TORTS

John E. Johnson, Chris Desjardins** and Krystine Grabowski***

INTRODUCTION

In view of the wide scope of the law of torts, we have not attempted to cover all of the recent cases or developments in the field. Rather, we have selected cases of interest or importance and classified them under the familiar headings of intentional torts, negligence, vicarious liability and occupier's liability. The period which the survey covers is from January 1970 to June 1971.

I. INTENTIONAL TORTS

During the survey period there were no significant developments in the law in intentional torts. The following cases in trespass, nuisance and false imprisonment, however, were of interest.

A. *Trespass*

In *Regina v. Peters*, [1] the accused was prosecuted under the Petty Trespass Act [2] for refusing to leave a shopping plaza where he was participating in a demonstration. The court rejected the contention that the owner of the plaza did not have such possession of the property as to entitle him to request Peters to leave. This decision goes against the judgment of the Saskatchewan Court of Appeal in a similar [3] case which held that the landlord of a shopping centre did not have actual possession of the lands in question and, accordingly, could not seek an injunction based on trespass in respect to picketing carried on by a union against one of the tenants.

In *London Borough of Southwark v. Williams*, [4] the defendant and his family moved into a vacant house owned by the borough when living conditions in the rented room where the family resided became unbearable. The defence of necessity was raised to counter allegations of trespass. The English Court of Appeal restated the accepted rule that this defence is operative only in cases of great and imminent danger to life. Here the critical urgency was lacking. Lord Denning went on to state that to expand the scope of the defence of necessity beyond its present limits would lead to disorder.

---

* Survey Editor, 1971-72, *Ottawa Law Review*.

** Asst. Survey Editor, 1971-72, *Ottawa Law Review*.

1 [1971] 1 Ont. 597, 16 D.L.R.3d 143 (1970).

2 ONT. REV. STAT. c. 294, § 1 (1960).

3 Grosvenor Park Shopping Centre Ltd. v. Waloshin, 49 W.W.R. (n.s.) 237, 46 D.L.R.2d 750 (Sask. 1964).

4 [1971] 2 All E.R. 175 (C.A. 1970).

B. *Nuisance*

The elements of actionable nuisance were examined in *Kennedy v. The Queen.* [5] The Province had established a correctional camp 1,500 feet from plaintiff's farm and plaintiff claimed that by reason of its proximity and the occasional escape of inmates, his property had considerably declined in value. Mr. Justice King stated: "One must consider the nature of the interests to be protected and the conduct which interferes with such interests . . . [Plaintiffs may successfully claim the protection of the law] for such use and enjoyment as is reasonable and to a degree which is reasonable under the circumstances." [6] King went on to find that the criteria of "reciprocal reasonableness in the use of the land" [7] had not been violated.

In Manitoba the issue of nuisance arose in a different context. [8] The province constructed a floodway to divert the waters of the Red River and as a result, the plaintiff's well failed. Remedial measures undertaken at the expense of the defendant restored the water supply; however, the water had a very high salt content and caused severe damage to the bedding plants which plaintiff grew as part of his gardening business. Defendant argued that no cause of action existed since the water did not flow in a defined underground channel and consequently, plaintiff as owner of the property had no common law rights. The court held that "different principles apply where the question of pollution is involved than are applicable in the case of diversion or abstraction of water." [9] Relying on the decision in *Ballard v. Tomlinson,* [10] Mr. Justice Matas ruled that the province was liable.

C. *False Imprisonment*

A recent Ontario decision [11] dealt with the factors to be considered in assessing damages for false arrest. Due to a mistake of identity, plaintiff was forced to spend twelve days in jail and sought compensation. The court, acting on the authority of *Harnett v. Bond* [12] rejected this claim stating that plaintiff was entitled to compensation only for the period of detention between the time of arrest and the remand into custody by the magisrate.

II. Negligence

A. *Duty of Care*

The concept of "duty" is concerned with the problem whether the relationship between parties warrants the imposition upon one of an obligation of care for the benefit of the other. While it is not always an easy matter

[5] [1970] 3 Ont. 546, 13 D.L.R.3d 442 (High Ct.).

[6] *Id.* at 549, 13 D.L.R.3d at 445.

[7] *Id.* at 550, 13 D.L.R.3d at 446.

[8] Connery v. Manitoba, 75 W.W.R. (n.s.) 289, 15 D.L.R.3d 303 (Man. Q.B. 1970).

[9] *Id.* at 295, 15 D.L.R.3d at 309.

[10] 29 Ch. D. 115, 54 L.J. Ch. (n.s.) 454 (1885).

[11] Crowe v. Noon, [1971] 1 Ont. 530, 16 D.L.R.3d 22 (High Ct. 1970).

[12] [1924] 2 K.B. 517 (C.A.); *aff'd* [1925] A.C. 669.

to determine when such a relationship exists, there is no doubt that if there is a contractual tie, the promisee is owed some duty. [13] In *Zervobeakos v. Zervobeakos,* [14] the plaintiff rented a room over a restaurant operated by the defendant who owned and occupied the premises. A fire in the restaurant was caused by unguarded operation of a frying machine which the defendant had previously known to be defective. In an effort to escape the burning premises, the plaintiff climbed out onto a window ledge and fell, sustaining serious injuries. Had he remained in the building, it appeared the fire would have been controlled before he would have been harmed. Dealing first with the issue of duty, the court held that as a consequence of assuming a contractual obligation with his boarder, the defendant had entered into such a relationship as to require of himself a duty amounting to a limited warranty that the premises were as safe as reasonable care and skill could make them. [15] Dealing next with the question of causation, the court decided against the defendant notwithstanding that hindsight showed the plaintiff's intervening act to have been imprudent. The underlying policy here recognizes that the actions of a party put in peril or seeming peril by the negligence of another should be judged by an evaluation of the facts as they appeared to him at the time.

In the case of a tavern owner and a patron, both statutory provisions [16] and the common law duty not to serve a patron liquor when visibly intoxicated create a duty relationship. In *Menow v. Honsberger,*[17] the plaintiff was served beer until well past the point of intoxication and then was ejected from the establishment. The plaintiff was a familiar patron and it was known to the tapman that the plaintiff would have to walk along a main roadway to reach home. On the way home, the plaintiff was struck by a negligent motorist and was severely injured. The tavern owner was deemed to be a proximate cause and was fixed with a portion of the blame. Specifically, liability was attributed to him for having put the plaintiff in a position of potential personal danger when he knew the latter was unable to take care of himself. Thus even a statutory right, in this case, the right to eject a drunken patron, [18] is not an absolute right in law and must be tempered by a duty of care and consideration for the personal safety of the person to be affected, when it is reasonably foreseeable that he might suffer harm.

---

[13] *See* Winterbottom v. Wright, 10 M.&W. 109, at 114, 62 Rev. Rep. 534, at 538 (1842), where it was suggested the promisor could owe a duty to no one else but the promisee. The concept of privity is no longer the inviolable sacred cow it once was, but it is yet the determinant in some cases. *Cf.* Alliance Assurance Co. v. Dominion Electric Protection, [1970] Sup. Ct. 168, where lack of a contractual obligation prevented the imposition of liability based on nonfeasance.

[14] 4 D.L.R.3d 603 (N.S. Sup. Ct. 1969).

[15] *See* Maclenan v. Segar, [1917] 2 K.B. 325; Beaudry v. Fort Cumberland Hotel, 1 N.S.R.2d 475, 12 D.L.R.3d 273 (Sup. Ct. 1970) where such a contractual entrant was said to be owed a duty higher than that owed by an invitor.

[16] The Liquor Licence Act, ONT. REV. STAT. c. 218, § 53(3) (1960). The Liquor Control Act, ONT. REV. STAT. c. 217, § 81 (1960).

[17] [1971] 1 Ont. 129 (1970).

[18] ONT. REV. STAT. c. 218, § 53(6).

A somewhat analogous situation arose in *Hendricks v. The Queen.*[19] In this instance, the federal government had constructed a concrete weir below the surface of the water in order to permit navigation over certain rapids. Signs warning of the falls which might be created by the weir had been posted in the channel, but heavy spring-flooding had washed them away. Although at the time of the incident in question the flooding had subsided sufficiently to allow the servants of the Crown to replace the warnings safely, they had failed to do so. As a result, the plaintiff's boat and his party were swept over the falls when they approached too closely. Liability was apportioned equally between the plaintiff, for failure to keep a proper look-out and the Crown, for its conduct in creating a navigational hazard and then failing to warn users of the waterway of an unreasonably great risk of harm.

Horsley v. MacLaren[20] is an attempt to stretch the scope of liability further to include the situation where a defendant who is not at fault in creating a situation of peril, may by his subsequent inexpert conduct in attempting a rescue be considered to be putting another in peril and as a result, a duty arises to a foreseeable rescuer. In this case, a passenger on a pleasure boat, Matthews, fell overboard through his own fault. The defendant, who was the operator of the boat, tried to rescue him by approaching him stern first instead of using the orthodox rescue procedure of circling and approaching bow first. However, when the motors of the boat were put in neutral to avoid catching him in the propellers, the boat began to drift. As Matthews appeared to be unconscious at this point, Horsley dived into the water to attempt a rescue. The shock of the cold water killed him. The Court of Appeal reversed the trial decision and absolved the defendant of liability. The majority felt that his inexpert attempt at rescue did not amount to negligence but to an error in judgment. Since the majority was of the opinion that the defendant was not responsible for Matthew's situation, they held that he could not be responsible for the independent acts of a third party. In any event, they felt that even if he had been negligent in his rescue attempt, on the facts a rescue attempt could not have reasonably been foreseen — a weak reason in light of the fact that a second passenger dove in shortly after Horsley.[21]

B. *Standard of Care*

Once a duty of care has been established, the issue becomes one of how that duty must be discharged. The standard adhered to in almost every situation is that of the "reasonable man." The result is, of course, that there are as many different standards as there are situations. In many situations however, guidelines have been established by the decided cases and these guidelines are extended as novel situations arise.

---

[19] 9 D.L.R.3d 454 (Sup. Ct. 1969)

[20] [1970] 2 Ont. 487.

[21] *See* Note, 4 OTTAWA L. REV. 325 (1970).

1. *Dangerous Things*

In *Dahlberg v. Naydiuk,* [22] the defendant was hunting deer on the land of an adjacent farmer when he accidentally wounded the plaintiff with an errant bullet. In attempting to establish the extent of the duty owed the plaintiff, a reference was made to a category of objects and substances which earlier cases had deemed to be inherently dangerous. The court, following the Supreme Court decision in *Ayoub v. Beaupré,* [23] pointed out that it preferred to apply the ordinary rules of negligence, recognizing that in each case, it is a matter of degree varying with circumstances what standard of care should be observed. In this instance, the defendant was found negligent in discharging his firearm into heavy brush knowing that there were buildings in that direction. He was also negligent in firing over and hunting on the plaintiff's land without permission. [24]

While the court may not acknowledge the existence of such a category, there is no doubt that in some circumstances the standard of care demanded by the ordinary rules of negligence does approximate, practically speaking, that of an insurer. Such would seem to be the case with respect to the gas installations of a public utility. In a Manitoba case, [25] a gas company installed an unprotected gas-riser pipe at the corner of a school building. The infant defendant, who had been given a snowmobile by his father, but who had been improperly instructed in its use by him, accidentally ran into the pipe. Escaping gas was carried into a nearby air vent in the school and an explosion resulted. The gas company having failed to erect protective devices and change the location of either the air vent or the pipe was found equally responsible with the father and son.

One defence raised by the company involved the assertion that it had complied with statutory regulations and therefore ought not to be held responsible for any resultant accidents. In any question concerning legislation and civil liability, the court is faced with the issue of determining where to strike the balance between fault and strict liability, or as was the case here, between fault and exoneration. On this occasion, the function of the judge and jury in establishing a specific standard of care was not supplanted by statutory regulation. Compliance with the regulation (about which there was some doubt in any event), was received as evidence of no-fault but it was not conclusive. [26] Rather the court deemed that regulations aside, a rea-

[22] 72 W.W.R. (n.s.) 210, 10 D.L.R.3d 319 (Man. 1969).

[23] [1964] Sup. Ct. 448, 45 D.L.R.2d 411.

[24] An interesting sidelight to this case is that the action was framed in both negligence and trespass. Although the actual decision was arrived at in negligence, the court in this instance felt it would have been bound by the decision in Stanley v. Powell [1891] 1 Q.B. 86 (1890) as interpreted in Cook v. Lewis, [1951] Sup. Ct. 830. Consequently the anomaly in the law which will allow a plaintiff in a trespass action to shift the onus of proof and force a defendant to disprove negligence continues to be the law in Canada, despite the English decision in Fowler v. Lanning, [1959] 1 Q.B. 426 and Letang v. Cooper, [1965] 1 Q.B. 232 (1964).

[25] School Div. of Assiniboine South v. Hoffer, [1971] 1 W.W.R. 1, 16 D.L.R.3d 703 (Man. Q.B. 1970).

[26] *See* Sterling Trusts Corp. v. Postma, [1965] Sup. Ct. 324, 48 D.L.R.2d 423 (1964), where the breach of a safety statute did not create absolute liability, although it was given more effect than being mere evidence of negligence.

sonable man handling a substance of such nature as gas would have acted differently than did the gas company.

One instance where circumstances precluded liability for the misuse of a dangerous substance was in *Cone v. Welock.* [27] The defendant was a guest at the plaintiff's hunting lodge. He had rented quarters there previously and was aware of the plaintiff's habit of permitting guests to start their fireplaces with small containers of fuel oil. As a result of inadequate directions, the defendant mistakenly filled his container with gasoline and finding the contents to feel "oily", he attempted to start a fire with the substance. The plaintiff's claim for damages, arising out of the unexpectedly good results the defendant obtained in starting the fire, was dismissed. It was felt that in the circumstances, the defendant had acted reasonably and had satisfied the duty of care required of him in attempting to identify gasoline.

2. *Animals*

At common law, the owner of an animal could be fixed with liability for damages inflicted if it could be shown he had knowledge (scienter) of the dangerous, mischievious or vicious propensity of the animal. In addition if the owner's negligence could be demonstrated to have occasioned the damage, he would be accountable to the victim. In *Morris v. Baily* [28] the defendant was aware of the propensity of his ninety-pound collie to run at people barking, although not actually touching them. The animal advanced toward the plaintiff without touching her and she fell to the sidewalk sustaining injuries as a consequence. In commenting on the finding of liability, Chief Justice Gale, stated: "It may be that liability based on *scienter* in respect of domestic animals has become for practical purposes indistinguishable from liability arising on the ordinary principles of negligence." [29] In this case, however, liability was actually decided on the grounds of negligence although obviously the plea in scienter would have rendered an identical result.

With respect to animals on highways, conflicting decisions have been handed down by the courts of Nova Scotia and Saskatchewan. The Nova Scotia Supreme Court in *Crosby v. Curry* [30] held that the ordinary rules of negligence were applicable and this meant that reasonable care would be required to prevent straying of cattle or other livestock from pastures onto adjacent highways. In the Saskatchewan case [31] the court decided to follow the decision in *Searle v. Wallbank,* [32] which held (1) that there is no duty at common law for a landowner adjoining a highway to maintain fences on his property against the escape of animals and (2) that in any event he owes no duty to highway users to take reasonable care to ensure his animals do not stray onto the road. The decision of the Supreme Court in *Fleming v.*

[27] [1970] Sup. Ct. 494, 10 D.L.R.3d 257.

[28] Morris v. Baily, [1970] 3 Ont. 386, 13 D.L.R.3d 150.

[29] *Id.* at 390, 13 D.L.R.3d at 154.

[30] 7 D.L.R.3d 188 (N.S. Sup. Ct. 1969).

[31] Lane v. Biel, [1971] 2 W.W.R. 128, 17 D.L.R.3d 632 (Sask. Dist. Ct. 1970).

[32] [1947] A.C. 341.

Atkinson [33] was said by Judge Cruickshank to have held that only that the *Searle* rule was not applicable in Ontario and with respect to the facts of that case, a distinction between nonfeasance (no fence as in this case) and misfeasance (where the owner deliberately turned out his cattle onto the road as in *Fleming*) should be drawn. Consequently, he felt free to adjudicate upon the applicability of the rule in Saskatchewan.

3. *Carrier and passenger*

The duty of the carrier is to carry the passenger to the agreed destination using due and reasonable care to avoid or prevent injury. In the event of an accident, a heavy onus is cast upon the driver to exculpate himself but in some circumstances, this burden can be discharged. In *Connolly v. City Cab Co.,* [34] the defendant's taxi driver, finding cars parked on both sides of a narrow street, stopped in the middle of the road and discharged his passenger. While alighting, the plaintiff who was a rather obese woman, apparently slipped by reason of the force of her own weight and not because of the patches of snow or ice that covered some portions of the road. The plaintiff's natural lack of mobility, coupled with the fact that depositing her at the snow-covered curb would probably have been no safer than stopping in the roadway, sufficiently convinced the court that the defendant's actions did not cause the accident nor did such actions constitute an unwarranted risk wherein the plaintiff was exposed to an unusual hazard on the road. This case demonstrates that the duty of a carrier is not so high as to make him an insurer, but another recent Western case [35] illustrates that a very high standard of care is nevertheless required. In this case, the defendant's transit system had a fairly commonplace apparatus controlling the opening and closing of the rear doors on buses. When one pushed a gate at the top of a stairwell, the door opened and remained so until the gate was released. The bus could not be set in motion until the gate returned to its normal position, which would take about two and one-half seconds. The plaintiff preceded her three-year old daughter through this exit and as she turned to pick up the infant, the doors closed and caught the child's leg in the pliable rubber panels bridging the gap between the folding doors. The bus started up and dragged the infant about twenty feet before it was stopped. It was possible for the driver to see the rear door, steps and stairwell in his rear-view mirror and he was judged to be negligent for failing to satisfy himself that his passengers had disembarked safely. This was so despite the plaintiff's manner of exiting before the child and despite her failure to read instructions printed on the gate.

4. *Employer-Employee*

In the past, there has been no dearth of cases dealing with the employer-employee relationship. However, changing social attitudes and economic growth have affected modifications in the degree of care to be accepted

[33] [1959] Sup. Ct. 513.

[34] 74 W.W.R. (n.s.) 387 (Alta. Sup. Ct. 1970).

[35] Englefield v Winnipeg, [1971] 2 W W.R. 302, 17 D.L.R.3d 620 (Man. 1970).

as the norm for an employer. The recent trend is to judge according to the ordinary rules of negligence and the touchstone of reasonable care. [36] Following this trend, industrial safety legislation has recently been interpreted in Ontario as imposing a heavy duty on an employer. The courts have stopped short of making him an insurer against all industrial accidents regardless of fault. Thus, where the safest and most practical guard available is in use on a machine and the operator through his own inadvertence is involved in an accident, liability does not attach to the employer. [37]

What is reasonable care is a question of fact and varies with circumstances. Such considerations as the ease, difficulty and expense of installing safety equipment and the seriousness of the harm to be avoided may be relevant. These were the deciding factors in *Wiebe v. Harris*, [38] where a farm labourer slipped and fell into an unguarded screw-type auger (a machine used to convey grain) and lost both his feet. The defendant was found to be in breach of his duty to provide safe premises free from unreasonable risk. He could have satisfied his duty by simply erecting a guard.

Liability, however, does not extend to include harm caused by a defec which reasonable precautions would not have protected against. In *Burnside v. Winnipeg School Division* [39] the defendant was not liable to a teacher who, being aware of a malfunctioning safety guard, continued to use the machine and subsequently suffered injury. The school board sufficiently discharged its duty by maintaining a system of regular visits and inspections of industrial arts equipment, and by instructing all teachers to shut down and report any machines not working properly. A somewhat analogous situation, though not strictly an employer-employee case, concerned a student who was injured while operating a power saw in an industrial arts class. [40] The instructor demonstrated the correct method of making cuts and watched the student complete some cuts himself. Then he arranged to have another student assist in the operation and directed his attention to others in the class with an occasional glance directed towards the plaintiff. The plaintiff was severely cut when his hand slipped and touched the blade. The Court of Appeal made a different evaluation of the facts and reversed the lower court finding of negligence, pointing out that the defendant had followed the normal and appropriate procedure and had done all that could reasonably have been expected to prevent accidents. The injury was due to the plaintiff's own inattention and it was thought unlikely that the defendant's proximity could have prevented the mishap.

Lynch & Co. v. United States Fidelity & Guaranty Co. [41] is an interesting case dealing with the general issue of a master's right to recover damages from his servant for the latter's breach of his implied duty to use reasonable

---

[36] *See* J. FLEMING, THE LAW OF TORTS 454-55 (3d ed. 1965).

[37] Regina v. Slater Steel Indus. Ltd., [1971] 1 Ont. 760 (County Ct. 1970), where Ont. Reg. 1964-196, § 28(1) passed pursuant to the Industrial Safety Act, Ont. Stat. 1964 c. 45, was deemed not to impose strict liability.

[38] [1971] 2 W.W.R. 764 (Man. Q.B.).

[39] 72 W.W.R. (n.s.) 129 (Man. Q.B. 1964).

[40] Dziwenka v. The Queen, [1971] 1 W.W.R. 195, 16 D.L.R.3d 190 (Alta. 1970).

[41] [1971] 1 Ont. 28, 14 D.L.R.3d 294 (High Ct. 1970).

care. The plaintiff company, a brokerage firm, had hired a Mr. Cooper as a "customers' man". Cooper came to the job with little experience and was given little instruction by his superiors as to the manner in which his duties which included opening accounts, were to be carried out. In good faith, Cooper opened several accounts for one man under different names. Subsequently certain stocks in the various accounts were de-listed, the accounts became under-marginal and the situation was discovered. On the evidence, the court decided that such salesmen were not engaged on the footing that they had a particular skill in extending credit and valuing securities for margin accounts. Consequently, there was no breach of an implied duty of care as the employee had acted reasonably in an area of the business for which he bore no responsibility. Lynch also attempted to characterize Cooper's actions as "dishonest" and in this way recover under an indemnity bond with the defendant company. The argument was based on dicta in some American cases which had extended the meaning of "dishonest" in such circumstances to include acts which are reckless or unfair to the employer and may subject him to loss. [42] However Mr. Justice Fraser chose to give the word its ordinary meaning, thus requiring some intent to deceive or cheat. As a result, the plaintiff's action was dismissed.

5. Manufacturers' Liability

A manufacturer of a product owes a duty to the ultimate consumer which approximates absolute liability. He must ensure that the product is free from defects arising from manufacture, shipment or use, which defects could foreseeably expose people to danger. This was true of ginger beer in *Donoghue v. Stevenson* and it has been recently shown to cover such wares as cars, trucks and gas furnaces. In *Phillips v. Ford Motor Co. of Canada,* [43] the plaintiff was sold a car with a brake apparatus known as the "fail safe system." Using this power booster assist, twenty-five pounds pressure was sufficient to lock the wheels but in the event of a power failure, ten times as much pressure was required to bring the car to a halt. The plaintiff was involved in an accident when he discovered that the "fail safe system" was not in actuality what it had purported to be in theory. The defendant manufacturer and dealer were both found liable for failing to warn the plaintiff of the inadequacy of this system and the potential hazards which ensued when the power booster was not operative.

A similar finding was reached with respect to a natural gas furnace manufacturer who was aware of a defect in his product whereby it would lose screws in shipment and during use. [44] The second defendant in this case, a gas company servicing and inspecting the furnace, was also aware of this defect, but neither defendant warned the customer nor took steps to remedy the deficiency. As a result, the loose screws caused a series of events leading to the production of carbon monoxide and resultant personal injuries. The court fixed both defendants with liability, remarking that a doctrine of for-

[42] Home Indemnity Co. v. Reynolds & Co., 38 Ill. App.2d 358, 187 N.E. 274, at 282 (1962).

[43] [1970] 2 Ont. 714, 12 D.L.R.3d 28 (High Ct.).

[44] Ives v. Clare Bros., [1971] 1 Ont. 417 (High Ct. 1970).

giveness of sin by intermediate inspection is not applicable where both defendants failed to fulfil their duties. Commenting on the remark that an innocent gas user harmed by the use of gas was in an analogous position to a pedestrian under section 106(1) of the Highway Traffic Act, [45] Mr. Justice Wright stated: "I do not assert that that is the law of products' liability generally, but I shall not be shocked or surprised when higher authority free to do so avers it to be the law." [46] However, having said this, the court proceeded on the basis that it was the law and injury having been caused by the use of natural gas, the onus of proving no negligence shifted to those who manufactured, installed and serviced the furnace.

Another case, *White v. International Harvester,* [47] illustrated that even in the absence of fault, such as a latent defect in the metal used in the steering mechanism of a truck, a manufacturer could be fixed with liability. Employing the *res ipsa loquitur* doctrine, which in the field of products' liability is becoming more like a true presumption of law, the plaintiff won his case by showing that in the ordinary course of things the truck would not have gone out of control as it did while he was exercising proper care with respect to its management.

6. *Physicians and surgeons; Hospital employees*

A doctor is expected to possess the skill, judgment and knowledge of the average of the special group of practitioners to which he belongs. [48] That the law has not been modified in this respect is illustrated by two Ontario cases. In *Ostrowski v. Lotto,* [49] a medical specialist was absolved of liability and was found to have rendered reasonable care to a patient when he acted upon the advice of other specialists whom he had previously consulted. Similarly in *Johnston v. Wellesley Hospital,* [50] the court absolved the defendant of negligence by pointing out that the technique used in this case was consistent with good medical practice. Unfortunately in light of subsequent developments, it was shown that in applying the medication as long as he did the doctor had judged wrongly. The plaintiff, however, was unable to establish that the error was due to lack of skill, carelessness or lack of knowledge. In the alternative the plaintiff tried to rely on the fact that he was only twenty years old in order to establish a case in assault and battery but the court settled the issue of consent by holding that a minor, who is as fully capable of understanding the consequences of an operation as an adult, may give his consent.

With respect to hospitals and the standard of care demanded of its employees, the following two decisions illustrate that in cases with a standard of care issue, what is an unreasonably great risk of harm is a question of

[45] ONT. REV. STAT. c. 172 (1960).

[46] *Supra* note 44, at 421.

[47] 71 W.W.R. (n.s.) 235 (Alta. Sup. Ct. 1969).

[48] Wilson v. Swanson, [1956] Sup. Ct. 804, 5 D.L.R.2d 113; *foll'd in* Challand v. Bell, 18 D.L.R.2d 150 (Alta. Sup. Ct. 1959).

[49] [1971] 1 Ont. 372 (1970).

[50] [1971] 2 Ont. 103, 17 D.L.R.3d 139 (High Ct. 1970).

fact. In the first case, *Child v. Vancouver General Hospital,* [51] the plaintiff had been assigned three nurses to care for him in eight-hour shifts. His condition had been deteriorating after an operation and he was prone to suffer hallucinations and to become restless and disturbed. In an incident occurring five days after the operation a nurse came on duty and found the plaintiff in a restless state. A doctor was summoned, but by the time he arrived, the plaintiff had calmed down. The doctor expressed his opinion that the patient was improving. With this in mind and as he appeared to be sleeping, the nurse took her break. When she returned fifteen minutes later, the plaintiff had climbed from his bed and fallen from a window. On this basis, the jury at trial concluded that the defendant's actions would not have been unexpected of a reasonably careful nurse. However, a different conclusion was reached in *Laidlaw v. Lions Gate Hospital,* [52] where, the nurse had received no assurances concerning the patient. On the contrary, all the nurses involved were made aware of the danger to which patients coming out of surgery were exposed in the post-anaesthesia recovery room. Despite the fact that the hospital required one nurse to every three patients in this room, one of the nurses took her coffee break, with the permission of the other nurse on duty. It was apparent to both nurses that other patients would be arriving soon. The plaintiff was unattended for a period of three to four minutes at a time when she was expected to have been under constant supervision. As a result the plaintiff suffered a lack of oxygen to the brain and was permanently injured.

7. *Solicitors*

In the same manner as other professionals must practice the standard of competence of the average, so must a solicitor demonstrate at least such a level of diligence and skill in attending to his client's business. In the case of *Wilson v. Rowswell,* [53] the plaintiff had retained the defendant to handle a loan transaction for him. However, when the borrower defaulted the plaintiff was not able to realize the whole of the debt on the securities arranged by the defendant solicitor. Damages were awarded to the plaintiff amounting to the difference between what he had realized and what he should have realized. The case of *Kolan v. Solicitor* [54] is interesting in that the defendant brought the duty upon himself and then failed to discharge it. The solicitor, knowing of the existence of a by-law under which a dwelling could be classified as substandard and made subject to a demolition order, inserted a condition respecting this in the offer of purchase and he made a superficial inquiry about it. However, having directed his mind to this potential problem, the duty devolved upon him to make a thorough search before closing the transaction and as a result of his failure to find any standing order made under the by-law, he was fixed with liability.

---

[51] [1970] Sup. Ct. 477, 10 D.L.R.3d 539 (1969).

[52] 70 W.W.R. (n.s.) 727, 8 D.L.R.3d 730 (B.C. Sup. Ct. 1969).

[53] 11 D.L.R.3d 737 (Sup. Ct. 1970).

[54] [1970] 2 Ont. 686, 11 D.L.R.3d 672.

III. Negligence on the Highway

A separate section has been devoted to negligence on the highway because by far the largest single group of cases in the field of torts involves the careless use of the automobile. These cases do not usually fit well into the gourmet diet of a student of tort law, but are daily fare for practitioners in civil litigation. As such, their importance ought not to be underestimated.

A. *Breach of Traffic Regulations*

Traffic regulations have two main purposes: the first is to ensure safety and the second is to promote the free circulation of traffic. These rules must be regarded as no more than a minimum requirement and compliance with them does not excuse the driver from the observance of his common law duty to exercise due care in the circumstances.

A recent English Court of Appeal decision [55] illustrates the general rule that where a statute or a regulation imposes a public duty and provides a remedy such as a fine or other penalty, it does not confer on a member of the public a right to an alternative remedy, unless the language and purpose of the statute is such as to bring it within an exception to the general rule. Such an exception would be where the statute was enacted for the protection of a particular class of persons.

In this case, plaintiff was driving in broad daylight and collided with defendant who was parked on the road in a no-stopping zone. Plaintiff attempted to sue on the basis of this infraction of the traffic regulations, but it was held that the primary purpose of the regulation was to facilitate the passage of traffic and it did not fall within the exception to the general rule. Plaintiff was found completely at fault for not keeping a proper lookout which would have enabled him to avoid the stationary vehicle. Plaintiff was also unsuccessful in his argument that the vehicle constituted a nuisance.

In a New Brunswick Court of Appeal decision [56] it was decided that failure to use a portable reflector unit, in the event of an emergency, as required by the Motor Vehicle Act [57] was a breach of a statutory provision enacted for the protection of users of the highway and prima facie gave a cause of action to anyone injured as a result of its breach. Plaintiff had demonstrated that on the balance of probabilities the breach of the statutory duty caused or materially contributed to his injury and damage. The court did not find it necessary to decide whether the duty imposed by the statute was an absolute one or whether it merely imposed a burden on the individual to show that he had acted reasonably.

With respect to other traffic regulations, we are reminded in the case of *Levasseur v. Berubé* [58] that the driver with the right of way is entitled to rely on the other driver's obedience to the law and will not be held negligent

---

[55] Coote v. Stone, [1971] 1 All E.R. 657 (C.A. 1970).

[56] Blakney v. Leblanc, 2 N.B.2d 274, 13 D.L.R.3d 180 (1970).

[57] N.B. Stat. 1955 c. 13, § 217, *as amended*.

[58] 2 N.B.2d 417 (1970); *see also* Pilgrim v. Weston Bakeries, [1970] 3 Ont. 256, 12 D.L.R.3d 692.

unless he was aware or should have been aware of the other driver's disregard of the law or unless, having becoming aware of it, he had an opportunity to avoid the accident.

Train engineers at railway crossings are entitled to make the same assumption of motor vehicle drivers. [59] The fact that the train has been operated in compliance with the requirements of the Railway Act [60] is sufficient to meet any allegation of negligence in the absence of any exceptional circumstances which would impose a higher duty of care.

The seat belt controversy has arisen again in the Alberta Supreme Court decision of *Anders v. Sim.* [61] The court found no contributory negligence for failure to have worn the available seat belt. A previous decision of the British Columbia Supreme Court [62] was expressly disapproved and the reasoning of the Nova Scotia Supreme Court [63] applied. The basic fallacy of the seat belt defence would seem to be that there is no duty on a motorist to take protective measures against the mere possibility of some future negligent act by another. Such a duty could rise by statutory enforcement of the use of the seat belt.

B. *Liability of Highways Departments*

From time to time, the blame for accidents on the highway can be attributed, at least in part, to the carelessness of the highways department. In a recent Supreme Court of Canada decision, [64] a provincial highways department was found to be fifty per cent at fault for failure to properly warn of a highway curve under construction.

In *Queensway Tank Lines v. Moise* [65] the highways department was joined as a third party in an action for damages because it had not painted the white line down the centre of the highway with the result that the lane was one foot wider in plaintiff's direction. Defendant contended that plaintiff had crossed the physical centre of the road and thus had not given him half of the road. However, it was held that defendant still had to show that plaintiff had been negligent. It was found that plaintiff had acted as a reasonably prudent and careful man in taking the white line to be the line dividing his half of the highway from the defendant's half.

The case of *Allan v. Saskatoon* [66] re-emphasizes the importance of framing actions in the alternative when proceeding against a municipality. An accident was caused by the failure of the city to remove snow properly from the street. The limitation period for an action in disrepair had passed.

---

[59] C.P.R. v. Pawliw, 71 W.W.R. (n.s.) 692 (Sask. 1969); *see also* Kozack v. Richter, [1971] 1 W.W.R. 508 (Sask. 1970).

[60] CAN. REV. STAT. c. 234, § 311(1) (1952).

[61] 73 W.W.R. (n.s.) 263, 11 D.L.R.3d 366 (Alta. Sup. Ct. 1970).

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

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

[64] Vinnal v. The Queen, [1970] Sup. Ct. 502, 12 D.L.R.3d 196.

[65] [1970] 1 Ont. 535, 9 D.L.R.3d 30 (1969).

[66] [1971] 3 W.W.R. 448 (Sask.).

However, the action was also brought in nuisance and negligence which were not subject to any limitation period. It was held that the common law liability based on nuisance and negligence was not abrogated by legislation unless clearly set out in the act.[67] The act was silent on this matter and consequently, the city was held liable for breach of its duty to remove snow in a manner that would not endanger the safety of the people using the street. This duty is, however, not an absolute one, as illustrated by the Ontario case of *Wright v. Wilson.*[68]

Every driver must be aware of the driving conditions he will at times meet in travelling upon the highways and for that reason he must accept some of the risks. In the *Wright* case, the road at the entrance to a bridge had been free of ice at the end of the afternoon, but had frozen over by 7:30 p.m. when the accident occurred. It was held to be unreasonable to expect the municipal authority to have taken action in so short a time.

Another interesting case in this area is *Millette v. Coté.*[69] The remarks of Mr. Justice Galligan are extremely lucid and provide insight into the various duties respecting maintenance of highways. The scene of the accident was a notorious stretch of highway known as the "Killer Strip." The particular portion of the highway where the accident occurred had a tendency to become icy and treacherous during the winter. An accident had already occurred at that spot earlier in the day. The policeman at the accident noted the condition of the road but made no great effort to report it to the highways department. Galligan held that the duty imposed by section 33(1) of the Highway Improvement Act[70] to maintain and keep the highways in repair requires the highways department to use the means at its command to supply the travelling public with an open and reasonably safe highway. In this case, the department knew or ought to have known of the tendency of the road to ice up and should have remedied the situation or at least warned of its existence. The department was found negligent in failing to perform reasonable inspection and failing to take reasonable steps to reduce or eliminate the hazard or give warning of it. The policeman at the accident was found in breach of the duty on the part of a police officer patrolling a highway to observe and report dangerous conditions seen by him on his patrol.

C. *Gratuitous Passengers and Gross Negligence*

When a negligent driver causes an accident which results in injury to his passengers, not only is he likely to lose their companionship, but the number of cases in this area would seem to indicate that his conduct will also be the subject of a civil action.

There is, of course, a higher duty owed to a passenger who pays for his journey than to a passenger who does not. Two conflicting decisions have recently come to light on the issue of whether a guest passenger who has made voluntary contributions to help pay for his trip is a gratuitous pas-

[67] The City Act, SASK. REV. STAT. c. 147 (1965).
[68] [1970] 2 Ont. 391, 11 D.L.R.3d 42 (High Ct. 1969).
[69] [1971] 2 Ont. 155, 17 D.L.R.3d 247 (High Ct. 1970).
[70] ONT. REV. STAT. c. 171 (1960).

senger in the absence of any prior agreement as to payment. The Quebec Court of Appeal decided that it was necessary to prove the existence of a prior agreement as to remuneration. [71] The Newfoundland Supreme Court decided that the passenger need not establish an arrangement of a commercial nature with the driver. The existence of voluntary remuneration is sufficient. [72]

In *Platt v. Katz* [73] two aluminum products salesmen were travelling in the same district to call on householders. They agreed to go in the same car and share the cost of the gasoline. They were also to share in the commissions they earned. Due to the negligent driving of one of them the other was injured and the issue arose as to whether the plaintiff could be called a gratuitous passenger. The court looked at the whole of their agreement as a commercial venture and held that the arrangement for the use of the car was an essential part of the venture and could not be separated from it. [74]

Sometimes the issue is not whether the passenger paid his way, but whether he was a passenger at all. Two Manitoba decisions [75] employed the evidentiary presumption of continuance to determine that the last known driver is assumed to have been the driver in cases where it is impossible to tell who was driving at the time of the accident.

Before there can be any recovery against a negligent driver by a gratuitous passenger, his acts must constitute gross negligence or wilful and wanton misconduct. The guiding light in these matters continues to be *McCulloch v. Murray.* [76] Mr. Chief Justice Duff wrote: "All these phrases, gross negligence, wilful misconduct, wanton misconduct, imply conduct in which, if there is not conscious wrong doing, there is a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves." [77]

Unless the carelessness goes substantially beyond mere casual inadvertence or momentary forgetfulness or thoughtlessness it does not amount to gross negligence. [78] In order to provide recovery for the passenger, the courts have tended to give gross negligence a very wide definition. However, a recent Manitoba decision [79] serves as a reminder that there is a very clear distinction between gross negligence and ordinary or simple negligence and that the courts ought to be hesitant in finding a driver guilty of gross negligence unless his conduct falls squarely within the words of Duff in *McCulloch v. Murray.*

---

[71] La Compagnie d'Assurance Provinces-Unies v. Hamel, [1970] Ins. L.R. 1057 (Que.).

[72] Gilbert v. Upshall, 12 D.L.R.3d 187 (Nfld. Sup. Ct. 1969).

[73] [1971] 1 Ont. 342, 15 D.L.R.3d 296 (1970).

[74] *See also* Teasdale v. MacIntyre, [1968] Sup. Ct. 735, 69 D.L.R. 1.

[75] Hoplock v. Zaporzan, 74 W.W.R. (n.s.) 594 (Man. Q.B. 1970); *see also* Dubois v. Canada Permanent Trust, 75 W.W.R. (n.s.) 107 (Man. Q.B. 1970).

[76] [1942] Sup. Ct. 141, [1942] 2 D.L.R. 179.

[77] *Id.* at 145, [1942] 2 D.L.R. at 180.

[78] Hagg v. Bohnet, 38 W.W.R. (n.s.) 679, at 685, 33 D.L.R.2d 378, at 386 (B.C. 1962).

[79] Dahl v. Saydack, 73 W.W.R. (n.s.) 133 (Man. Q.B. 1970); *see also* Ivins v. Preece, 73 W.W.R. (n.s.) 391 (Alta. Sup. Ct. 1970).

In this case, defendant was driving along a city boulevard at 4:00 a.m. He was proceeding at a moderate speed when he allowed his attention momentarily to wander; his car struck a wooden light standard causing serious injuries to his passenger. It was held that while defendant was clearly negligent, his momentary lapse of attention during a short period of driving, which was otherwise unexceptionable, did not amount to gross negligence.

To illustrate the other extreme, it was relatively easy to find gross negligence on the part of a driver who was driving on an unfamiliar road at night using his low beams, with one hand around his girlfriend, the other on the steering wheel and a bottle of beer between his legs. [80]

Two Western decisions [81] illustrate the principle that acts which are not gross negligence in themselves ought not to be considered cumulatively to amount to gross negligence. Without delving into the facts of these cases, the principle was properly expressed to be that the circumstances of the negligence must be considered in toto and not on a cumulative basis.

An interesting twist to this area of the law emanates from two decisions one from Saskatchewan [82] and the other from Nova Scotia. [83] While the Saskatchewan Vehicles Act [84] was found to be of general application to highways and private property, the Nova Scotia Motor Vehicle Act [85] was found to be inapplicable to private property. The practical effect is soon obvious. In the event of an accident on private property the gratuitous passenger in Nova Scotia need only prove ordinary negligence, while the same passenger in Saskatchewan must establish gross negligence. It should also be noted that traffic regulations generally, do not apply, therefore, to motor vehicles on private property in Nova Scotia.

Two interesting cases on the issue of gross negligence have arisen because the driver in each instance either fell asleep at the wheel or became hypnotized by the road. In each case the driver sought to use his condition as a defence against an action for damages by his passenger.

In *Brennan v. Sabatier* [86] the defendant driver had been awake for all but two and one-half of the twenty-four hours prior to the accident. However, he denied that he had had any forewarning of sleep. It was held that the true test is not whether he appreciated the danger of falling asleep, but whether in the light of the surrounding facts and circumstances, he ought to have appreciated the danger of falling asleep and the danger of driving under those circumstances. Although defendant claimed that he was not aware of the premonitory signals of fatigue, the court found that he clearly ought to have been. A similar test is applied in cases of

---

[80] Gaudet v. Teed, 2 N.B.2d 535 (Q.B. 1970).

[81] Marchyshyn v. Cole, [1971] 1 W.W.R. 730 (Sask.), Duchesne v. Horn, [1971] 3 W.W.R. 301 (Alta. Sup. Ct.).

[82] Hudon v. Haakenson, [1971] 1 W.W.R. 67, 16 D.L.R.3d 578 (Sask. 1970).

[83] McQuarrie v. Purkis, 1 N.S.2d 317 (Sup. Ct. 1970).

[84] SASK. REV. STAT. c. 377 (1965).

[85] N.S. REV. STAT. c. 191 (1967).

[86] 75 W.W.R. (n.s.) 752, 16 D.L.R.3d 234 (Alta. 1970).

"highway hypnosis." If defendant had any actual or constructive warning of the development of a hypnoidal state it is his responsibility to act so as to prevent the state from developing. [87] In this type of case the defendant driver is often at a loss to explain his actions due to the manner in which he slowly lost consciousness. In an attempt to infer gross negligence, plaintiff's counsel will often plead *res ipsa loquitur.* Commenting on this practice in *Ivins v. Preece,* [88] Mr. Justice MacDonald of the Alberta Supreme Court asked: "How can the maxim of *res ipsa loquitur* create a finding of 'gross negligence' or of 'wilful and wanton misconduct'? It seems clear that this finding can only be made if it is: (1) Established by the evidence; or (2) Inferred from the evidence as the reasonable and probable conclusion to be drawn from the evidence." [89]

A set of circumstances common to many highway accident cases finds the driver and passenger drinking together before embarking upon their journey. If an accident occurs in which the passenger is injured, the defendant driver will usually seek shelter in the maxim *volenti non fit injuria.* However, the judgment of Mr. Justice Cartwright in *Lehnert v. Stein* [90] has rendered the defence practically useless and since that decision most drivers have been assessed with various degrees of fault depending on the circumstances.

Another defence often pleaded in these cases is described by the maxim *ex turpi causa non oritur actio.* Its effectiveness is also waning. In the recent case of *Rodrigue v. Penner,* [91] the differing opinions expressed by several learned authors in respect of *ex turpi* are reviewed. No real conclusion is reached as to its present state but reference is made to the statement of Mr. Justice MacDonald in *Foster v. Morton,* [92] later cited with approval by the Supreme Court of Canada. [93] MacDonald said that: "[A]uthority of the clearest kind should be required before concluding that the mere fact that the conduct of a party to a civil action was wrongful as being in violation of the Criminal Code or a penal act constitutes a defence." [94] The defence no longer applies in Ontario, since the case of *Lewis v. Sayers.* [95] In that case section 4 of the Negligence Act was under consideration. [96] It provides: "In any action for damages which is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff which contributed to the damages, the court shall apportion the damages in proportion to the degree of fault or negligence found against

---

[87] McDonald v. Little, 74 W.W.R. (n.s.) 132, 14 D.L.R.3d 114 (Alta. Sup. Ct. 1970).

[88] 73 W.W.R. (n.s.) 391 (Alta. Sup. Ct. 1970).

[89] *Id.* at 394; *see also* Lardner v. Canada Permanent Trust, 71 W.W.R. (n.s.) 759, 6 D.L.R.3d 628 (Man. Q.B. 1969).

[90] [1963] Sup. Ct. 38, 36 D.L.R.2d 159 (1962); *but see* Champagne v. Champagne, 67 W.W.R. (n.s.) 764 (B.C. Sup. Ct. 1969).

[91] 74 W.W.R. (n.s.) 96 (Man. Q.B. 1970).

[92] 38 Mar. Prov. 316, 4 D.L.R.2d 269 (N.S. Sup. Ct. 1956).

[93] Miller v. Decker, [1957] Sup. Ct. 624, at 627-28, 9 D.L.R.2d 1, at 10.

[94] *Supra* note 92, at 333, 4 D.L.R.2d at 281.

[95] [1970] 3 Ont. 591, 13 D.L.R.3d 543 (Dist. Ct.).

[96] ONT. REV. STAT. c. 261 (1960).

the parties respectively." In the course of a very sensible judgment, Judge Gould expressed the view that: "[I]n a case to which, by reason of its facts, s. 4 of the *Negligence Act* applies, the Ontario Legislature has quite deliberately substituted for the *ex turpi causa* rule a positive direction that the Court shall make a finding as to the degree of fault or negligence to be attributed to every party and shall apportion the damages accordingly." [97]

The effect of the important Ontario decision in *Menow v. Honsberger* [98] is already beginning to show in other unrelated areas. In the Manitoba decision in *Hempler v. Todd* [99] it was unclear from the evidence whether the owner or his companion had been driving the car prior to its leaving the road. Both had been drinking heavily. Mr. Justice Hall held that it did not matter who was driving, because in either event defendant owner was fifty per cent at fault. If the owner had been driving then his companion had contributed to his own demise as an active and willing participant in the activity which led to his death. If his companion had been driving, then the owner of the car had breached a duty owed to his companion not to allow him to drive the vehicle when he knew or ought to have known that he was placing his companion in a position of personal danger. It was clearly negligent for the owner to have permitted his friend to drive while intoxicated; however his friend had to accept some degree of fault for his negligent operation of the vehicle.

D. *Liability of Automobile Owners*

Every province in Canada has a motor vehicle statute containing a provision for imposing vicarious liability upon the owner of a motor vehicle for the negligent acts of persons driving his vehicle with his consent. Section 70(1) of the Motor-vehicle Act [100] of British Columbia goes further than this and imposes liability on the owner for the acts of any member of his family living with him and driving his car. The section reads as follows:

> In an action for the recovery of loss or damage sustained by any person by reason of a motor-vehicle on any highway, every person driving or operating the motor-vehicle who is living with and as a member of the family of the owner of the motor-vehicle, and every person driving or operating the motor-vehicle who acquired possession of it with the consent, express or implied, of the owner of the motor-vehicle, shall be deemed to be the agent or servant of that owner and to be employed as such, and shall be deemed to be driving and operating the motor-vehicle in the course of his employment.

Several litigants have recently sought the proper interpretation of this section in the British Columbia Supreme Court. In *Usher v. Goncalves* [101] it was decided that consent to drive a motor vehicle may be implied notwithstanding the expressed refusal of the owner to permit such driving,

---

[97] *Supra* note 95, at 598, 13 D.L.R.3d at 550.

[98] [1970] 1 Ont. 54, 7 D.L.R.3d 494 (High Ct. 1969); *aff'd* [1971] 1 Ont. 129, 14 D.L.R.3d 545 (1970).

[99] 74 W.W.R. (n.s.) 758, 14 D.L.R.3d 637 (Man. Q.B. 1970).

[100] B.C. REV. STAT. c. 253 (1960).

[101] 9 D.L.R.3d 15 (B.C. Sup. Ct. 1969).

if the owner is aware that the driving will probably take place. This statement was qualified in *Large v. Platais.* [102] There, the court held that if no intention or expectation that the vehicle will be driven by someone other than the person entrusted with it, the owner is relieved of liability.

The court in *Paynter v. Wood* [103] decided that although section 70(1) speaks of a member of the family of the owner, it does not necessarily imply that the owner must be *in loco parentis* to the driver, but the vicarious liability of the owner depends solely on his ownership of the vehicle and his membership in the family. In this case, a twenty-seven year old man returned home temporarily to live with his mother and eighteen year old brother. He borrowed his younger brother's car and caused an accident which resulted in injuries to several other persons. The younger brother was held liable under section 70(1) for the damages incurred by his older brother.

In *Labentsoff v. Smith,* [104] the plaintiff, who was the owner of the car, argued that section 70(1) created a master-servant relationship and that the defendant, who was driving the car at the time of the accident, was in breach of this contractual relationship by failing to exercise reasonable care in the driving of the car. In his opinion, the defendant was therefore liable to indemnify him for the voluntary settlement he had made with the injured party. The court expressed a different view and held that the section only applies to recovery of loss or damage sustained by any person by reason of a motor vehicle on a highway and it could not be used by an owner seeking indemnity from the driver of his vehicle for a settlement he had made with a person injured by that driver.

A recent Supreme Court of Canada decision [105] indicates the willingness of the courts to imply consent for the use of a motor vehicle in circumstances which can only be described as "dubious." The underlying reason is, of course, to enable the plaintiff to dip into the coffers of an insurance company rather than force him to seek recovery from an impecunious defendant. In this case, the mother had given her son the full use of her car. For all practical purposes, the mother exercised no control over who was to drive. Evidence showed that she gave her tacit approval for the car to be driven by anyone to whom her son entrusted it. Unknown to his mother, the son had been teaching a girlfriend to drive, using the mother's car as a practice vehicle. The girl had only her beginner's permit and had never driven the car while alone. One evening, while at a restaurant, without any evidence of express consent on the son's part, the girl took the car, using the keys which were left in the ash tray, and proceeded to drive one of her friends home whereupon an accident occurred. Mr. Justice Ritchie examined the circumstances and the intimate relationship of the young couple and implied consent on the son's behalf and through him on the part of his mother. In the result, the mother was held liable.

---

[102] 75 W.W.R. (n.s.) 147 (B.C. Sup. Ct. 1970).

[103] [1971] 1 W.W.R. 546, 15 D.L.R.3d 622 (B.C. Sup. Ct. 1970).

[104] 71 W.W.R. (n.s.) 304, 8 D.L.R.3d 586 (B.C. County Ct. 1969).

[105] Deakins v. Aarsen, 17 D.L.R.3d 494 (1970).

The effect of the recent English Court of Appeal decision in *Launchbury v. Morgans* [106] will certainly be worth watching in the near future. In England, the liability of the owner of an automobile is based on the common law. The owner will only be relieved of liability if the car was being driven on an occasion in which he had no interest or where he had not consented to its use. There are no special statutory provisions regarding the use of the car by members of the family.

The *Launchbury* case involved a family car registered in the wife's name, but which the husband was free to use at any time. On his way home from work one night, the husband decided to stop at a tavern for a drink. Sometime later he decided he was too intoxicated to drive home and asked one of his friends to take over the wheel. An accident occurred shortly after leaving the tavern. The husband was killed and other passengers who were in the car were seriously injured. The friend's negligent driving was the cause of the accident. The other passengers then sought to impose liability for their injuries on the wife of the deceased. Lord Denning, during the course of his judgment, noted with interest the fact that the plaintiff would not recover anything at all unless it was from the wife's insurance company because there had been some difficulty with the insurance of the husband and his friend. Lord Denning's conclusion was that it made no difference if the car was being driven for the wife's purposes, the husband's purposes or those of the family and children; it was in the interest of the wife that the third party should drive the car home. Lord Justice Megaw expressed a strong dissent from the majority view. He agreed that the wife had an interest in the safety of her husband and the safety of the car. However, he thought that using the car for a "pub-crawl" could not possibly be on the wife's behalf or for her purposes. Megaw obviously missed the thrust of Denning's argument, namely, that the key factor in imposing liability is the interest in the car and not the purpose for which it is being used.

This decision ought to be of special interest in jurisdictions where the motor vehicle act does not contain the "family" provision. It would seem that the decision has the same effect as the statutory provision and, although not binding, could be used to imply consent where the family car is taken by one of the members without the owner's express permission.

IV. Vicarious Liability

A. *Employer-employee*

"The doctrine of vicarious liability has not grown from any very clear, logical or legal principle but from social convenience and rough justice." [107] The pattern usually followed by the courts is to attach some moral responsibility to the individual or concern who is being saddled with the legal liability for another's tort. In most instances, this moral justification is a thin disguise for their continuing attempts to find "deeper pockets."

---

[106] [1971] 1 All E.R. 642 (C.A.).

[107] Imperial Chemical Indus. v. Shatwell, [1965] A.C. 656, at 685, [1964] 2 All E.R. 999, at 1011-12 (1964) (Lord Pearce).

Two recent Ontario decisions illustrate this attitude. In the first one, [108] the defendant was acting as agent for the plaintiff to solicit drivers in Toronto who would take plaintiff's cars from there to Calgary. The defendant solicited by newspaper, but took no steps to inquire further as to the driver's trustworthiness or capability. One of the persons hired by the defendant was driving through the United States when he was involved in an accident attributable to his own carelessness. The car was a total wreck. The driver abandoned it and disappeared. The defendant was held liable to plaintiff for the value of the car because it was necessarily implied that reasonable care and skill would be used in the selection of capable drivers.

In the second case, [109] the owner of a trucking firm was held liable under section 54(1) of the Highway Traffic Act [110] for one of his drivers who exceeded the load limit specified for his vehicle. Even though the offence was one of "operating" the vehicle while overloaded, the court decided that the word had a more general meaning and it was therefore not necessary to prove that the owner was the driver in order to register a conviction.

In another Ontario case involving a trucking firm, [111] the owner of a truck devised a lease agreement with his only customer whereby the driver of his truck would become the employee of the customer. In this way, the owner had the use of a licence under the Public Commercial Vehicles Act [112] which his customer held, but which was not otherwise available to him. Inevitably, the driver was involved in an accident and the question arose as to who was liable, the owner or the customer. Mr. Justice Lacourciere looked closely at the substance of the leasing agreement and decided that the actual relationship of the parties was of controlling significance and not the sham transaction which was never intended to operate according to its terms and was devised only to evade the application of a public statute.

Moving from trucks to tugboats we find a noteworthy decision from the Supreme Court of British Columbia. [113] In a previous judgment the Texada Towing Company had been found liable for the sinking of a customer's barge caused by the carelessness of its employee, Minette. Minette escaped liability in the first action because it was found that his only duty of care was owed to his employer and not to the barge owners. In the present action the towing company sought indemnity from Minette. Minette pleaded res judicata on the ground that the issue of his liability had already been decided. The court did not agree and held that Minette's negligence was solely responsible for Texada's liability, that is, the same act which

---

[108] Hillcrest General Leasing Ltd. v. Guelph Inv. Ltd., [1970] 3 Ont. 565, 13 D.L.R.3d 517 (County Ct.).

[109] Regina v. Peterson, [1971] 1 Ont. 559, [1971] 2 Can. Crim. Cas.2d 154 (1970).

[110] ONT. REV. STAT. c. 172 (1960).

[111] Reid v. Wilson, [1970] 2 Ont. 760, 12 D.L.R.3d 104 (High Ct. 1969).

[112] ONT. REV. STAT. c. 319 (1960).

[113] Texada Towing Co. v. Minette, 71 W.W.R. (n.s.) 417, 9 D.L.R.3d 286 (B.C. Sup. Ct. 1969).

rendered Texada liable to the barge owners also rendered Minette liable to Texada. There was no difference between the sort of negligence which was in issue in both actions and since Minette's negligence was res judicata he could not escape in the second action for lack of a duty owed.

B. *Hospitals*

Only two decisions of interest have come to light recently on the issue of vicarious liability of hospitals. The propositions evinced by either of them are probably not seriously subject to question. In *Johnston v. Wellesley Hospital,* [114] the physician in question was a member of the active staff of the hospital with the privilege of admitting his patients to the hospital and treating them there. He received no salary or emolument of any kind from the hospital. All of his medical income was derived from fees for which he billed his patients directly. The hospital was found not liable for his actions.

In the Supreme Court of Canada decision in *Martel v. Hotel-Dieu St.-Vallier* [115] the hospital was found vicariously liable for a resident anaesthetist whose salary was based on fees collected by the hospital for his services. Because the anaesthesia was administered before the surgeon arrived in the operating room Mr. Justice Pigeon refused to accept the argument that the anaesthetist fell under the direction of the surgeon.

C. *Independent Contractors*

Vicarious liability for the acts of an independent contractor received thorough treatment in the Ontario case of *Custom Ceilings Inc. v. S. W. Fleming & Co.* [116] Plaintiffs, contractors on a construction job, sub-contracted with defendants to install some material in a ceiling. Defendants' employees were careless in their work and weld splatters from their oxy-acetylene torches damaged some wall panels. Plaintiffs reimbursed the general contractors for the damage and subsequently sought indemnity from the defendants. The defendants argued that plaintiffs owed no duty to the general contractors to pay for the damages since they (defendants) were independent contractors and therefore, plaintiffs could not be liable for their acts unless certain conditions were met. The issue was, therefore, whether these conditions did exist. The rule with respect to the vicarious liability of an employer of an independent contractor can be stated as follows: Such employer will be liable for the acts of the contractor when an inherently dangerous task is being performed and it is within the contemplation of the employer that the contractor will be doing this work. Following the Supreme Court decision in *Aga Heat (Canada) Ltd. v. Brockville Hotel Co.* [117] the court felt that the use of oxy-acetylene torches in the circumstances of the case, was an inherently dangerous activity imposing a non-delegable duty on the plaintiff to take appropriate precautions. With respect to the second condition it was noted from the evidence that Fleming

[114] [1971] 2 Ont. 103, 17 D.L.R.3d 139 (High Ct. 1970).
[115] [1969] Sup. Ct. 745, 14 D.L.R.3d 445.
[116] [1970] 3 Ont. 17, 12 D.L.R.3d 209 (High Ct.).
[117] [1945] Sup. Ct. 184, [1945] 1 D.L.R. 689.

had never sought authorization for the use of the torches. It was, therefore, to be inferred that Fleming felt the work was so clearly within the scope of its contract that no authorization was needed. Indeed, it was thought that any time the negligent conduct of an independent contractor bore some relation to the work to be performed under the contract, the employer would be liable. Even in the event that there was no duty, the court felt that Fleming would be liable under an implied contract of indemnity and cited Mr. Justice Ferguson in *McFee v. Joss* [118] as authority. An implied contract of indemnity arises in favour of a person who, without fault on his part, is exposed to liability and compelled to pay damages on account of the negligence or tortious act of another, provided the parties are not joint tortfeasors in such a sense as to prevent recovery. [119]

D. *Per quod servitium amisit*

The status of the action *per quod servitium amisit* does not yet seem to be settled in Canada. Two recent decisions, one from Manitoba and the other from Ontario, reached opposite conclusions on this issue. In both cases, plaintiff was the major shareholder of a company and he sued in the corporate name to recover for the loss of his own services as company officer.

In *Schwartz v. Hotel Corporation of America (Manitoba) Ltd.*, [120] it was held that such an action was not maintainable in Manitoba except for loss of services of domestic or household servants, or members of the family performing such services, or for the loss by the Crown arising out of the armed services. Mr. Justice Hunt was of the opinion that the law in Manitoba was that expressed by Lord Denning in *Inland Revenue Commissioners v. Hambrook*. [121] In that case, Lord Denning traced the history of *per quod* and concluded that: "I think it should be confined today (as it was in the eighteenth century) to the realm of domestic relations where a member of the master's household is injured: for that is the only realm to which it can in reason be applied. It does not lie, therefore, at the instance of governments, limited companies, or other employers who keep no household." [122]

A different result was arrived at in *Gibson v. Dool.* [123] Judge Gratton relied heavily on *Nykorak v. Attorney General of Canada,* [124] which held that the Crown is entitled to bring a *per quod* action for the loss of services of members of the armed services. He concluded that if the Supreme Court in *Nykorak* had perceived the relationship of master and servant between Crown and service men as one different from the usual relationship between

---

118 56 Ont. L.R. 578, [1925] 2 D.L.R. 1059.

119 *Id.* at 584, [1925] 2 D.L.R. at 1064.

120 75 W.W.R. (n.s.) 664, 15 D.L.R.3d 764 (Man. Q.B. 1970).

121 [1956] 2 Q.B. 641, [1956] 3 All E.R. 338 (C.A.); *see also* Swift Canadian Co. v. Bolduc, 29 D.L.R.2d 651 (N.S. Sup. Ct. 1961)

122 [1956] 2 Q.B. 641, at 666, [1956] 3 All E.R. 338, at 343 (C.A.).

123 [1970] 3 Ont. 60, 12 D.L.R.3d 325 (Dist. Ct. 1969).

124 [1962] Sup. Ct. 331, 33 D.L.R.2d 373; *see also* The Queen v. Sylvain. [1965] Sup. Ct. 164, 52 D.L.R.2d 607 (1964).

employer and employee in commercial and industrial fields it would have so indicated.

In his opinion *Nykorak* decided, contrary to all English cases, that wherever the master-servant relationship exists, whether such relationship is created by statute or exists at common law, the action *per quod servitum amisit* lies without the limitations sought to be imposed by *Hambrook*.

V. Occupiers Liability

This area of law continues to be governed in Canada by rules which classify entrants onto land according to the interest of the occupier and specify the standard of care to be observed accordingly.

Thus an invitee can expect protection, as far as reasonable care will permit, against unusual danger of which the occupier knows or ought to have known. One of several factors affecting the "unusualness" of a situation may be the age of the claimant. This would appear to have been the deciding factor in a Saskatchewan case [125] where a fourteen-year old girl, who was familiar with the layout, recovered for injuries suffered when she ran through a glass panel at the school entrance, believing it was an open doorway.

Lord Porter's well-known definition of "unusual" [126] guided the court in *Bilenky v. Ukrainian Greek Catholic Parish*. [127] In this case, as the plaintiff invitee was entering the church hall to play bingo, she slipped on some steps which she had noticed to be icy. The parish caretaker, a new employee, had neither sanded nor cleared the steps. The court pointed out that it is not a necessity that the danger be unseen or unknown, although that is a relevant factor in determining the issue of contributory negligence, which was found to be thirty-five per cent in this case. The plaintiff clearly was not a member any particular class whose training or experience would have made this an expected or usual danger. [128]

Similarly, where a bank is aware of inadequate eavestroughing which allows excessive amounts of water to be tracked into the building, it is liable to a customer who slips because of the moisture. [129] The patron may

[125] Sombach v. Regina Catholic Separate School, [1971] 1 W.W.R. 156, 18 D.L.R.3d 207 (Sask. 1970). *See* Piket v. Monk Office Supply Ltd., 64 W.W.R. (n.s.) 63 (B.C. Sup. Ct. 1968), where the adult plaintiff ran into a glass door while leaving the defendant's store and was denied recovery for failing to use reasonable care for her own safety.

[126] London Graving Dock Co. v. Horton, [1951] A.C. 737, at 745.

[127] [1971] 2 W.W.R. 595 (Man. Q.B.).

[128] *See* Brandon v. Farley, [1968] Sup. Ct. 150, 66 D.L.R.2d 2[illegible], where a tank truck operator whose business was to obtain water and who was aware that in winter time ice from spillage formed on a door sill was denied recovery for his fall on the basis that this was not an unusual danger for persons of his class.

[129] Bull v. Royal Bank, 72 W.W.R. (n.s.) 150 (B.C. Sup. Ct. 1969). *Cf.* Campbell v. Royal Bank, [1964] Sup. Ct. 85, 43 D.L.R.2d 341 where in very similar circumstances, the bank was found liable, one of the deciding factors being the economical and easy precautions which were not taken to prevent slush being tracked into the bank.

successfully maintain that water in the public area of the bank constitutes an unusual danger as far as he is concerned as an ordinary customer and that a duty is thereby imposed on the occupier.

With respect to the question of who constitutes an invitee, the case of *Pringle v. Price* [130] showed that a potential economic benefit (such as when a friend helps another to clear brush around the home, thus possibly increasing the resale value) may create the status of an invitee. In this case, a large pole, which had gone uninspected by the defendant for ten years, and had since rotted, fell onto the plaintiff as she was helping with the heavy gardening. The defendant was found liable for not satisfying the duty which required her to warn of concealed dangers and to maintain a reasonable system of inspection. [131]

Licensees, must take the premises as they find them subject to the qualification that the occupier must warn them of concealed dangers or traps of which he has actual knowledge. Thus where the potential hazard is visible, even if not seen, there can be no recovery. [132] With regard to actual knowledge, it is not necessary to know of the very trap or defect; it is sufficient to be aware of the potential risk. Thus in *Mantin v. Hamilton,* [133] a boy who had come onto premises to collect bottles was able to recover damages from the landlord for a fall occasioned by a rotted board. The landlord had earlier contemplated making repairs to the verandah and this fact allowed the court to impute actual knowledge to him and in this way circumvent the rigid categorization of the common law.

The theory of duty respecting the trespasser is not to injure him recklessly or maliciously but here again, the fixed category approach is not always suitable, especially where children are concerned. The most transparent device at the court's disposal for imposing higher duty, is to raise the status of the trespasser to that of licensee by imputing consent. An interesting application of the implied licensee device occurred in *Leadbetter v. The Queen.* [134] In this case, an employee of the Post Office placed a mail box alongside a main road but did not properly level it. It was known to the employee that children played in this area. Shortly afterwards, a child

130 73 W.W.R. (n.s.) 705, 13 D.L.R.3d 346 (B.C. Sup. Ct. 1970).

131 An alternative reason given for the decision was based on the statement of Lord Gardiner, L.C., in Comm'r for Rys. v. McDermott, [1967] 1 A.C. 169, at 186, where he said "the basic principle... is that occupation of premises is a ground of liability and is not a ground of exemption from liability... because it gives some control over and knowledge of the state of the premises, and it is natural and right that the occupier should have some degree of responsibility for the safety of persons entering his premises with his permission." Thus even assuming the plaintiff was a licensee, a concurrent duty arose here to do what was reasonable to prevent foreseeable injury. *Cf.* Van Oudenhove v. D'Aoust, 70 W.W.R. (n.s.) 177, at 191, 8 D.L.R. 145 (Alta.) where it was said that "... the distinctions between the various classes of lawful entrants are irrelevant where the injury is caused, not by a static condition of the structure, but by the current activities of the occupier thereon or therein...."

132 Thompson v. Harris, 72 W.W.R. (n.s.) 489 (Sask. Q.B. 1970), where plaintiff caught the pointed heel of her shoe in a clearly visible, though small hole in a piece of plywood serving as a verandah landing, and was denied recovery for her injuries.

133 1 N.B.2d 93, 11 D.L.R.3d 453 (Sup. Ct. 1969).

134 12 D.L.R.3d 738 (Exch. 1970).

climbed onto the box which, because of its uneven placement, fell on and injured the three-year old plaintiff. The court felt that this mail box constituted an allurement and even though the object was on a public way, the duty owed was no less than that expected of an actual occupier.

The implied permission ruse was also employed in *Marquardt v. De-Keyser Enterprises Ltd.* [135] For years, the defendant company had permitted residents to use a baseball diamond situated on their land. However on another piece of their land, the company had just started to work a shale pit, but had neither posted signs warning of the danger of hot shale, nor fenced their operation. The plaintiff, along with another group of youths, had been chased from the site earlier in the day but after the departure of the work crews, they returned and the plaintiff was seriously burned when he fell into the pit. The court noted a recent decision which held that where injury is caused by the current activities of the occupier, the duty to warn a licensee extends to include dangers of which the occupier ought to have known and not simply actually knew. [136] Subsequently, it dismissed the warning of the employee as pertaining only to the danger arising from the actual operation and not to the danger of the hot shale itself, which the defendant ought to have known was a concealed danger or trap.

An interesting English case touching upon the confused area of the child trespasser is *Herrington v. British Ry. Board.* [137] The defendant had erected fences along its lines to protect people from electrocution. Houses were built along certain stretches of the line. At one place, a footpath had been constructed over the line but the fences on both sides of the track were broken down at this point so that a convenient short cut was available. About one and a half months before the plaintiff youth was injured on the electrified line, the stationmaster was notified that children had been seen on the property of the railway. He asked the police to investigate the situation but no follow-up action was ever taken, that is, a system of inspection was never instituted, nor were the fences ever repaired. The trial judge awarded the plaintiff damages and based his decision on the ratio of *Videan v. British Transport Commission,* [138] which broadly stated, says that an occupier owes, even to a trespasser, a duty of reasonable care against foreseeable harm. Although both Lord Justice Edmund Davies and Lord Justice Cross in the Court of Appeal expressed a preference for the reasonably foreseeable and reasonable care tests, both felt obliged to follow the "reckless disregard" test postulated by the Privy Council. [139] The third member of the court, Lord Justice Salmon, did not concede that the trial

[135] 75 W.W.R. (n.s.) 439 (Alta. Sup. Ct. 1970).

[136] *Supra* note 131, in particular the *Van Oudenhove* case.

[137] [1971] 1 All E.R. 897 (C.A. 1970).

[138] [1963] 2 Q.B. 650 (C.A.).

[139] *See* Comm'r for Rys. v. Quinlan, [1964] A.C. 1054, and Comm'r for Rys. v. McDermott, [1967] 1 A.C. 169, which confirm that the law as laid down in R. Addie & Sons (Collieries) Ltd. v. Dumbreck, [1929] A.C. 358, at 365 where Lord Hailsham, L.C., said, "There must be some act done with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the trespasser," is unaffected by Donoghue v. Stevenson, [1932] A.C. 562, [1932] All E.R. Rep. 1.

judge was in error for applying the reasonable care test as set forth in the *Videan* case, but like the other members of the court, he also dealt with the question of liability applying the "reckless disregard" test. Despite the fact that each member of the court suggested a different interpretation for "reckless disregard", they were unanimous in finding that wherever the standard was set, the defendant had breached it. It is to be hoped the House of Lords will, as suggested by Lord Justice Salmon, bury the *Addie* doctrine and along with it ". . . the artificial doctrine based on fictitious permission springing from a supposed allurement which was invented by the courts in an attempt to mitigate the harshness and injustice caused by the ancient legal dogma relating to infant trespassers." [140]

VI. OTHER

A. *Defamation*

A controversy about the merits of fluoridating the public water supply in Vancouver [141] came to a head when the City Health Officer, an avowed advocate of fluoridation was deliberately misquoted and a statement to the effect that fluoridation caused kidney damage was attributed to him. In a clear and well-reasoned judgment, Mr. Justice McIntyre found that the defendant's action would "discredit [plaintiff] in the eyes of reasonable men." [142] However, he went on to hold that there was no express malice even though defendants had acted with full knowledge that the statement was false, [143] reasoning that they were prompted by the heat of the moment and a sincere belief that fluoridation was harmful.

In *Murphy v. LaMarsh,* [144] the court rejected the defence that the words, "heartily detested by most of the Press Gallery" were a mere expression of personal opinion and therefore not defamatory. Quoting Lord Atkin in *Sim v. Stretch,* [145] the court ruled that the words were a bald statement of fact tending to lower the plaintiff in the estimation of right-thinking members of society.

The scope of the defence of qualified privilege was the issue before the court in *Netupsky v. Craig.* [146] The alleged libel was in the form of a letter written by a firm of architects at the request of city authorities defending their position in the face of a telegram sent by the defendant, a consulting engineer, intimating that proposed changes in design would render a particular building unsafe. Both the telegram and letter had been published in city newspapers. Mr. Justice Schroeder held that defendants "were replying to an unfair and unwarranted attack upon their professional integrity and com-

---

[140] *Supra* note 137, at 901.

[141] Bonham v. Pure Water Ass'n, 74 W.W.R. (n.s.) 617, 14 D.L.R.3d 749 (B.C. Sup. Ct. 1970).

[142] *Id.* at 623, 14 D.L.R.3d at 754.

[143] Proof that defendant knows a statement is false is usually regarded as conclusive evidence of malice.

[144] [1971] 2 W.W.R. 196, at 197, 13 D.L.R.3d 484, at 486 (B.C. Sup. Ct. 1970).

[145] [1936] 2 All E.R. 1237.

[146] [1971] 1 Ont. 51, 14 D.L.R.3d 387 (1970).

petence which hey were justified in repelling by a denial and explanation." [147] Finding that this constituted the foundation for the defence of qualified privilege, he went on to add that defendants were thus entitled to considerably wider latitude in framing their reply without risking the allegation of malice. The trial judge had directed the jury that the privilege extended only to words reasonably necessary to answer the inquiry. Schroeder ruled that since there was no evidence of extrinsic or intrinsic malice, the action must be dismissed. The court's conclusion is interesting in view of the fact that at trial, plaintiff succeeded and was awarded $250,000 in damages.

B. *Negligent Misrepresentation*

An Esso car clinic was found liable for advice given by its employees to a prospective purchaser to the effect that the car they had examined required only minor repairs. [148] On the strength of this statement, plaintiff bought the car. A short time later, the car required four hundred dollars worth of repairs to remedy a condition which a careful examination would have revealed. The court held that the employees of the clinic ought to have known under the circumstances that plaintiff was relying on their statement.

In another Ontario case, [149] a firm of diamond merchants sought to recoup their losses after a robbery by suing the company who had installed and serviced the burglar alarm system. The claim was based on statements asserting that the system was foolproof made by the defendant company's technician to the plaintiff's clerk. The court refused to consider this contention stating that there was no evidence in fact or by implication that the technician was authorized to furnish information. Mr. Justice Schroeder stated that plaintiff was attempting to hold defendant liable for failing to say that the system was capable of being circumvented. He went on to hold that such a claim was an unwarranted extension of the *Hedley Byrne* principle.

A recent decision of the Privy Council [150] considered the elements necessary to give rise to a duty of care within the *Hedley Byrne* rule. A policy holder, sought advice from an insurance company about the financial prospects of a second company. Both companies were subsidiaries of the same parent corporation. The information was furnished without disclaimer of responsibility and prompted plaintiff to invest. Shortly afterwards the company floundered carrying all its shareholders with it. Plaintiff alleged negligent misrepresentation relying on the fact that: 1) the company was in a position to provide advice, 2) the advice was given without disclaimer and 3) the company knew that plaintiff was relying on the information. Lord Diplock, speaking for the majority, held that no liability existed because the advice was not given in the course of the company's business.

[147] *Id.* at 71, 14 D.L.R.3d at 407.

[148] Babcock v. Servacar, [1970] 1 Ont. 125 (Division Ct. 1969).

[149] J. Nunes Ltd. v. Dominion Elec. Protection Co., [1971] 1 Ont. 218, 15 D.L.R.3d 26 (1970).

[150] Mutual Life & Citizens' Assurance Co. v. Evatt, [1971] 1 All E.R. 150 (P.C. 1970).

Lacking this element, recovery could only be possible if there was an express holding out by the adviser that he possessed the necessary skill and competence to make the statement. The two dissenting judgments accepted the principle as stated by the majority but disagreed with the narrow definition of the words "in the course of business." Lord Reid stated that the phrase encompasses a company's ordinary activities and thus includes advice given to a client to earn his continued patronage. Therefore liability may arise from which is peripheral to, but nevertheless connected with, the business of the company.

C. *The Right to Privacy*

An individuals right to privacy was the subject of two cases which came before the courts in the past year. In *Krouse v. Chrysler Canada Ltd.*,[151] the question concerned the existence of such a right in law. The court admitted that the action which alleged invasion of privacy was novel but found that jurisdiction existed in Ontario to hear the complaint.

In British Columbia the Court of Appeal[152] resorted to *Black's Law Dictionary* for assistance in construing the provisions of the Privacy Act.[153] Plaintiff was suing a private detective employed by plaintiff's wife to gather evidence for a divorce action. The surveillance was conducted over a period of seven months and plaintiff claimed that the whole thing made him so nervous that his health suffered. The court held that the existence of a violation depended on the nature and the degree of privacy to which a person was entitled in a given situation. Here the detective, acting as the wife's agent had a legitimate right to keep the plaintiff under observation. The investigation was conducted in a reasonable manner without any harassment or embarrassment. The fact that the plaintiff was affected by it was not relevant to the issue since he was not entitled to any greater degree of privacy than an ordinary individual.

D. *Damages*

1. *Extent of Recovery*

The problem of assessing what injuries can be attributed to the defendant's original negligent act when the damage is not immediately apparent has been canvassed in several cases.

In *Dvorkin v. Stuart*[154] plaintiff suffered a coronary occlusion but otherwise was not scratched or bruised when defendant's truck struck his car at an intersection. He recovered from the heart attack but emerged with a traumatic neurosis which manifested itself in a complete change of personality. Applying the principle enunciated in *Dulieu v. White & Sons*,[155] "The tortfeasor takes his victim as he finds him" and the decision in *Smith v.*

151 [1970] 3 Ont. 135, 12 D.L.R.3d 463 (High Ct.).
152 Davis v. McArthur, [1971] 2 W.W.R. 142 (B.C. 1970).
153 B.C. Stat. 1968 c. 39.
154 [1971] 2 W.W.R. 70 (Alta. Sup. Ct. 1970).
155 [1901] 2 K.B. 669.

Christie Brown & Co.,[156] the court held that the accident was the *causa causans* of the plaintiff's present condition notwithstanding an existing predisposition to heart ailment and a low anxiety threshold.

An Ontario decision[157] allowed recovery to plaintiff who suffered two heart attacks following an auto accident. The first occurred within two weeks and the second almost a year later.

The British Columbia Court of Appeal considered the question of recovery in connection with the likelihood of future developments attributable to existing injuries.[158] The plaintiff had a fractured hip and the argument on appeal centred on compensation for the possibility of disabling arthritis setting in at some future time. Mr. Justice Robertson, overruling the trial decision, pointed out that such questions need not be decided on the basis of the strict "balance of probability" test. It is sufficient to establish "on a balance of probabilities that there is a risk of something happening."[159] The degree of proof required is therefore much less.

A recent English case,[160] again involving a car accident, dealt with an unusual chain of events. The husband suffered head injuries causing changes in personality and behaviour patterns. As a result, he became irritable and easily provoked. The wife, suffering from a pre-existing nervous disorder, was unable to work solely because of the effect of her husband's changed behaviour on her vulnerable personality. The court held that "The defendant must take his wife as he finds her and there is no difference in principle between an egg-shell skull and an egg-shell personality . . . . Once damage of a particular kind . . . can be foreseen . . . the fact that it arises or is continued by reason of an unusual complex of events does not avail the defendant . . . ."[161]

In two cases, plaintiffs were awarded damages on the basis of the *Wagon Mound*[162] principle of foreseeability of injury. The injury complained of in both bore only a tenuous link with the original negligent act as compared with the more direct causal connection in the four cases already mentioned. In *Jones v. Wabigwan*,[163] the defendant drove off the road into a field, knocking down a hydro pole and bringing the wires down. Plaintiff went into the field after him and came into contact with the live wires. As a result, plaintiff was severely burned and had to have his leg amputated. Reversing the trial decision, Mr. Justice Schroeder found the defendant

---

156 [1955] Ont. 301, [1955] Ont. W.N. 239 (High Ct.); *aff'd* [1955] Ont. W.N. 570.

157 Starrett v. Gerry, [1970] 1 Ont. 791, 9 D.L.R.3d 541 (High Ct. 1969).

158 Kovats v. Ogilvie, [1971] 1 W.W.R. 561 (B.C. 1970).

159 *Id.* at 564. Robertson declared that this was the proposition laid down by the Supreme Court in Corrie v. Gilbert, [1965] Sup. Ct. 457, 52 D.L.R.2d 1. A reading of that case reveals that his conclusion is at best tenuous. The *Corrie* case could be used with equal effectiveness to argue the opposite.

160 Malcolm v. Broadhurst, [1970] 3 All E.R. 508 (Q.B.).

161 *Id.* at 511.

162 The Wagon Mound (No. 2), [1967] 1 A.C. 617, [1966] 2 All E.R. 709 (P.C. 1966).

163 [1970] 1 Ont. 366, 8 D.L.R.3d 424 (1969).

liable on the ground that the plaintiff's rescue attempt was a probable and foreseeable consequence of defendant's negligence. In *Wieland v. Cyril Lord Carpets Ltd.*, [164] plaintiff was fitted with a neck brace following an accident caused by the admitted negligence of the defendant. The resulting restriction in neck movement made it difficult for her to adjust her head to the position necessary to see properly through her bifocal glasses. As a result she fell while descending some stairs and sustained further injuries. Mr. Justice Everleigh stated that "... in determining liability for those possible consequences it is not necessary to show that each was within the foreseeable extent or foreseeable scope of the original injury in the same way that the possibility of injury must be foreseen in determining whether or not the defendant's conduct gives a claim in negligence." [165]

2. *Punitive Damages*

The wave of controversy stirred up by the 1964 House of Lords decision in *Rookes v. Barnard* [166] has come full circle with the recent decision of the English Court of Appeal in *Broome v. Cassell.* [167] The court, in a highly unusual decision, repudiated the *Rookes* case declaring that the categories [168] created by *Rookes* were both illogical and unworkable. Furthermore, doubts were expressed on the binding force of the decision, the general consensus being that it was decided per in curiam. Almost as an afterthought, the court added that in the event the *Rookes* case *is* binding, the case at bar (involving defamation) qualified under the second category thus allowing an award of punitive damages. The Canadian cases [169] dealing with punitive damages have continued to reject *Rookes* with no equivocation.

3. *Economic Loss*

The question of compensation for loss of profit occasioned by the negligence of the defendant was thoroughly examined in two recent cases which together provide a comprehensive survey of the law in this area. In the first, [170] the defendant, while carrying on construction in the vicinity of the plaintiff's factory, damaged a high voltage cable supplying the factory with electricity. The power failure stopped all production for seven hours and caused raw materials to solidify and clog some of the machines. The defendants conceded that the possibility of such a consequence was foreseeable but sought to escape liability by arguing that they owed no duty of care to

164 [1969] 3 All E.R. 1006.

165 *Id.* at 1009.

166 [1964] 1 All E.R. 367.

167 [1971] 2 All E.R. 187 (C.A.).

168 The case held that punitive damages could only be awarded in the case of oppressive, arbitrary or unconstitutional action by the servants of the government and in the case where the defendant's conduct had been calculated by him to make a profit for himself exceeding compensation payable to the plaintiff.

169 Eagle Motors (1958) Ltd. v. Makaoff, [1971] 1 W.W.R. 527 (B.C. 1970); Parkes v. Howard Johnson Restaurants Ltd., 74 W.W.R. (n.s.) 255 (B.C. Sup. Ct. 1970); S. v. Mundy, [1970] 1 Ont. 764 (County Ct. 1969).

170 SCM (United Kingdom) Ltd. v. W. J. Whittall & Son Ltd., [1970] 3 All E.R. 245 (C.A.).

the plaintiff on the basis that the damage to the factory was indirect and therefore too remote. The court held that recovery depended not on the existence of a duty of care [171] but rather on the existence of material damage from which the economic loss flowed. "[A]part from the special case of imposition of liability for negligently uttered false statements, there is no liability for unintentional negligent infliction of any form of economic loss which is not itself consequential on foreseeable physical injury or damage to property." [172]

In *Rivtow Marine Ltd. v. Washington Iron Works*, [173] plaintiff got judgment on the basis of the existence of a duty of care flowing from the "special case" mentioned above. Defendants manufactured and sold special cranes for use on barges. The plaintiff, a barge owner, learned that one of the cranes had collapsed and killed its operator and took its barge out of service to carry out repairs on the crane. The court awarded damages for profits lost while the barge was idle on the ground that defendants knew of the faulty design of the crane and failed to warn plaintiff to take remedial measures. Mr. Justice Ruttan found that the nature of the business association between plaintiff and defendant coupled with the special knowledge defendant possessed about plaintiff's business operations and the economic loss which might ensue if plaintiff could not choose the time most convenient to take the barge out of service contemplated the existence of a duty of care under the *Hedley Byrne* principle. [174]

---

[171] The court held that a duty of care did exist here. In accordance with Donoghue v. Stevenson, [1932] A.C. 562, [1932] All E.R. Rep. 1, the foreseeability of damage to the factory brought plaintiff within the ambit of persons to whom defendant owed a duty of care.

[172] *Supra* note 29, at 258.

[173] 74 W.W.R. (n.s.) 110 (B.C. Sup. Ct. 1970).

[174] Hedley Byrne & Co. v. Heller & Partners Ltd., [1964] A.C. 465, [1963] 2 All E.R. 575 (1963). For a contrary conclusion, *see* J. Nunes Diamonds Ltd. v. Dominion Elec. Protection Co., [1971] 1 Ont. 218, 15 D.L.R.3d 26 (1970).