note 36, at 4.

> such standards as were then ascertainable. The estimate was an opinion and the fact that the [defendant] company was known to be in the business of making heating cost estimates does not convert it into a guaranteed cost. [42]

Chief Justice Laskin, however, while concurring with the majority, did "not think that it is invariably enough to defeat the action that the defendant has used the skill or knowledge then known to him or to others in his field of endeavour". [43] In the Chief Justice's opinion, the case would turn on what information or advice had been sought from the defendant and what he had unqualifiedly represented that he could give:

> He may assume to act in a matter beyond his then professional knowledge or that of others in the field and, if he does, he cannot then so limit the plaintiff's reliance unless he qualifies his information or advice accordingly or unless the plaintiff knows what are the limitations of the defendant's competence when seeking the information or advice. [44]

Spence J., dissenting, referred to "several additional pieces of evidence" that the majority had not discussed, which, in his view, indicated negligence on the part of the defendant even judged by the existing standards of 1967. His Lordship, moreover, was "unable to accept as absolute the statement that if [the defendant's employee] had prepared his estimate according to the skill and knowledge available to those engaged in that field, he was by that mere fact free from any liability for negligence". [45] It is submitted that there is more merit in the approach of Spence J. [46] (and Laskin C.J.) than the eight-to-one margin in the case might indicate. On the matter of the "standards of the time", the position of the defendant company was radically different from that of a doctor. A doctor may be excused if he treats a patient in 1967 in a manner which in 1976, and in the light of more recent information, is erroneous. However, in the case of a prospective client for a swimming pool, it would seem to be incumbent upon a company whose advice is sought and to whom substantial profits may accrue as a result of this advice to make it perfectly plain that the advice is based on an incomplete capacity to assess the true cost. [47]

Tower Equipment Rental Ltd. v. Joint Venture Equipment Sales Ltd. [48]

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[42] *Supra* note 36, at 10.

[43] *Id.* at 5.

[44] *Id.*

[45] *Id.* at 15. Spence J. referred to W. PROSSER, THE LAW OF TORTS 167-68 (4th ed. 1971). *See* Texas & Pac. Ry. Co. v. Behymer, 189 U.S. 468, at 470, 23 S. Ct. 622, at 623 (1903); The T.J. Hooper, 60 F.2d 737, at 740 (2d Cir. 1932); Anderson v. Chasney, [1949] 2 W.W.R. 337, at 340-41, [1949] 4 D.L.R. 71, at 73-74 (Man. C.A.).

[46] *See also* Spence J.'s dissent in the important decision of J. Nunes Diamonds Ltd. v. Dominion Elec. Protection Co., *supra* note 34.

[47] *Cf.* Cari-Van Hotel Ltd. v. Globe Estates Ltd., *supra* note 16, in which liability was not imposed on an appraiser of real estate where his appraisal was based on the best use of the land. "I do not accept [the] submission that the 'cash market value' can only mean the cash the property will fetch as is and where is, for sale in its present condition . . . . Clearly the appraiser's duty to his client is to present him with the best valuation he can so that the appraisal may be of greatest value to its possessor." *Id.* at 718-19.

[48] 9. O.R. (2d) 453 (H.C. 1975).

is a decision falling "well within the limits of the principle" established in *Hedley Byrne*. The plaintiff was engaged in major construction work and, on the prompting of one of the defendants, was anxious to acquire a crane which could be leased to his subcontractor. One of the other defendants, the manufacturer of the crane, presented a report regarding its condition which "was addressed to the plaintiff and intended to get into the hands of the plaintiff, [when] it was obvious that the plaintiff intended to act upon its contents". [49] The report, while stopping short of an absolute untruth, "was misleading with respect to the age of the crane. The report implies that the crane was two years and four months old when in fact it was ten years old". [50] The report had been sought from the defendant manufacturer "as an expert in the field", and, as the court emphasized, "the evaluation was not gratuitous since the prospect of a finder's fee was obviously in the minds [of the defendant's employees who examined the crane]". The defendant's argument that the report should not have been relied upon since "it is not customary for anyone to buy a crane without first examining it" was rejected on the basis that, "[w]hile this custom may exist within a small circle of experts, the plaintiff was not within that circle and for that reason elected to procure the [defendant's] report". [51]

Two recent decisions regarding the *measurement* of damages for negligent misstatement are *West Coast Finance Ltd. v. Gunderson, Stokes, Walton & Co.* [52] and *Uncle Ben's Tartan Holdings Ltd. v. Northwest Sports Enterprises Ltd.* [53] The decisions are in accord that the plaintiff is only entitled to recover for actual "out of pocket" loss and not the loss of the "benefit of the bargain". [54]

In the United States, the general exemption [55] from liability for negligently caused economic loss has been circumscribed in a manner somewhat similar to that in Canada and elsewhere in the Commonwealth. In *Union Oil Co. v. Oppen,* [56] the defendant company was responsible for the discharge of vast quantities of new crude oil from a drilling platform off the coast of

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[49] *Id.* at 462.

[50] *Id.* at 461.

[51] *Id.* at 462. *See also* Porky Packers Ltd. v. The Pas, *supra* note 35, where a municipality was held liable by the Manitoba Supreme Court and Court of Appeal for selling land to the plaintiffs for the construction of an abattoir and subsequently encouraging them to continue building when it was found that the proposed use was contrary to the municipality's health by-laws. The Supreme Court of Canada, however, reversed on the basis that the plaintiff had relied on his own knowledge and judgment in the matter.

[52] [1974] 2 W.W.R. 428, 44 D.L.R. (3d) 232 (B.C.S.C.).

[53] [1974] 4 W.W.R. 69, 46 D.L.R. (3d) 280 (B.C.S.C.).

[54] The terms are from J. FLEMING, THE LAW OF TORTS 561 (4th ed. 1971). The author, who provides specific examples of the practical differences between the two criteria, states that British authority favours the latter concept (endorsed in *West Coast Finance* and *Uncle Ben's Tartan Holdings*) and American authority favours the former criterion.

[55] *See, e.g.,* Ultramares Co. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931); Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145 (1965); Bright v. Goodyear Tire & Rubber Co., 463 F.2d 240 (9th Cir. 1972).

[56] 501 F.2d 558 (9th Cir. 1974).

Santa Barbara, California, which resulted in the death of a large number of fish in the coastal waters of Southern California, thereby interfering severely with the livelihood of the plaintiff, a commercial fisherman. The Ninth Circuit Court imposed liability on the defendant in negligence. Having referred to some exceptions to the general rule of non-recovery for economic loss, the court, strongly influenced by the philosophy of *Dillon v. Legg*,[57] the famous decision on mental distress, held that the damages were foreseeable and that the defendant was in breach of a duty of care owed to the plaintiff.[58]

The decision has been criticized for not having articulated more clearly the policy considerations on which it was based.[59] Against this, it might be argued that a straightforward unencumbered foreseeability criterion affords the courts the optimum flexibility in a highly complex area of legal policy.

VI. Children's Liability

The standard of care required of children was analyzed in *Ryan v. Hickson*.[60] The plaintiff, a nine-year-old boy, was injured when the snowmobile on which he was a passenger struck a snowdrift, causing him to fall into the path of another snowmobile, which was travelling close behind the first. The driver of the first snowmobile (on which the plaintiff was a passenger) was twelve years old, and the driver of the second vehicle was fourteen years old. The highway had not been ploughed, and the snowmobiles were travelling at a speed of twenty-five to thirty miles per hour.

The plaintiff sued both drivers and their respective fathers. Goodman J., of the Ontario High Court, discussed in some detail the question of the standard of care appropriate to the two drivers. Having first referred to the leading Canadian decision of *McEllistrum v. Etches*,[61] Goodman J. went on to quote with approval[62] a passage in Professor Linden's *Canadian Negli-*

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[57] 68 Cal. 2d 728, 441 P.2d 912 (1968).

[58] *Supra* note 55, at 568. "[W]e are not foreclosed by precedent from examining on its merits the issue presented by the defendants' motion . . . . As we see it, the issue is whether the defendants owed a duty to the plaintiffs, commercial fishermen, to refrain from negligent conduct in their drilling operations, which conduct reasonably and foreseeably could have been anticipated to cause a diminution of the aquatic life in the Santa Barbara Channel area and thus cause injury to the plaintiffs' business."

[59] Comment, *Union Oil Co. v. Oppen: Recovery of a Purely Economic Loss in Negligence*, 60 Iowa L. Rev. 315, at 324-27 (1974-75).

[60] 7 O.R. (2d) 352, 55 D.L.R. (3d) 196 (H.C. 1974).

[61] [1956] S.C.R. 787, 6 D.L.R. (2d) 1. The subjective criterion espoused in *McEllistrum* appears to have been endorsed by Cory J. in Mattinson v. Wonnacott, 8 O.R. (2d) 654, 59 D.L.R. (3d) 18 (H.C. 1975), and by Disberry J. in Phillips v. Regina Bd. of Educ., 1 C.C.L.T. 197 (Sask. Q.B. 1976), and was clearly supported in Ingram v. Lowe, [1975] 1 W.W.R. 78, 55 D.L.R. (3d) 292 (Alta. C.A. 1974); Bishop v. Sharrow, 8 O.R. (2d) 649, 59 D.L.R. (3d) 13 (H.C. 1975); Paskivski v. Canadian Pacific Ltd., [1976] 1 S.C.R. 687, 57 D.L.R. (3d) 280 (1975); Stein v. Hudson's Bay Co., 70 D.L.R. (3d) 723 (B.C.S.C. 1976); and Hnatuk v. Trapp, 10 N.R. 97, 71 D.L.R. (3d) 63 (Fed. C.A. 1976).

[62] *Supra* note 60, at 358, 55 D.L.R. (3d) at 202.

gence Law [63] concerning the liability of children engaged in adult activities. Though being of the opinion that he should not take into account whether or not "the activity in which the infant is engaged is one that is normally insured", [64] Goodman J. considered that "the other principles expressed in the [quoted] passage seem eminently sensible". "Snowmobiles . . . are no less a lethal weapon" than automobiles when used by persons lacking skill, so Professor Linden's principles "are equally as applicable to snowmobiles as to automobiles . . . whether or not such vehicles are in use on or off the highway". [65]

On the facts, the drivers of both snowmobiles were held by his Lordship to have been negligent. The defence of *volenti* was rejected on the basis that the plaintiff had "no knowledge as to the activities to be engaged in on the snowmobile other than the fact that they were going for a ride. There was no suggestion that they would be engaged in racing, speeding, jumping snow-drifts or snow-banks or any other unusual activities". [66] The trial judge did, however, find the plaintiff to have been contributorily negligent to the extent of one-third, since he had not maintained his hold on the driver and had turned around to wave at the snowmobile behind him.

While the decision represents an extension of the ambit of recovery for persons injured by children, it must be admitted that if the insurance factor is excluded from Professor Linden's list of considerations, what remains is a good deal less than convincing. A franker acknowledgement of the relevance of insurance protection by the court might have been advisable. [67]

VII. Nervous Shock

Recovery for negligently inflicted "nervous shock" is one of the growth areas of negligence law. [68] However, after the bold decision of Haines J. in

[63] A. Linden, Canadian Negligence Law 33-34 (1972). "Special rules for children make sense, especially when they are plaintiffs. However, when a young person is engaged in an adult activity, which is normally insured, the policy of protecting the child from ruinous liability loses its force. Moreover, when the rights of adulthood are granted, the responsibilities of maturity should also accompany them. In addition, the legitimate expectations of the community are different when a youth is operating a motor vehicle than when he is playing ball . . . . Consequently, there has been a movement toward holding children to the reasonable man standard when they engage in adult activities. A more lenient standard for young people in the operation of motor vehicles, for example, was thought to be 'unrealistic' and 'inimical to public safety'. When a society permits young people of 15 or 16 the privilege of operating a lethal weapon like an automobile on its highways it should require of them the same caution it demands of all other drivers."

[64] *Supra* note 60, at 358, 55 D.L.R. (3d) at 202.

[65] *Id.* at 359, 55 D.L.R. (3d) at 203.

[66] *Id.* at 359-60, 55 D.L.R. (3d) at 203-04.

[67] *Cf.* Symmons, *supra* note 6. For an account of the general Canadian position, see Binchy, *Annual Survey of Canadian Law: Part 2: Torts*, 6 Ottawa L. Rev. 511, at 528 (1974).

[68] "[I]t was not until this century that the courts recognized the fact that a person is a unity and can suffer even more serious injuries through . . . his emotions than by some physical impact". Green, *The Negligence Action*, [1974] Ariz. State L.J. 369, at 371.

Marshall v. Lionel Enterprises, [69] which appeared to merge the law on the subject with the mainstream of negligence law, a cloud of uncertainty has again descended with the Ontario decision of *Brown v. Hubar.* [70] In that case, the plaintiff's daughter, aged thirteen, [71] was seriously injured in a traffic accident caused by the negligence of the defendant. She later died in hospital. The plaintiff, a paramedical professional, was called to the scene of the accident, his wife having been informed by phone that the girl had been hurt, but "[n]o indication [having been] given by such call that the girl was severely injured." [72] When the plaintiff arrived on the scene of the accident,

> [h]e saw a form covered with a blanket and as he approached closer he saw it resembled a body. He lifted the blanket from the face and saw it was his daughter. He says [*sic*] that discovery of her identity disturbed him. He attempted to take her pulse at the wrist and neck. Her eyes were open and there was a pool of blood behind her head. He found no indication of life. The blood was of a colour that he thought indicated she would not survive but he still had some hopes that she might live. [73]

The plaintiff's daughter was brought to hospital, and the plaintiff naturally followed. For some time he was unable to obtain information on her condition, but after an hour he was told that she had been dead on arrival. The plaintiff had to identify the body.

Since the plaintiff had suffered a heart attack about a month previously, experiencing acute coronary insufficiency and myocardial infarction for about three weeks thereafter, his doctor was called to the hospital on the evening of his daughter's death. The doctor found him "pale and very anxious and shaky, very excitable, restless, almost crying and difficult to control". He also had chest pains. Thereafter the plaintiff suffered difficulty in emotional control and he had to be sedated for several weeks. His doctor stated in evidence that "the incident [of the death of his daughter] definitely

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[69] [1972] 2 O.R. 177, 25 D.L.R. (3d) 141 (H.C. 1971). In the United States, a similar trend is becoming apparent after the watershed decision of Dillon v. Legg, 68 Cal. 2d. 728, 441 P.2d 912 (1968), although "[t]he *Dillon* approach . . . remains a minority position". Sullivan, Comment, 23 CATHOLIC U.L. REV. 621, at 635 (1975). *See, e.g.,* First National Bank v. Langley, 314 So. 2d 324 (Miss. 1975), perceptively analyzed by Webb, Comment, 46 MISS. L.J. 871 (1975); Prince v. Pittston Co., 63 F.R.D. 28 (Va. 1974), noted by McCormally, Comment, GEO. L.J. 1179 (1975). *See generally,* Towey, *Negligent Infliction of Mental Distress Reaction to Dillon v. Legg in California and Other States,* 25 HASTINGS L.J. 1248 (1974), Leibson, *Recovery of Damages for Emotional Distress Caused by Physical Injury to Another,* 15 J. FAMILY L. 163 (1977), Greyson, *Recent Developments in the Negligent Infliction of Emotional Shock,* 3 No. KY. ST. L.F. 76 (1975), and Simons, *Psychic Injury and the Bystander: The Transcontinental Dispute Between California and New York,* 51 ST. JOHN'S L. REV. 1 (1976).

[70] 3 O.R. (2d) 448, 45 D.L.R. (3d) 664 (H.C. 1974).

[71] Grant J. states that the daughter, Sonja, "was born on August 29, 1956, and was killed . . . February 8, 1970". *Id.* at 449, 45 D.L.R. (3d) at 665. However, later in his judgment his Lordship states that "[t]he daughter was 14½ years of age at the time of her death". *Id.* at 454, 45 D.L.R. (3d) at 670.

[72] *Id.* at 450, 45 D.L.R. (3d) at 666.

[73] *Id.*

prolonged the convalescence of the plaintiff at least four months and that the emotional shock caused by the death of his daughter had a detrimental effect on his health and delayed his recovery". [74]

The plaintiff's action was not successful. The judgment of Hughes J. is unconvincing in almost every respect. After a neutral summary of the relevant authorities, his Lordship referred to the "rescue" cases [75] and commented:

> It is worthy of note that in all such three cases a situation of danger created by the defendant still existed when the plaintiff came on the scene. In the present case the defendant's negligence was spent when the plaintiff arrived and saw his daughter. [76]

This observation is misleading in its effect. The plaintiff was not claiming to have suffered foreseeable injury by reason of being a *rescuer;* the foreseeability pertained to the plaintiff's ultimate presence at the scene of the accident on account of his *relationship* with the girl whom the defendant had negligently injured and who had ultimately died. [77]

Mr. Justice Hughes went on to lay very great emphasis on the fact that "[t]he plaintiff . . . did not call any evidence as to the events or situations surrounding the accident, nor as to the manner in which the defendant was negligent". [78] His Lordship continued:

> The facts surrounding the speed and mode of driving, coupled with the nature of the scene, must be relevant factors in determining the answer to the reasonable forseeability test. The onus of relating the shock to the negligence of the defendant is upon the plaintiff. If one were driving at a high rate of speed in a crowded street, would it not be more apparent to him that he might cause mental shock by such conduct without actual collision, while if he caused an injury to a pedestrian while travelling at a moderate rate of speed, it might not be judicial to draw such conclusion against him. [79]

With respect, it is submitted that the precise nature of the defendant's negligent driving is in no way relevant to the plaintiff's claim. The plaintiff was not suggesting that his mental shock derived simply from his status as a bystander. Whether or not the defendant drove in such a manner as to cause distress to a witness of the accident was completely irrelevant.

Although there was no evidence as to the manner in which the defendant was negligent towards the plaintiff's *daughter,* there was clear evidence of

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[74] *Id.* at 452, 45 D.L.R. (3d) at 668.

[75] Chadwick v. British Ry. Bd., [1967] 1 W.L.R. 912, [1967] 2 All E.R. 945 (Q.B.); Jones v. Wabigwan, [1970] 1 O.R. 366, 8 D.L.R. (3d) 424 (C.A.); Mount Isa Mines Ltd. v. Pusey, 125 C.L.R. 383 (H.C. 1970).

[76] *Supra* note 70, at 457, 45 D.L.R. (3d) at 673. In Fenn v. Peterborough, 1 C.C.L.T. 90 (Ont. H.C. 1976), the plaintiff recovered damages for severe nervous shock although the defendant's negligence had been similarly spent.

[77] In any event the concept of negligence being "spent", even in the context of rescuers, is one which should not be asserted lightly. *Cf.* Corothers v. Slobodian, [1975] 2 S.C.R. 633, 51 D.L.R. (3d) 1 (1974), discussed in Part 1 of this *Survey,* 9 OTTAWA L. REV. 192, at 195-98 (1977).

[78] *Supra* note 70, at 458, 45 D.L.R. (3d) at 674.

[79] *Id.*

the manner in which the defendant was negligent towards the *plaintiff*. Such evidence could be stated in the form of a general proposition based on human experience rather than some precise allegation of careless driving—namely, that a man who negligently kills a thirteen-year-old girl may reasonably foresee that her father (who may be in poor health) may suffer emotional shock leading to physical injury, upon hearing of the girl's death. [80]

The next reason indicated by his Lordship for holding against the plaintiff was as follows:

> The plaintiff went to the area where his daughter was lying with some knowledge of the fact that she had been involved in a mishap. Although there is no evidence to indicate that he knew she had sustained physical injury, he must have been directing his attention, however, to the welfare of his daughter as he went to the scene. To find her therefore as he did was not a complete surprise. It was only after waiting to see the attending doctor at the hospital for over an hour that he became aware of her demise. [81]

Implicit in this statement is the argument that the plaintiff ought to have disciplined himself for the shock, which he might have been expecting. If this interpretation is correct, it surely may be called into question for imposing a standard of reasonable foresight unduly indulgent to the defendant. While it might have been to the plaintiff's own welfare to have steeled himself against the anticipated shock, it is simply going too far to impose a serious legal obligation (involving many thousands of dollars) upon him to cultivate a cold and unfeeling temperament. Puritanism should scarcely be permitted so to engraft itself onto the law of negligence. [82] Furthermore, if it was foreseeable that a reasonable person with no previous condition of illness would have suffered shock in the circumstances of this case, the plaintiff's condition, which exacerbated the effects of the shock, should not have deprived him of a remedy.

Brown v. Hubar is an unfortunate decision; its reasons for denying a remedy to the plaintiff are not convincing. Decisions on nervous shock have rarely been notable for judicial frankness; *Brown v. Hubar* is a prime example of judicial reluctance to deal openly with the complex of legal and social

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[80] *But see* West, Comment, 10 WAKE FOREST L. REV. 187, at 192 (1974), who argues that the limitation that the mental distress result "from the sensory and contemporaneous observance [*sic*] of the accident . . . seems to be necessary to prevent an unlimited extension of the right to recovery to a plaintiff who suffers mental distress not from direct observance [*sic*] but from subsequently learning of an accident".

[81] *Supra* note 70, at 459, 45 D.L.R. (3d) at 675. Far from there being no evidence, in fact the evidence was strongly to the contrary. At the time of the telephone call to the plaintiff's wife "requesting that someone come and *pick up the daughter*"—hardly indicative that the daughter had sustained serious injuries—"[n]o indication was given by such call that the girl was severely injured". *Id.* at 450; emphasis added.

[82] *Cf.* Jacobs, Comment, 36 MODERN L. REV. 314, at 316 (1973).

policies facing the court. [83]

In *Babineau v. MacDonald,* [84] the wife and daughter of a man who was killed in a traffic accident owing to the negligence of the defendant claimed that they suffered nervous shock as a result of hearing of his sudden death. The evidence on behalf of the wife was that "[d]uring the year following the death of her husband [the plaintiff] suffered anxiety and nervousness, a slight loss of weight and mental depression as a consequence of the loss of her husband". [85] Her doctor stated that "her condition was a normal reaction to the loss of a spouse and that the most serious consequences were usually observed for six months following the death". However, the evidence also disclosed that the wife had been unable to continue in her employment—a reaction which would seem, at least to a layperson, to be abnormal. The evidence in regard to the daughter was that she "was also emotionally affected by the loss of her father and found it difficult to attend school regularly".

At trial, Leger J. rejected the plaintiffs' claim on the basis of lack of foreseeability. On appeal, the trial court's finding was upheld. The two issues requiring resolution were, it is submitted: (1) whether the injuries fall under the classification of "nervous shock" at all (and there seems reason to doubt this on the facts stated in the judgments), [86] and (2) assuming that what they had suffered *was* injury induced by nervous shock, whether, according to precedent and principle, the injuries fell within the ambit of recovery.

The Appeal Division disposed of these central questions in three sentences. Chief Justice Hughes stated:

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[83] *Cf.* Curll v. Robin Hood Multifoods Ltd., 56 D.L.R. (3d) 129 (N.S.S.C. 1974), a decision invoking aggravation of a pre-existing nervous condition. The court held a manufacturer of flour liable to the plaintiff, a woman 58 years old, when she discovered a decomposed mouse in a bag of flour as she was about to make some molasses cookies. After discovering the mouse the plaintiff "was surprised and shocked. She said that she could not work about the house for the rest of that day. She felt 'just terrible' ". *Id.* at 130. See also, to similar effect, Taylor v. Weston Bakeries Ltd., 1 C.C.L.T. 158 (Sask. Dist. Ct. 1976).

[84] 10 N.B.R. (2d) 715, 59 D.L.R. (3d) 671 (C.A. 1975), *rev'g in part* 8 N.B.R. (2d) 520 (S.C.).

[85] *Id.* at 723.

[86] *Cf.* Hinz v. Berry, [1970] 2 Q.B. 40, [1970] 1 All E.R. 1074 (C.A.), discussed in my previous *Survey, supra* note 67, at 539-40. Disappointment and frustration arising from breach of contract have been compensated in recent English decisions: *see Survey, supra* note 67, at 450, n. 195, and Jackson v. Horizon Holiday Ltd., [1975] 3 All E.R. 92, [1975] 1 W.L.R. 1468 (C.A.), criticised by Wylie, Comment, 26 N.IR.L.Q. 326, at 332 (1975), who argues that a negligence-based remedy would have been appropriate, on the facts. However, the later decisions of Heywood v. Wellers, [1976] Q.B. 446, and Cox v. Phillips Ind. Ltd., [1976] 1 W.L.R. 638, have "reasserted the fundamental rule and should enable the courts to adopt a more flexible approach in the future": Newell, *Note,* 92 L.Q.R. 328, at 330 (1976). *See also* Newell, Comment, 39 MODERN L. REV. 353 (1976), and Ramsay, Comment, 55 CAN. B. REV. 169 (1977). *Cf.* the position in Louisiana, where non-pecuniary damages may not be awarded for breach of contract: Meador v. Toyota of Jefferson, Inc., 332 So. 2d 433 (La. S.C. 1976), noted by Marks, 37 LA. L. REV. 625 (1977).

> In the present case neither [the mother] nor [the daughter] were present when the fatal accident [occurred]. Their states of anxiety resulted from grief caused by the loss of the deceased. In my opinion the evidence does not establish the foreseeability of the damage which resulted from nervous shock experienced by the plaintiffs. [87]

With respect, it is not clear whether this amounts to a finding that the plaintiffs had *not* suffered nervous shock. Certainly the statement that "[t]heir states of anxiety resulted from grief caused by the loss of the deceased" seems to amount to a clear finding to this effect. Yet the statement that "the evidence does not establish the foreseeability of the damage *which resulted from nervous shock* experienced by the plaintiffs" [88] would appear equally clearly to concede that nervous shock had been suffered, the plaintiffs' claim being rejected simply on the grounds of lack of proof of the foreseeability of the shock.

In any event, the finding of lack of foreseeability would have benefited from some supporting—or even clarifying—argument. The statement that "neither [plaintiff] w[as] present when the fatal accident occurred" is presented with no indication as to what effect—if any—that fact had on the determination of the issue. *Abramzik v. Brenner* [89] is quoted with approval in *Babineau,* yet *Abramzik* has been criticized for its failure to give reasons for its finding of lack of foresight. [90]

VIII. Products Liability [91]

Despite academic attempts to remove this topic from the sphere of tort law, the citadel has not yet fallen [92] in Canada. Products Liability remains a species of negligence here, and not a substantive cause of action. Some recent decisions are given in the note below. [93]

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[87] *Supra* note 84, at 723.

[88] (Emphasis added).

[89] 62 W.W.R. 332, 65 D.L.R. (2d) 651 (Sask. C.A. 1967).

[90] *See, e.g.,* Glasbeek, Comment, 47 Can. B. Rev. 96 (1969), and the previous *Survey, supra* note 67, at 541.

[91] *Cf.* S. Waddams, Products Liability (1974), reviewed by Binchy, 24 Int. & Comp. L.Q. 901 (1975).

[92] *Cf.* Prosser, *The Fall of the Citadel,* 50 Minn. L. Rev. 791 (1966).

[93] In Lem v. Borotto Sports Ltd., 58 D.L.R. (3d) 465, at 471 (Alta. S.C. 1975), the plaintiff was injured by a defective shell from a shot shell reloader manufactured by the defendant. No liability was imposed on the defendant. The plaintiff's contention that he had not been instructed in the use of the machine by the manufacturer was rejected on the evidence. Lambert v. Lastoplex Chemicals Co., [1972] S.C.R. 569, 25 D.L.R. (3d) 121, was distinguished by Moore J.: "Surely there is a substantial difference between a person using lacquer for the first time and not being adequately warned of its dangers on the one hand, and a person with wide experience with guns and ammunition and by his own admission knowing that badly produced shells can explode —on the other hand." The Appellate Division of the Alberta Supreme Court affirmed, 1 C.C.L.T. 180 (1976), relying on *Rivtow Marine, supra* note 17, and The Queen v. Côté, [1976] 1 S.C.R. 595, 49 D.L.R. (3d) 574 (1974), discussed in Part I of this *Survey,* 9 Ottawa L. Rev. 192, at 202-03 (1977).

In Austin v. 3M Canada Ltd., 7 O.R. (2d) 200, 54 D.L.R. (3d) 656 (Cty. Ct.

IX. CAUSATION

In *Goodyear Tire & Rubber Co. of Canada v. MacDonald,* [94] the defendant, who was driving his truck along the highway "at a distance of from 8 to 10 car lengths" [95] from the plaintiff's vehicle, stopped suddenly when a highway sign which he was transporting fell from his vehicle. [96] The plaintiff attempted to stop his vehicle but, because of fresh, slippery tar on the highway, slide into the rear of the stopped truck ahead.

At trial, the plaintiff's action was unsuccessful. Dubinsky J. referred to the evidence of the plaintiff that he "could and would have stopped in time" [97] if the tar had not been in such a slippery condition and concluded:

> The collision between the two vehicles was due not to the *causa sine qua non* of the improperly attended sign falling from the defendant's truck, but

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1974), the *Lambert* case was again distinguished. The plaintiff, who was in the auto body repair business, was injured when a grinding disc which he was using shattered because it was being used at too high a speed. The plaintiff contended that the defendant manufacturer of the discs should have warned him of the dangers of high speed. The court did "not consider that the plaintiff is a member of the general public in the sense contemplated by Chief Justice Laskin in *Lambert*". *Id.* at 204. Furthermore the court was "satisfied on the evidence that the discs caused no danger in their ordinary use in the hands of a reasonably competent auto body repairman, which the plaintiff contended he was". *Id.* at 205.

See also Allard v. Manahan, [1974] 3 W.W.R. 588, 46 D.L.R. (3d) 614 (B.C.S.C.), where the manufacturer-distributor was not liable for having failed to warn a purchaser of the danger of possible injury or (as happened) death when using a power-actuated tool sold without a safetyguard. The likelihood of injury was too small to impose liability.

See also W.H. Miller Co. v. New Brunswick Elec. Power Comm., 8 N.B.R. (2d) 230, 48 D.L.R. (3d) 728 (C.A. 1974), *aff'g* 8 N.B.R. (2d) 237 (S.C. 1973), in which an electricity supplier was held not to be under a duty to install fuses on its supply lines in anticipation of inadequate consumer wiring. "I know of no law in Canada which requires the supplier to inspect and supervise the work of the employees of the customer and make sure that he has protected his own property". *Id.* at 237. *Cf.* Sydney County Council v. Dell'Oro, 4 A.L.R. 417, 132 C.L.R. 97 (H.C. Aust. 1974); Taylor v. Weston Bakeries Ltd., 1 C.C.L.T. 158 (Sask. Dist. Ct. 1976); Lem v. Barotto Sports Ltd., 1 C.C.L.T. 180 (Alta. C.A. 1976). For an interesting comparative survey of products liability in certain European countries and in the United States, see L'ASSOCIATION EUROPEEN D'ETUDES, PRODUCT LIABILITY IN EUROPE (1975), reviewed by Binchy, [1976] J. BUS. L. 103.

Another Canadian decision on products liability is McMorran v. Dominion Stores Ltd., 1 C.C.L.T. 259 (Ont. H.C. 1977), where a manufacturer was held liable for injuries caused to the plaintiff when removing a top which had been fastened in a dangerous manner to a soda water bottle. *See also* Direct Warehousing & Transfer Ltd. v. John Clouston Ltd., 10 Nfld. & P.E.I.R. 122 (Nfld. S.C. 1976).

The Canadian decisions on *res ipsa loquitur* are collected and analyzed in a useful article by Schiff, *A Res Ipsa Loquitur Nutshell,* 26 U. TORONTO L.J. 451 (1976). For an account of recent developments in the United States, *see* Harris, *Products Liability,* [1977] ANNUAL SURVEY AM. L. 85.

[94] 9 N.S.R. (2d) 114 (C.A. 1976), *rev'g* 9 N.S.R. (2d) 119 (S.C.).

[95] *Id.* at 116.

[96] It was not in serious contention that the sign had been negligently positioned
Vehicle Act, R.S.N.S. 1967, c. 191, s. 177(1), in this regard: *id.* at 117.
on the defendant's truck. The defendant had pleaded guilty to a breach of the Motor

[97] *Id.* at 120.

> to the *causa causans* of the fresh and slippery tar, i.e. the *novus actus interveniens* . . . . [T]he fresh tar was so independent and so efficient in its own effects in bringing about the collision, that it must be regarded as having relegated the fall of the sign to an event of merely historical significance.[98]

On appeal, the plaintiff was successful. With respect, however, and whatever the merits of the decision on the facts of the case, the Court of Appeal tended to let the conceptual vagaries of causation cloud the relatively simple issue requiring resolution. The court disagreed with the trial judge's finding of *novus actus interveniens* on the following basis:

> [A] *novus actus interveniens* . . . is a conscious act of human origin intervening between a negligent act or omission of a defendant and the occurrence by which the plaintiff suffers damage . . . . There was not such intervening act here between the falling of the sign on the highway and the rear-end collision.[99]

To this argument there can be little dissent. However, the conclusion does not follow that a physical intervention between an act of negligence and consequent damage fails to break the chain of causation simply because it is not a *novus actus interveniens*. Existence of a *novus actus* is merely one way of proving a break in causation. To establish, therefore, that the slippery tar was not a *novus actus* does not end the question of causation, which still requires to be resolved on simple common sense principles.[100]

Their Lordships do not appear to have perceived the problem in this light, for Cooper J.A. stated that "assuming that the fresh and slippery tar was another cause of the accident, I am of the opinion that the respondent is not thereby absolved from liability".[101] His Lordship relied principally on a passage in *Halsbury*,[102] which he quoted as follows:

> Where the liability of a particular defendant to the plaintiff is established, it may be necessary to consider causation in relation to further questions of remoteness of damage or of contributory negligence, or as to the apportionment of the liability between defendants. So far, however, as the plaintiff is concerned, and subject to remoteness, where a tort has been committed it is enough that it should be a cause of the damage for which the claim is made, and it is then unnecessary to evaluate competing causes in order to ascertain which of them is dominant.[103]

With respect, the quoted passage is concerned with a different issue from that in this case: it assumes a negligent causal connection existing between the

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[98] *Id.* at 120-21.

[99] *Id.* at 118. Cooper J.A. cited 11 HALSBURY, LAWS 281 (3rd ed. 1959). Two decisions involving the issue of *novus actus interveniens* in respect of intervening criminal conduct are Nielson v. Atlantic Rentals Ltd., 8 N.B.R. (2d) 594 (C.A. 1974), and Goulton v. Notre Dame College, 60 D.L.R. (3d) 501 (Sask. Q.B. 1975), where the plaintiff recovered for the loss of articles stolen when the defendant was, but ought not to have been, absent. *Cf.* J. FLEMING, THE LAW OF TORTS 199 (4th ed. 1971).

[100] The same court was well able to recognize this fact in other cases. *See, e.g.*, Cochrane v. Reid, 12 N.S.R. (2d) 154 (C.A. 1975), *rev'g in part* 12 N.S.R. (2d) 165 (S.C. 1974).

[101] *Supra* note 94, at 118.

[102] 11 HALSBURY, LAWS 282 (3rd ed. 1959).

[103] *Supra* note 94, at 118-19.

negligent conduct and the damage—which was precisely the issue requiring resolution on the facts in this case. [104]

X. Contributory Negligence [105]

Social guests will be relieved by the decision in *Prasad v. Prasad,* [106] which held that it is not contributory negligence to fail to look out for lethal knives [107] among the cushions before sitting on the chesterfield in the home of a friend, a family man with mischievous offspring. Nor, according to other cases, is it contributory negligence to fail to notice embedded in the ground of a shopping carpark a bumper four inches high, forming an obstacle to customers coming out of the store; [108] or to fail to observe a one-inch depression in the sidewalk; [109] or to fail to appreciate that a wet floor under a "mix" table where drinks are being dispensed may have melting ice cubes on it. [110]

The "seat-belt defence" has not yet been finally resolved, though the trend in Canada and elsewhere [111] favours a finding of contributory negligence. *Reineke v. Weisberger* [112] is, it must frankly be admitted, an implacably conservative decision. The plaintiff was injured in a collision between

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[104] Another decision concerned with the issue of causation is Girletz v. Bailey Selburn Oil & Gas Ltd., 65 D.L.R. (3d) 533 (Alta. S.C. 1975), where the plaintiff in a nuisance action succeeded in establishing on the balance of probabilities a causal relationship between the injury and death of his cattle and the spread of crude oil on his land.

[105] In the United States, "[t]here is at present a stampede toward comparative negligence": Schwartz, *Comparative Negligence: Oiling the System* 11 Trial 58 (1975). Over thirty States have adopted comparative negligence, either legislatively or judicially. The leading text is V. Schwartz, Comparative Negligence (1974). It is worth noting that the issues which plagued Commonwealth jurisdictions as "growing pains" after the abolition of contributory negligence as an absolute defence are now re-appearing in the United States: *see, e.g.*, Johnson, *The Doctrine of the Last Clear Chance—Should it Survive the Adoption of Comparative Negligence in Texas?* 6 Texas Tech. L. Rev. 131 (1974). The old doctrine is still not completely dead in Canada: *see* Hartman v. Fisette, 8 N.R. 201, 66 D.L.R. (3d) 576 (S.C.C. 1976).

[106] [1974] 5 W.W.R. 628, 54 D.L.R. (3d) 451 (B.C.S.C.), discussed in Part 1 of this *Survey*, 9 Ottawa L. Rev. 192, at 199 (1977).

[107] The knife in question was about eight or nine inches long, having "a wooden handle with a screw eye in the head of the handle for hanging it on a hook and a blade which tapers from the hilt to a sharp point". *Id.* at 629.

[108] Irving v. Roy F. Chisholm Ltd., 11 N.S.R. (2d) 420 (C.A. 1975).

[109] Holemans v. St. Vital, [1974] 1 W.W.R. 461, 43 D.L.R. (3d) 459 (Man. C.A.).

[110] Tokar v. Selkirk, [1974] 3 W.W.R. 610 (Man. Q.B.). *See also,* Sparks v. Thompson, 6 N.S.R. (2d) 481, 46 D.L.R. (3d) 225 (S.C.C.), *rev'g* 4 N.S.R. (2d) 823 (C.A.), *aff'g* 4 N.S.R. (2d) 833 (S.C.) (failure to push automobile to shoulder of highway on dark night when repairing electrical failure held to constitute contributory negligence to extent of 25 per cent): Minichiello v. Devonshire Hotel (1967) Ltd., [1976] 3 W.W.R. 502, 66 D.L.R. (3d) 619 (B.C.S.C.) (not contributory negligence for patron to leave car keys in ignition as requested by notice and claim for negligent loss of valuables from trunk successful).

[111] *See* Williams, Comment 53 Can. B. Rev. 113 (1975), Hicks, *Seatbelts and Crash Helmets,* 37 Modern L. Rev. 308 (1974).

[112] 46 D.L.R. (3d) 239 (Sask. Q.B. 1974).

the car she was driving and another car. Her action against the driver of the other car was successful, although the defence of contributory negligence had been raised on the basis that the plaintiff had not worn an available seat belt.

Sirois J. of the Saskatchewan Queen's Bench rejected the defence. His Lordship reviewed the authorities, referred to the evidence of an engineering expert, whom he called a "seat-belt crusader",[113] and observed that:

> The seat belt, harness and head-rest age is still in its infancy. While the [expert] witness and all others involved in automobile safety have learned a great deal during the past few years, they would, I am certain, be the first to admit that they still have a long row to hoe before the dust has settled and the public are apprised of what is best in this regard.[114]

Sirois J. adverted to the likelihood that "with ever solicitous legislators always on their guard to do more and more things 'gratuitously' for an ever-increasing number of people who cannot think for themselves anymore, that legislation will soon come to pass making the wearing of safety gear in vehicles compulsory".[115] He concluded his general analysis as follows:

> Having said earlier that no final consensus has yet been reached by the research people in the field of automobile safety, the proposition that a person driving down the highway on his proper side of the road is entitled to assume that other persons using the highway will obey the laws of the road still appeals to me and it is not negligence not to strap oneself in a seat like a dummy, a robot or an astronaut.[116]

In any event, his Lordship "could not possibly find the plaintiff guilty of contributory negligence" on the facts of the case since no evidence had been tendered as to whether the seat belts were in a wearable condition and since it was possible that the injuries would have occurred even if the plaintiff *had* worn a seat belt, as a result of "the driver tossing about when the car rolled over".

In contrast, *Haley v. Richardson*[117] forcefully supports the opposite view. The plaintiff, who was injured in an automobile collision, did not realize that the vehicle she was driving had a seat belt. The trial judge reduced her damages by 20 per cent, and this finding was not disturbed by the Appeal Division of the New Brunswick Supreme Court, which held:

> The test to be applied in circumstances such as are found in the present case where the plaintiff does not actually know of the existence of seat belts in a

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[113] *Id.* at 242.

[114] *Id.* at 243.

[115] *Supra* note 112, at 243. Recent amendments to the Highway Traffic Act have made the wearing of seat belts compulsory in Ontario: see The Highway Traffic Amendment Act, 1975, S.O. 1975 (2nd Sess.), c. 14. *Cf. Comment The Limits of State Intervention: Personal Identity and Ultra Risky Activities*, 85 YALE L.J. 826, at 830-34 (1976).

[116] *Supra* note 112, at 243. *Cf.* Durant v. Tweel, 8 Nfld. & P.E.I.R. 539 (P.E.I. S.C. 1975).

[117] 10 N.B.R. (2d) 653 (C.A. 1975), *aff'g in part* 9 N.B.R. (2d) 318 (Q.B. 1974). *Haley* was followed in Burtt v. Davis and Atmus Equipment Ltd., 14 N.B.R. (2d) 541 (Q.B. 1976).

> car which he has been driving for some months must be an objective test and I would therefore hold that [the plaintiff] should, as a reasonable person, have known that the car she was driving was equipped with seat belts and that for her own protection she should make use of an available seat belt. [118]

The Nova Scotia decision of *Beaver v. Crowe* [119] is of particular interest in that the court specifically disagreed with a recent English decision on an important aspect of the "seat-belt defence". The two plaintiffs were, respectively, driver and passenger in an automobile which had seat belts. The defendant was responsible for the collision in which the plaintiffs were injured. In response to the defendant's contention that the plaintiffs had been contributorily negligent in not using the seat belts, MacIntosh J., after a wide-ranging review of the authorities, stated:

> These cases indicate that judicial thinking at the moment varies from those who feel the failure to use available seat belts cannot amount to contributory negligence to those who say it can provided the necessary causal connection is established. With this latter view I agree.
>
> To say at this time that seat belts are not capable of lessening injury in motor vehicle accidents is to ignore reality. [120]

However, on the facts of the case, his Lordship rejected the defence since "[t]o make a finding in this case that the failure to wear seat belts would have lessened or avoided the injuries suffered by the plaintiffs would be to indulge in pure speculation". [121] The defendant further argued that the plaintiff driver had been negligent (or contributorily negligent) in not advising his several passengers to use the seat belts. This contention had been successful in the English decision of *Pasternack v. Poulton*.[122] However, MacIntosh J. rejected it, stating:

> With the reasoning of the learned Judge [in *Pasternack*] on this aspect of the seat belt issue I must disagree. In my opinion, the responsibility of the driver of a motor vehicle under the circumstances is to operate [it] in a careful and prudent manner. It did not extend in this instance to advising the female plaintiff to use the seat belts. [123]

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[118] *Supra* note 117, at 668. *See also* Earl v. Bourdon, 65 D.L.R. (3d) 646 (B.C.S.C. 1975), where failure of the plaintiff to wear a seat belt constituted contributory negligence, the court accepting the evidence of the same expert who had given evidence in the seminal decision of Yuan v. Farstad, 62 W.W.R. 645, 66 D.L.R. (2d) 295 (B.C.S.C. 1967). The percentage of contributory negligence attributable to the plaintiff's failure to wear a seat belt was not specified by Rae J., but was in any event less than 75 per cent.

[119] 49 D.L.R. (3d) 116 (N.S.S.C. 1974).

[120] *Id.* at 119-20.

[121] *Id.* at 120.

[122] [1973] 2 All E.R. 74, at 79-80, [1973] 1 W.L.R. 476, at 382-83 (Q.B.).

[123] *Supra* note 119, at 120-21. *See also* Kinney v. Haveman, 1 C.C.L.T. 229 (B.C.S.C. 1976), where the seat-belt defence was raised but not resolved; specifically, the plaintiff passenger in a jeep with only a seat belt for the driver was held to be *volens*.

In the United States, the trend of decisions is towards a finding of contributory negligence for failure to wear a seat belt. [124]

XI. Trespass

In two recent decisions, judges have expressed a personal preference for the English rationalization of tort law into intentional and negligent actions, rather than direct and indirect causation. [125] However, in both decisions the courts deferred to precedent. [126]

In *Teece v. Honeybourn,* [127] the defendant policeman was attempting to apprehend four suspected car thieves. Shots had already been fired, although the defendant did not know by whom; he grasped one of the suspects by the clothing between the shoulder blades:

> As he did so [the suspect] struggled to resist arrest, swung round to his right and grasped with his left hand the fore part of the revolver in [the defendant's] right hand and at some point gave it a violent jerk. There was a relatively short violent struggle . . . . On being jerked the revolver discharged with the muzzle close to [the suspect's] right shoulder. [128]

The shot proved fatal. In an action brought by the deceased's relatives for trespass to the person and negligence, Rae J. of the British Columbia Supreme Court referred to the principle expressed in *Cook v. Lewis:*

> [W]here a plaintiff is injured by force applied directly to him by the defendant his case is made by proving this fact and the onus falls upon the defendant to prove that such trespass was utterly without his fault . . . [*i.e.,* he must satisfy] the onus of establishing the absence of both intention and negligence on his part.[129]

His Lordship stated that he was "of course bound to follow" this statement of the law, adding that "[w]ere that not so, I would, with great respect, find the reasoning in *Fowler v. Lanning* . . . and in *Letang v. Cooper* . . . persuasive". [130] On the facts of the case, the defendant was not liable for

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[124] *E.g.,* Spier v. Barker, 35 N.Y. 2d 444, 323 N.E. 2d 164, noted by Reitzfeld, Comment, 3 Hofstra L. Rev. 883 (1975). *Cf.* Carnation Co. v. King Son Wong, 516 S.W. 2d 116 (Tex. S.C. 1974), criticized by Diem, Comment, 6 Texas Tech. L. Rev. 1203 (1975).

[125] *See generally* Trinidade, *Some Curiosities of Negligent Trespass to the Person —A Comparative Study,* 20 Int. & Comp. L.Q. 706 (1971).

[126] *E.g.,* Cook v. Lewis, [1951] S.C.R. 830, [1952] 1 D.L.R. 1.

[127] [1974] 5 W.W.R. 592, 54 D.L.R. (3d) 549 (B.C.S.C.).

[128] *Id.* at 597, 54 D.L.R. (3d) at 553.

[129] *Supra* note 126, at 839, [1952] 1 D.L.R. at 15 (Cartwright J.).

[130] *Supra* note 127, at 602, 54 D.L.R. (3d) at 553. The cases cited are Fowler v. Lanning, [1959] 1 Q.B. 426, [1959] 1 All E.R. 290, and Letang v. Cooper, [1965] 1 Q.B. 232, [1964] 2 All E.R. 929.

intentional wrongdoing, but was liable in negligence. [131]

The decision is also interesting for its rejection of the defence of *turpis causa*. The court disposed of that contention as follows:

> The principle is founded on public policy. It would be contrary to public policy, it seems to me, to apply it in the case before me to exclude the claim of the plaintiffs. It may seem somewhat anomolous that where the defendants, as here, were not involved as participants in the criminal wrongdoing, they may not have the advantage of the defence, whereas, were they so involved, they might have that advantage. But that appears to be the law. [132]

The damages [133] were, however, reduced by 80 per cent since "[b]y far the greater 'fault' (the word used in the Contributory Negligence Act . . . and wide enough to encompass the acts of Teece) was that of Teece in resisting arrest by force in the manner described". [134]

In *Goshen v. Larin,* [135] the plaintiff fractured his wrist when a referee at a wrestling match, defending himself against a hostile crowd, unintentionally knocked him down. The referee had been proceeding to the dressing room with his arm shielding his head and eyes. In an action for trespass it was argued on behalf of the defendant, and it seemed to be agreed by the parties, that "there [had been] no intent on the part of the defendant to willfully inflict damage on anyone". [136] At trial, the plaintiff was successful:

> [T]he defendant [did] not discharg[e] the onus placed upon him in an action of this kind to establish the absence of negligence on his part, rather there is considerable evidence to indicate that the defendant actually conducted

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[131] The evidence disclosed that the defendant's finger was on the trigger of the gun when the weapon discharged and the defendant "failed to satisfy [the court] that it [was] more likely than not that his finger was neither on the trigger of his own volition, nor because of lack of reasonable care on his part. On that issue he must, due to the onus of proof upon him, fail." *Id.* at 559. *See also* Clelland v. Berryman, [1975] 1 W.W.R. 147, 56 D.L.R. (3d) 395 (B.C.S.C.) (defence of inevitable accident in automobile collision case rejected because although the defendant had not been responsible for the faulty brakes, he ought to have taken more effective evasive action).

[132] *Supra* note 127, at 604, 54 D.L.R. (3d) at 560, citing FLEMING, *supra* note 53, at 232, SALMOND ON TORTS para. 190 (16th ed. 1973) and Nat'l Coal Bd. v. England, [1954] A.C. 403, at 418-20, 424-25 and 428-29, [1954] 1 All E.R. 546 (H.L.). *See generally*, Weinrib, *Illegality as a Tort Defence*, 22 U. TORONTO L.J. 28 (1976).

[133] The sum of $48 represented the defendant's total liability being 20 per cent of the $240 in special damages. No more damages were awarded since, having regard to the deceased's life-style, the plaintiffs were unable to prove "reasonable expectation of pecuniary advantage accruing to them . . . from the deceased, had he lived". *Supra* note 127, at 603, 54 D.L.R. (3d) at 560.

[134] *Supra* note 127, at 604, 54 D.L.R. (3d) at 560. Citation for the Act is R.S.B.C. 1960, c. 74. *Cf.* Hollebone v. Barnard, [1954] O.R. 236, [1954] 2 D.L.R. 278 (H.C.); Trinidade, *supra* note 125, at 726-27. *See also* Chernesky v. Armadale Publishers Ltd., [1974] 6 W.W.R. 162, 53 D.L.R. (3d) 79 (Sask. C.A.) where the court held that there was no right to contribution or indemnity in respect of libel since The Contributory Negligence Act, R.S.S. 1965, c. 91 did not alter the common law position.

[135] 10 N.S.R. (2d) 66, 56 D.L.R. (3d) 719 (C.A. 1974), *rev'g* 46 D.L.R. (3d) 137 (N.S.S.C. 1974).

[136] *Supra* note 135, at 140.

> himself in a negligent manner by not taking care to avoid striking persons who were lawfully on the premises and who were not in any way threatening him.[137]

On appeal, the decision was reversed on the issue of negligence. The court stressed that the defendant was in protective police custody at the time of the accident,[138] and that, at the material time, "[he] was in some position of danger"[139] and had himself been injured.

Of more general legal interest is the statement by MacDonald J.A. that "[t]he English judicial view, as expressed [in *Fowler v. Lanning* and *Letang v. Cooper*] appeals to me as being a fair and just one".[140] His Lordship continued: "I am, however, bound by the decision of the Supreme Court of Canada in *Cook v. Lewis* . . . [which] has been followed and applied in various jurisdictions."[141] The decision rested, accordingly, on the *Cook v. Lewis* criterion.

In *Reynen v. Antonenko,*[142] the plaintiff, who was in illegal possession of heroin secreted in his rectum, was arrested by the defendant police officers, who brought him to a hospital where he was examined by the defendant doctor, who discovered the heroin. In an action for assault and battery (and exemplary damages) MacDonald J. of the Alberta Supreme Court held in favour of all the defendants. The police were entitled to act as they had done, both under the Criminal Code[143] and at common law.[144] With regard to the doctor, the position was somewhat more complicated. One of the policemen had indicated to him that the plaintiff had consented to the search. However, the court found:

> [A]lthough [the] Constable . . . may have misinterpreted the statement or response of the plaintiff, yet he had some reason to believe that the plaintiff had indicated consent, and [the] Constable . . . acted in good faith. It is true that the plaintiff did not give his written consent or explicit verbal consent, for that matter, to the examination by the doctor, but neither was he asked for it.[145]

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[137] *Id.* at 142. Morrison J. went so far as to state that "even if the burden of proving negligence were on the plaintiff, I would find that [he] established a *prima facie* case of negligence which was not rebutted by the evidence of the defendant".

[138] MacDonald J. went so far as to state that "although it is not necessary to decide this point, and I expressly refrain from doing so, it might well be argued that if [the defendant] pushed the [plaintiff] intentionally, he was doing so in aid of and in consort with the peace officers, in achieving the common purpose of the police officers, namely, to get [him] and the two wrestlers safely to their respective dressing rooms". *Supra* note 135, at 74, 56 D.L.R. (3d) at 725.

[139] *Id.* at 73, 56 D.L.R. (3d) at 724.

[140] *Id.* at 70, 56 D.L.R. (3d) at 722.

[141] *Id.*

[142] [1975] 5 W.W.R. 10, 54 D.L.R. (3d) 124 (Alta. S.C.).

[143] R.S.C. 1970, c. C-34, s. 25(1).

[144] MacDonald J. referred to Gottschalk v. Hutton, 17 Alta. L.R. 347, 66 D.L.R. 499 (C.A. 1921), Leigh v. Cole, 6 Cox C.C. 329 (Cir. Ct. 1853), Barnett v. Campbell, 21 N.Z.L.R. 484 (C.A. 1902), Dillon v. O'Brien, 16 Cox C.C. 245 (Ire. Ex. Div. 1887), and 1 RUSSELL ON CRIME, 657-658 (12th ed. 1964).

[145] *Supra* note 142, at 17, 54 D.L.R. (3d) at 131. The plaintiff had specifically refused to sign a consent form at the hospital to have his lip (which had been injured in the course of his arrest) sutured.

The plaintiff testified that when he had been asked by the doctor to position himself for the examination "he [had done] so believing 'he had no choice' ". He agreed that he had "co-operated fully with the doctor in the conduct of the examination".

Unfortunately, the resolution of the issue of the plaintiff's consent is not very satisfactory from an analytical standpoint. The court emphasized that the plaintiff had "not [been] injured in any way by the examination", that "[t]he total result of the examination was that the police obtained the heroin", and that "[n]o doubt this induced [him] to plead guilty to the charge later laid against him". With respect, these facts would only affect the question of quantum of damages. A clearer analysis of the subjective attitude of the plaintiff at the time of the examination would, it is respectfully submitted, have been desirable. [146]

XII. Assault and Battery

The extent to which one is legally entitled to protect another from attack is an area of the law which has "not [been] satisfactorily defined in the cases". [147] The entitlement, so far as it exists, traces its origins [148] to mediaeval social norms that have long been obsolete. Professor Fleming has contended that "[t]oday our heightened social consciousness calls for a right to protect our fellow citizen against an aggression." [149]

In *Gambriell v. Caparelli* [150] the plaintiff (a man aged fifty) and the twenty-one year old son of the defendant (a fifty-seven year old woman) came to blows over a trivial accident between their cars. In the course of the fight the plaintiff put his hands around the neck of the defendant's son and, according to the son, "held him down and was choking him". [151] The defendant, hearing the screams of the combatants, came upon the scene, saw her son being choked and yelled at the plaintiff to stop. She then obtained a three-pronged garden fork from her garden and struck the plaintiff three times on the shoulder and then on the head.

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[146] *Cf.* O'Brien v. Cunard S.S. Co., 154 Mass. 272, 28 N.E. 266 (1891); Latter v. Bradell, 50 L.J.Q.B. 488 (C.A. 1881); C. Wright & A. Linden, Canadian Tort Law: Cases, Notes and Materials 84 (6th ed. 1975).

[147] Wright & Linden, *supra* note 146, at 114.

[148] *See, e.g.*, Seaman v. Cuppledick, Owen 150, 74 E.R. 966 (1615); Leward v. Basely, 1 Ld. Raym. 62, 91 E.R. 937 (1695); Barfoot v. Reynolds, 2 Str. 953, 53 E.R. 963 (1733).

[149] Fleming, *supra* note 53, at 83.

[150] 7 O.R. (2d) 205, 54 D.L.R. (3d) 661 (Cty. Ct. 1974).

[151] *Id.* at 206, 54 D.L.R. (3d) at 662.

The plaintiff's action for assault [152] was not successful. County Court Judge Carter mentioned at the outset of his discussion of the principal issue that "[a]t trial both counsel advised me that they had been unable to find any reported case dealing with an action for assault on facts similar to those in the present case, nor have I been able to find any". [153] His Lordship referred to a number of criminal cases, [154] stating that "the principles outlined therein are of equal weight in a civil case of this nature", [155] and cited The Compensation for Victims of Crime Act, 1971, [156] which, in compensating persons injured while preventing the commission of an offence against persons other than a relative, "gave an affirmative answer to the question—'Am I my brother's keeper?', and by implication considered it meritorious to aid one's neighbour". [157] Carter J. considered:

> [W]here a person in intervening to rescue another holds an honest though mistaken belief that the other person is in imminent danger of injury, he is justified in using force, provided that such force is reasonable, and the necessity for intervention and the reasonableness of the force employed are questions to be decided by the trier of fact. [158]

Unfortunately, it is not clear whether, on the facts, the court found that the defendant's belief was mistaken. It is true that this may be implied by the statement that "when the defendant appeared on the scene and saw her son at the mercy of the plaintiff, and being *of the belief* that her son was in imminent danger of injury, she was justified in using force to prevent that injury from occurring". [159] However, immediately afterwards, his Lordship stated that the defendant "was justified in doing so in order to prevent what in English law would be termed a felony, although I am sure that this aspect of the matter did not even enter her head. She held an honest belief that her son was in danger, and she was justified in protecting him as an extension of the defence of self-defence". [160] In a further important passage Carter J. stated:

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[152] Technically, the action was for battery, since "prior to the actual striking of the plaintiff by the defendant, there was no immediate apprehension of violence by the plaintiff as far as the defendant was concerned". *Id.* at 208. However, the court considered that "in Canada, the distinction between assault and battery has been blurred, and that when we now speak of an assault, it may include a battery".

See also Fillipowich v. Nahachewsky, 3 D.L.R. (3d) 544 (Sask. Q.B. 1969); Villeneuve v. Sisters of St. Joseph, [1972] 2 O.R. 119, 25 D.L.R. (3d) 35 (C.A. 1971); *Survey, supra* note 67, at 525 n. 103; Kelly v. Hazlett, 1 C.C.L.T. 1 (Ont. H.C. 1976). *Cf.* Goshen v. Larin, *supra* note 135, where a statement of claim framed in assault was permitted to be amended to include battery.

[153] *Supra* note 150, at 208-09, 54 D.L.R. (3d) at 664-65.

[154] Regina v. Duffy, [1967] 1 Q.B. 63, [1966] 1 All E.R. 62 (C.A. 1965); Regina v. Chisam, 47 Cr. App. R. 130 (C.A. 1963); Regina v. Fennell, [1971] 1 Q.B. 428, [1970] 3 All E.R. 215 (C.A.).

[155] *Supra* note 150, at 210, 54 D.L.R. (3d) at 666.

[156] R.S.O. 1970 (2d Supp.), c. 51.

[157] *Supra* note 150, at 209, 54 D.L.R. (3d) at 665.

[158] *Id.* at 210, 54 D.L.R. (3d) at 666.

[159] *Id.* (emphasis added).

[160] *Id.*

> In my opinion she had little other chance. If the plaintiff could overpower her son, the empty-handed aid of a woman some seven years older than the plaintiff would have availed little. On the evidence, she was alone in the laneway with the exception of the combatants [and the wife of the plaintiff], who did nothing to assist. Had she gone for aid, her son might well have been beyond recovery before she returned, especially as, speaking Italian, she may have encountered difficulty in summoning aid. While I am loath to excuse violence, there are times, and I think this is one of them, where the violence inflicted by the defendant on the plaintiff and the degree of such violence was justified and not unreasonable in the circumstances. [161]

It is submitted that since the court made no specific finding that the defendant's belief was *not* mistaken, its statement of principle, so far as it extends to the question of reasonable belief, must be considered to be *obiter*. Clearly a criterion of the *honesty* (rather than the *reasonableness*) of the mistaken belief would be unduly indulgent to the defendant and inconsistent with the general philosophy of contemporary tort law. The issue is of some importance since, in the United States, the weight of authority has not accepted that a reasonable belief will excuse the defendant's conduct. [162] However, the *Restatement* [163] following the late Dean Prosser's view, adopts the same approach as that endorsed in *Gambriell v. Caparelli*. [164]

In *Delta Hotels Ltd. v. Magrum*, [165] "two big, heavy built well-conditioned professional football players . . . inflicted a savage beating on [two] men who by far [were] not their physical equals and by means which could not be tolerated even in the arena of their professional activity". [166] The assaults took place during meals in two different hotels on occasions separated by over a month. Exemplary damages were awarded.

Of some interest is the rejection of the claim made by one of the hotels that the defendants had been guilty of trespass *ab initio*. Mackoff J. considered this contention "untenable". "[I]t is only where the person enters the land of another under an authority given by law (*e.g.*, a building inspector) and subsequently abuses that authority that he becomes a trespasser *ab initio*." He did state, however, that "there well may be situations where the status of an invitee or licensee may change to that of a trespasser, but on the facts herein I am unable to so hold". [167]

In *Arbeau v. Dalhousie Taverns Ltd.*, [168] the plaintiff claimed damages for injuries suffered when he was forcibly ejected by a waiter from the defend-

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[161] *Id.* at 210-11, 54 D.L.R. (3d) at 666-67.

[162] HENDERSON & PEARSON, THE TORTS PROCESS 396 (1975).

[163] RESTATEMENT (SECOND) OF TORTS s. 76 (1965).

[164] W. PROSSER, *supra* note 44, at 112-13. *See also* FLEMING, *supra* note 53, at 83.

[165] 59 D.L.R. (3d) 126 (B.C.S.C. 1975).

[166] *Id.* at 130. For a good analysis of the issues relating to tortious and criminal liability for injuries in sports (principally ice hockey in the United States and Canada), *see* Kuhlmann, *Violence in Professional Sports*, [1975] WISCONSIN L. REV. 771. *See also* Love, Comment, 28 OKLA. L. REV. 840 (1975), Goldstein, Comment, 53 CHI-KENT L. REV. 97 (1976), and Burlage, Comment, 42 MO. L. REV. 347 (1977).

[167] *Supra* note 165, at 129-30. *See* CLERK AND LINDSELL ON TORTS para. 1339 (14th ed. 1975).

[168] 9 N.B.R. (2d) 625 (S.C. 1974).

ant's tavern. On the day of the incident that gave rise to the claim, the plaintiff entered the premises and was served by a waiter who was unaware of the fact that he had been barred. On being informed of this by another waiter, the waiter evicted the plaintiff, using, in his own words "a little force to push him out". Certain evidence indicated that the plaintiff was somewhat intoxicated at the time, but not, as one witness admitted, "plastered". On being evicted from the premises the plaintiff fell and fractured his leg.

Liability was imposed on the defendant on the basis that excessive force had been used in evicting him.[169] The defence that the eviction had been in discharge of the defendant's duty under the Liquor Control Act[170] not to permit drunkenness or disorderly behaviour was rejected on the basis that "[h]aving served beer to the plaintiff the defendants cannot rely on [his] drunkenness and the evidence does not support a finding that he was drunk. Nor is there any suggestion of any disorderly conduct on his part prior to the first request that he leave".[171] Stevenson J. observed:

> In any event any duty or right of a tavern operator to eject a patron is qualified by a duty not to subject the patron to danger of personal injury foreseeable as a result of eviction . . . . [The waiter] not only subjected the plaintiff to the danger of personal injury—he inflicted such injury upon him. This constituted an actionable battery on the plaintiff.[172]

In *Ozolins v. Harling*,[173] the defendant police officers were called to a pizzeria in the early hours of the morning to investigate a theft. On their arrival, the plaintiff, who had been standing near the cash register with two other persons[174] talking to "a person who appeared to be the cook", immediately began walking down a hallway which lead to the rear exit of

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[169] *See also*, MacDonald v. Hees, 46 D.L.R. (3d) 720 (N.S.S.C. 1974), where ejection of an unwitting trespasser without a request to leave and a reasonable opportunity to do so was held to constitute a battery. *Cf.* Brown v. Wilson, 66 D.L.R. (3d) 295 (B.C.S.C. 1975), in which a hotel bar patron was evicted by another patron (the defendant) whom he had appeared to be about to strike. The defendant stumbled and caused the first patron to fall and hit his head on the curb, an injury from which he later died. The onus on the defendant to show that excessive force was not used in self-defence was discharged.

[170] S.N.B. 1961-1962, c. 3, s. 76.

[171] *Supra* note 168, at 627.

[172] *Id.* at 628. *Cf.* Lakatosh v. Ross, [1974] 3 W.W.R. 56, 48 D.L.R. (3d) 694 (Man. Q.B.). A hotel was held liable for an assault on an employee's husband by a drunken bouncer employed by an agency that trained and hired out such men to hotels. Although normally the agency would be the employer, "the fact that [the bouncer] was drunk on the job, that this was known to responsible employees of the hotel and should have been known to and acted upon by the manager on duty, placed the hotel in a position where it in effect, by failing to remove [him], accepted him as its employee". *Id.* at 60, 48 D.L.R. (3d) at 697. *Cf.* Willman v. Pacer Oil Co., 504 S.W. 2d 55 (Mo. S.C. *en banc* 1973), noted by Hockensmith, Comment, 39 Mo. L. Rev. 626 (1974). *See also* Smith v. Pynch (N.S.C.A. 1977, as yet unreported), where a tavern bouncer, 6 feet 5 inches tall, was held to have used excessive force in evicting two women from the premises.

[173] [1975] 5 W.W.R. 121 (B.C.S.C.) *Cf.* Kingsmith v. Denton (Alta. S.C. 1977, as yet unreported), where a police officer was held liable for a number of assaults on an arrested person before and after arrest.

[174] One of whom was known by the arresting officer to have a criminal record.

the restaurant as well as the men's washroom. One of the officers, who knew the layout of the premises, followed the plaintiff, told him to stop as he wished to speak to him regarding a "theft", and arrested him. The court found that "[a]t all the material times, the plaintiff refused to co-operate with the defendants and conducted himself in a most despicable manner. He shouted obscenities at the defendants and generally conducted himself in an antisocial manner." [175] The plaintiff sustained minor injuries but, "if the defendants were justified in arresting the plaintiff, the injuries resulted from the use of reasonable force by the defendant". The plaintiff was subsequently acquitted of the charge of creating a public disturbance.

The plaintiff's claim for damages for unlawful arrest and false imprisonment was unsuccessful. The predominant issue in the case was the reasonableness of the defendant's belief. [176] Anderson J. considered that "[t]he test is not to be applied in a vacuum but in the light of the facts, as they existed, in that moment of time as comprehended by an ordinary man required to make a 'split-second' judgment". [177] His Lordship also ventured into the area of social and political policy:

> To seek a higher standard of judgment is to fetter unduly those persons charged with the duty of law enforcement. Men of good-will, in a free society, do not require compliance with standards of perfection. All they ask is that those persons given authority to detain them act fairly, honestly and not capriciously or arbitrarily. [178]

Conceding that the instant case was a "borderline" one, Anderson J. concluded:

> One must take a realistic view of the problems of law enforcement in our modern day society and not place too much emphasis on abstract principles. To do otherwise will only encourage the apostles of "law and order" to demand more rigid and harsher laws which can only have the effect of placing additional restraints on every citizen. [179]

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[175] *Supra* note 173, at 122.

[176] For an account of recent developments in the United States on the question of "probable cause" in relation to false arrest, see Turner, Comment, 25 BAYLOR L. REV. 697 (1973).

[177] *Supra* note 173, at 125.

[178] *Id.* at 126.

[179] *Id. Cf.* Fuller, *Law as an Instrument of Social Control and Law as a Facilitation of Human Interaction*, [1975] BRIGHAM YOUNG L. REV. 89, at 92: "The rules concerning murder and violent assault, while apparently only effecting control over human behaviour, do also in fact facilitate human interaction." The decision in Prior v. McNab, 1 C.C.L.T. 137 (Ont. H.C. 1976), where the defendant police officer was held to have acted over-zealously in apprehending the plaintiff who appeared to be assaulting another person, contains an analysis of the difficult position facing police officers that is worthy of note: *id.* at 148-49. See also *Arizona Appellate Decisions 1975-1976*, 18 ARIZONA L. REV. 585, at 834-48 (1976).

In Brennan v. Director of Mental Health (Alta. S.C. 1977, as yet unreported), proceedings for assault on the plaintif patient in a mental institution by an orderly were unsuccessful. It was considered that the plaintiff's mental condition "would clearly have an effect on his appreciation of the circumstances and his memory of them"; moreover, the defendant's evidence was accepted as credible.

XIII. Motor Vehicles

A. *In Canada*

In *Jackson v. Millar,* [180] the Supreme Court restored the finding by the trial judge [181] of gross negligence [182] where the defendant, aged sixteen, crashed his vehicle on a four-lane highway causing severe injuries to the plaintiff, a passenger, who was flung from the vehicle. The evidence disclosed that the defendant, the plaintiff and another youth had been attending an all-night drive-in movie and that the plaintiff had slept for not more than three hours, having spent an active day beforehand cycling and attending "a park and amusement place". The defendant was an inexperienced driver, having only very recently obtained a driver's licence. The accident occurred when the defendant over-reacted when he experienced gravel rattling against the vehicle.

The trial judge held that the failure to control the vehicle, together with the fact that the defendant had driven when fatigued, constituted negligence. He was, moreover, of the opinion that the evidence of the defendant was "no answer, even if believed in full. What followed leaves intact the presumption that there was a very marked departure from the normal standard and not a careful moderate turn from one lane to the other". [183]

The Ontario Court of Appeal unanimously allowed the defendant's appeal on the basis that the evidence disclosed simple negligence only. Evans J.A. "[did] not believe [the trial judge's] finding with respect to fatigue to be supported by the evidence nor has there been established a sufficient causal connection between the alleged fatigue and the accident". [184] The court considered that the maxim *res ipsa loquitur* was inapplicable, since there had been evidence as to how and why the accident had occurred.

On further appeal, the Supreme Court of Canada unanimously restored the verdict of the trial judge on the basis that his judgment had been a very carefully considered one and that he would have been best equipped to determine the issue. Moreover, Spence J. considered that "the circumstances described in the evidence . . . fully support the learned trial Judge's [view]". [185] On the question of *res ipsa loquitur*, the Court considered that

[180] 4 N.R. 17, 59 D.L.R. (3d) 246 (S.C.C. 1975).

[181] [1972] 2 O.R. 1975, 25 D.L.R. (3d) 161 (H.C. 1971), *rev'd* [1973] 1 O.R. 399, 31 D.L.R. (3d) 263 (C.A. 1972).

[182] The finding of 10 per cent contributory negligence by the trial judge for failure to use an available seat belt was not challenged on appeal.

[183] *Supra* note 181, at 209, 25 D.L.R. (3d) at 173.

[184] *Supra* note 181, at 405, 31 D.L.R. (3d) at 269.

[185] *Supra* note 180, at 25, 59 D.L.R. (3d) at 253. The Court relied on Burke v. Perry, [1963] S.C.R. 329. Spence J. refraining "from citing many other authorities to a similar effect": *Supra* note 180, at 25, 59 D.L.R. (3d) at 253. *See* Laudriault v. Pinard, 1 C.C.L.T. 216 (Ont. C.A. 1976) where liability was equally divided between the driver of an automobile involved in an accident (for speeding and for unnecessarily applying the brakes when he ought to have known that was a dangerous manoeuver), and the Ministry of Transportation and Communications (for neglecting to salt and sand the icy road where this amounted to a failure to maintain the road in a proper state of repair, as required of the Ministry by the Highway Traffic Act of the province).

the trial judge's resolution of the issue had been satisfactory since he had "considered the explanation given by the defendant and [come] to the conclusion that under all the circumstances it was not a valid explanation and that therefore the maxim applies". [186]

B. *U.S. Guest Statutes*

In the United States, the "notorious" [187] automobile guest statutes "have been condemned by virtually all authorities analyzing them" [188] since the time of their enactment. Only recently, however, has constitutional challenge yielded any considerable success. *Silver v. Silver,* [189] an early attempt to impugn a Connecticut statute on equal protection grounds was unsuccessful. Only statutes that totally deprived guest passengers of the right to sue were struck down on these grounds. [190]

In *Brown v. Merlo,* [191] the watershed decision, the California Supreme Court held that the classifications created by the guest statute of that state bore no rational relation to either of the two purposes which the state contended had inspired the legislation, namely, promoting a host's hospitality and preventing collusive suits. The Court held that the first purpose could not be sustained on the basis that "the hospitality justification . . . in light of widespread automobile liability insurance coverage, is largely a myth today",[192] and on account of the recent decision of *Rowland v. Christian,* [193] which, in raising the level of duty owed to guests on *land,* placed guests in *automobiles* in (relatively) a worse position. The purpose of preventing collusion was rejected on the basis that the classification adopted was "so grossly overinclusive as to defy notions of fairness or reasonableness": [194]

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[186] *Supra* note 180, at 27, 59 D.L.R. (3d) at 255. *See also* Hood v. McKarney, 9 Nfld. & P.E.I.R. 16 (P.E.I.C.A. 1975), Leonard v. Ryan, 10 Nfld. & P.E.I.R. 581 (Nfld. S.C. 1976), and Durant v. Tweel, *supra* note 116.

[187] Fleming, Comment, 82 L.Q.R. 25, at 28 (1966).

[188] Lawrence, Comment, 20 WAYNE L. REV. 1129, at 1139 (1974). *See, e.g.,* White, *The Liability of an Automobile Driver to a Non-Paying Passenger,* 20 VA. L. REV. 326 (1934); James, *Accident Liability Reconsidered: The Impact of Liability Insurance,* 57 YALE L. J. 549 (1948); Wernstein, *Should We Kill the Guest Passenger Act?* 33 U. DETROIT L. REV. 185 (1965); Lascher, *Hard Law Makes Bad Cases—Lots of Them (The California Guest Statute),* 9 SANTA CLARA LAWYER 1 (1968); Furman, *The Future of the Automobile Guest Statute,* 43 TEMPLE L.Q. 432 (1972); Wierwille, *Review of the Past, Preview of The Future: The Viability of Automobile Guest Statutes,* 42 U. CINCINNATI L. REV. 709 (1973).

[189] 280 U.S. 117, 50 S. Ct. 57 (1929).

[190] *See, e.g.,* Emberson v. Buffington, 228 Ark. 120, 306 S.W. 2d 326 (1957); Ludwig v. Johnson, 243 Ky. 533, 49 S.W. 2d 347 (1932).

[191] 506 P.2d 212, 106 Cal. Rptr. 388 (S.C. 1973). Noted by McDermott, Comment, 53 NEB. L. REV. 267 (1974); Shumate, Comment, 8 AKRON L. REV. 135 (1974); Thruston, Comment, 23 CATHOLIC U. L. REV. 402 (1973).

[192] *Supra* note 191, at 224, 106 Cal. Rptr. at 400. *See further* Lascher, *supra* note 188, at 16-19. It is interesting that a possible social reason for passage of the statutes was that the Depression caused a substantial increase in the number of hitchhikers on the highways. *Cf.* Wierwille, *supra* note 188, at 724: "At a time of energy crises and computerized carpools, [the guest statute] runs directly counter to society's needs".

[193] 69 Cal. 2d 108, 443 P.2d 561.

[194] *Supra* note 191, at 228, 106 Cal. Rptr. 404.

> Instead of confining its disability to those who actually institute collusive suits, the provision . . . burdens the great number of honest automobile guests. Moreover . . . [it] also extends its burden to some, such as hitchhikers, who pose no reasonable danger of collusion at all. [195]

The decisions since *Brown* have yielded "mixed results". [196] The general trend, however, should appear to be towards abolishing the classifications created by the guest statutes. [197]

XIV. NUISANCE

Walker v. Pioneer Construction Co., [198] which concerned an asphalt plant operated by the defendants close to the plaintiffs' property, was a "casebook" nuisance action. The plaintiffs claimed that the defendants were liable on a number of grounds, including excessive noise, smells, unsightly appearance, potential danger, and emanations of sand, soot and dust. Only the claim based on excessive noise was successful, and even then only partially so.

Marden J., of the Ontario High Court, presented a clear analysis of the relevant principles, referring to many of the leading decisions and to relevant academic commentary. Of particular interest is his handling of the locality issue—a difficult question on the facts since "the area definitely [could not] be regarded as of a residential nature nor ha[d] it received what might be called a predominantly industrial stamp." [199] The proximity of Highway 144 between Montreal and Vancouver was considered by the judge to be "[a] major influence on the character of the neighbourhood".

Also of interest is the application to the facts of the case of the criteria regarding the suitability of damages in lieu of an injunction set out in *Shelfer v. City of London Electric Lightning Co.* [200] The defendants' claim that damages were an appropriate remedy was rejected on the basis that the

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[195] *Id.* at 227-28, 106 Cal. Rptr. at 403-04.

[196] HENDERSON & PEARSON, *supra* note 162. Academic commentary is, however, generally in favour of *Brown*. *See, e.g.*, Stockdale, Comment, 23 DRAKE L. REV. 216, at 224 (1973).

[197] *Accord*, Thompson v. Hagan, 523 P.2d 1365 (Idaho 1974), noted by Brune, Comment, 10 TULSA L.J. 474 (1975), and Petty, Comment, 6 TEXAS TECH. L. REV. 1127 (1975); Johnson v. Hassett, 217 N.W. 2d 771 (N.D.S.C. 1974); Henry v. Bauder, 213 Kan. 751, 518 P.2d 362 (S.C. 1974). *Contra*, Justice v. Gatchell, 325 A.2d 97 (Del. S.C. 1974); Keasling v. Thompson, 217 N.W. 2d 687 (Iowa S.C. 1974); Cannon v. Oviatt, 520 P.2d 883 (Utah S.C. 1974); Tisko v. Harrison, 500 S.W. 2d 565 (Tex. Ct. App. 1973). For an account of legislative responses, *see* Widger, Comment, 59 CORNELL L. REV. 659, at 676-79 (1947), Vetri, *The Case for Repeal of the Oregon Guest Passenger Legislation*, 13 WILLAMETTE L.J. 53, at 53-55 (1976). Against the general trend Texas has recently extended the range of immunity. For an analysis of the definitional difficulties raised by this extension, *see* Sherman and Herpin, Comment, 25 BAYLOR L. REV. 599 (1973). *See also* Abraham and Riddle, *Comparative Negligence—A New Horizon*, 25 BAYLOR L. REV. 411 (1973).

[198] 8 O.R. (2d) 35, 56 D.L.R. (3d) 677 (H.C. 1975).

[199] *Id.* at 48, 56 D.L.R. (3d) at 690.

[200] [1895] 1 Ch. 289, at 322-23, 64 L.J. Ch. 216, at 229-30 (C.A. 1894).

inconvenience from noise early in the morning and in the evening was small; "[nor] is it made out that the case is one of such obvious economic hardship as to fall within the [established] principles". [201]

XV. DEFAMATION

In *Loan v. MacLean,* [202] the question of the distinction between defamation and mere insult was, it is respectfully submitted, not resolved in a satisfactory manner. The plaintiff, a high school teacher and alderman, and one of the defendants, also an alderman, "had a deep and abiding antipathy for [each] other." [203] After a Council meeting, where the plaintiff and defendant had quarrelled, the defendant gave a taped radio interview at his home in which he stated of the plaintiff:

> He's got to be one of the biggest jokes Peachland has had for a little while. It's too bad that he's quite so stupid . . . . He doesn't understand what's goin' on, this is the problem. He's out of his depth. It's most regrettable that the citizens of Peachland . . . saw to elect him because he's nothing but a bother, he doesn't understand, he may be good in . . . [t]eaching . . . the six- or eight-year-old children. [204]

The plaintiff sued, *inter alios,* the alderman and the radio station for libel. The defendant alderman pleaded justification. The court held that the plaintiff should succeed. Referring to *Sim v. Stretch,* [205] where Lord Atkin had defined defamation as words tending "to lower the plaintiff in the estimation of the right thinking members of society generally", [206] Kirke Smith J. considered:

> The words here, spoken of a high-school teacher with specific reference to his profession, are to me clearly disparaging. They were spoken, and broadcast, in a comparatively small community, where almost everyone knows everyone else's business, and it seems to me that in those circumstances,

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[201] *Supra* note 198, at 52-53, 56 D.L.R. (3d) at 694-95. *See also* Goodwin v. Pine Point Park, 7. O.R. (2d) 134, 54 D.L.R. (3d) 498 (C.A. 1974), which held it to be a public nuisance to erect a swimming platform on a lake about 150 feet from shore, that protruded only about 6 inches over the surface and was of a colour that blended with the colour of the water. The fact that the platform had not been licensed under the provisions of the Navigable Waters Protection Act, R.S.C. 1970, c. N-19, appears to have weighed heavily with the court. *See also* Kerr v. Revelstoke Building Materials Ltd., 71 D.L.R. (3d) 134 (Alta. S.C. 1976), where ash, smoke and noises were held to constitute a nuisance, and Mendez v. Palazzi, 12 O.R. (2d) 270, 68 D.L.R. (3d) 582 (Cty. Ct. 1976), where the encroachment of tree roots onto the plaintiff's land was held to constitute a nuisance.

[202] 58 D.L.R. (3d) 228 (B.C.S.C. 1975).

[203] *Id.* at 230.

[204] *Id.* at 229.

[205] [1936] 2 All E.R. Rep. 1237, 52 T.L.R. 669 (H.L.).

[206] *Id.* at 1240, 52 T.L.R. at 671.

> where right-thinking persons in that community could and probably would interpret them as defamatory, there must be legal liability.[207]

Yet, in rejecting the defence of fair comment presented by the radio station, his Lordship stated: "To me, the words in this case are not comment on any aspect of the municipal business of Peachland, but purely a personal insult, invited by [the radio station]."[208] With respect, if the remarks were "purely a personal insult", they could hardly have been defamatory at the same time. Conceding that the words in question were, at the least, "close to the line", the defendant alderman might well feel aggrieved that he was mulcted in damages for delivering no more than "purely a personal insult" to his political adversary.[209]

In *Drouin v. Gagnon,*[210] the defence of qualified privilege was considered. The plaintiff, a proprietor of a grocery and hardware store in a small farming community, and the defendant, a neighbour, attended a municipal committee meeting which was considering the construction of an access alley from the plaintiff's property to the street. The parties became involved in an altercation in which the defendant alleged that the plaintiff was a bootlegger who sold to teenagers.

The defendant admitted subsequently that his allegations "were not particularly relevant to the matter under discussion and were spoken to prevent the lane being built".[211] He also admitted that he "had not made any investigation to find out if [the plaintiff] was selling or giving liquor to teenagers or to anyone else", and that he "did not know if [the plaintiff] was selling or giving liquor to teenagers, but suspected that he was".[212]

Liability was imposed, Kirby J. of the Alberta Supreme Court rejecting the defence of qualified privilege. Referring to three decisions,[213] and quoting extensively from one of them, the recent House of Lords decision of *Horrocks v. Lowe,*[214] his Lordship stated one relevant legal principle as follows:

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[207] *Supra* note 202, at 231. The court also rejected the defence of qualified privilege on the basis that "[t]he words complained of were spoken not at, but after, the Council meeting: there was neither a public nor a private duty on [the defendant] to repeat for publication to the entire area his childish and derogatory personal views of [the plaintiff] as an individual. The words constituted a *gratuitous voluntary insult;* and for publication of that insult throughout the [locality] the defendant . . . is liable". *Id.* at 232 (emphasis added).

[208] *Id.* at 232. *See also* the clear reference to "insult", *supra* note 207.

[209] *Cf.* Wlodek v. Kosko, 7 O.R. (2d) 611, 56 D.L.R. (3d) 187 (C.A. 1974). A defence that statements to the effect that the persons' degrees were "phoney", that they were in charge of a "goon squad" or "armed band", that they were blackmailers, "political homosexuals" and suffering from an incurable mental condition, were merely abusive was rejected by the court.

[210] 58 D.L.R. (3d) 428 (Alta. S.C. 1975).

[211] *Id.* at 433.

[212] *Id.* at 433-34.

[213] Willows v. Williams, 2 W.W.R. (N.S.) 657 (Alta. S.C. 1950); Royal Aquarium and Summer and Winter Garden Soc'y v. Parkinson, [1892] 1 Q.B. 431, [1891-94] All E.R. Rep. 429 (C.A. 1892); Horrocks v. Lowe, [1975] A.C. 135, [1974] 1 All E.R. 662.

[214] *Supra* note 213.

> These decisions establish that qualified privilege can be lost under the following circumstances:
> (1) Where the person uttering the words is not doing so *bona fide*, but is using the occasion even when he believes the statement to be true for an improper purpose. Diplock L.J. [*in Horrocks*] calls this "express malice".
> (2) Where the person uttering the words did not honestly believe them to be true, or spoke them recklessly, without caring whether they were true or false. [215]

In the instant case, the defendant's conduct had, in the court's view, offended against both criteria, the defendant's accusation having "had no relevancy to the matter under discussion" and constituting "an improper use of the occasion," and the defendant's suspicions not constituting "honest belief in the truth of what he said". [216]

The defence of qualified privilege was again raised unsuccessfully in *Gillett v. Nissen Volkswagen Ltd.* [217] The plaintiff was seriously defamed by a former employer (who accused him of fraud) when the plaintiff was applying for a position elsewhere. The prospective employer had engaged the services of a credit reporting company which in its report passed on to the prospective employer the former employer's "completely false" [218] statements about the plaintiff. In an action against the reporting company, it was argued by the company that their situation was one to which the defence of qualified privilege should be applied.

The question whether credit reporting agencies should be afforded this protection is an issue that has been resolved differently by courts in England and the United States. In England, [219] the general approach is still that "[i]t is only right that those who engage in such a business, touching so closely very dangerous ground, should take the consequences if they overstep the law". [220] In contrast, the general view in the United States in regard to false statements by such agencies has, until recently, been that "[t]he harm that [they] occasionally do to applicants for credit is believed to be small in

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[215] *Supra* note 210, at 433.

[216] *Id.* at 434. *Cf.* Clarke v. Austin, 51 D.L.R. (3d) 598 (B.C.S.C. 1974), in which qualified privilege was held to arise where a store employee, believing he had seen a customer shoplifting, reported the matter to the manager, and where the manager discussed the matter subsequently with the customer and her husband. "I cannot conceive of a more appropriate situation for the application of the doctrine of qualified privilege, than the situation which existed [during the discussion between the manager and the customer and her husband]." *Id.* at 602. *See also* Foran v. Richman, 10 O.R. (2d) 634, 64 D.L.R. (3d) 230 (C.A. 1975) (leave to appeal refused by S.C.C., May 3, 1976), where a report by a doctor to an insurance company regarding the medical health of a patient was subject to qualified privilege.

[217] [1975] 3 W.W.R. 520, 58 D.L.R. (3d) 104 (Alta. S.C.).

[218] *Id.* at 526, 58 D.L.R. (3d) at 110.

[219] The general rule is qualified in relation to associations of persons (or businesses) combining together for their mutual protection. *See* London Assoc. for Protection of Trade v. Greenlands, Ltd., [1916] 2 A.C. 15 [1916-17] All E.R. Rep. 452.

[220] Macintosh v. Dun, [1908] A.C. 390, at 400, [1908-10] All E.R. Rep. 664, at 668 (P.C.). *Cf.* Smith, *Conditional Privilege for Mercantile Agencies—Macintosh v. Dun,* 14 COLUM. L. REV. 187 (1914), an article opposed to the English decision which "provided much of the rationale which until now has been utilized as justification for granting the privilege to credit reporting agencies".

relation to the benefits that subscribers derive from frank reports". [221]

In the instant case, Quigley J. stated that he was "satisfied that the principle enunciated by Lord Macnaghten in *Macintosh v. Dun* still applies in Canada". [222] His Lordship was fortified in this view by the admonition (under legal sanction) to the customer in the credit company's report that under no condition was the information supplied to be passed on to the subject of the report. Referring to the U.S. position quoted above, [223] Quigley J. commented:

> [H]ow can [the reports] ever be tested if the subject himself is unaware of the existence of such reports let alone the contents thereof. Canadian law subscribes to the principle that it is better that 99 guilty men go free than one innocent man be convicted. I see no reason for abdicating from that doctrine in civil matters, in order to permit mercantile reporting agencies to "perform a useful business service" with much less caution than would otherwise be required if the principle of qualified privilege is not extended to cover their disclosure of information. [224]

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[221] Watwood v. Stone's Mercantile Agency, Inc., 194 F.2d 160, at 161 (D.C. Cir. 1952), cited in Gillett v. Nissen Volkswagen Ltd., *supra* note 217, at 532, 58 D.L.R. (3d) at 117.

[222] *Supra* note 217, at 533, 58 D.L.R. (3d) at 116.

[223] *Supra* note 221. Recent developments in the United States have favoured the Anglo-Canadian approach. *See, e.g.*, Hood v. Dun and Bradstreet, Inc., 486 F.2d 25 (5th Cir. 1973).

[224] *Supra* note 217, at 534, 58 D.L.R. (3d) at 117. Another recent Canadian decision on defamation is Thompson v. NL Broadcasting Ltd., 1 C.C.L.T. 278 (B.C.S.C. 1976), where a purported apology by a radio commentator on municipal affairs for defamatory remarks regarding the mayor of Kamloops was held to be neither a full apology nor a proper retraction. A recent Canadian text on the law of defamation is J. WILLIAMS, THE LAW OF DEFAMATION IN CANADA (1976).