TORTS

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I. INTRODUCTION

At a time when its very foundations have been called into question [1] the law of torts has displayed in recent years tremendous resilience as well as a remarkably innovative capacity. It would be irony indeed if this most stimulating area of the law were to be legislated out of existence at a time which represents probably its most fruitful contribution to jurisprudence. What follows constitutes a brief account of some of the principal developments in the law of torts since July, 1971. [2] If, what might seem to be, undue attention is concentrated on the "growth areas," this may perhaps be defended on the basis that it is precisely their novelty which commands interest and critical attention.

The present survey will consider firstly, recent developments in negligence and its associated areas, and will then give a brief account of developments in the law of trespass, nuisance, and what, for want of a better concept, may be called "miscellaneous remedies." [3]

II. DUTY

The nature of the "duty" requirement in negligence has been analysed exhaustively in recent years [4] and the common understanding of it today is that it is a "control device that enables courts to check the propensity of juries to award damages in situations where matters of legal policy would dictate otherwise." [5] Whereas, in former years, judges, with rare excep-

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[1] Professor Fleming has observed: "As I now feel constrained to warn my class at the opening lecture, torts—and especially negligence—is a dying subject, with no-fault automobile plans in North America and the cradle-to-grave compensation system in New Zealand jostling as undertakers," *Book Review*, 11 OSGOODE HALL L.J. 349, at 349 (1973). For an account of the introduction of the no-fault concept into the field of automobile accident insurance in Ontario, see Kavanagh, *Ontario Automobile Accident Benefits*, 6 OTTAWA L. REV. 285 (1973).

[2] The previous *Survey on Torts*, by Johnson, Desjardins, and Grabowski, covered a period which terminated in June, 1971: 5 OTTAWA L. REV. 210 (1971).

[3] *Cf.* A. HARARI, THE PLACE OF NEGLIGENCE IN THE LAW OF TORTS at 22-23 (1962).

[4] A. LINDEN, CANADIAN NEGLIGENCE LAW c. 6, esp. at 207, n.1 (1972).

[5] *Id.* at 207.

tions, [6] were reluctant to speak openly of this policy factor, the trend in the last couple of years has been strongly in favour of frankness. Coupled with this tendency however, there is also evident in the approach of Lord Denning (aided and abetted by his colleagues in the English Court of Appeal), a desire not just to be frank in the recognition of this policy element in *new* areas of the law [7] but to go further and reduce the decisional process in a wide area of previously settled legal principles to a policy determination in each individual case. [8]

The principal areas where policy statements have been most explicit have been in respect of economic loss and occupiers' liability. However, Canadian jurisprudence has made a valuable contribution to the expansion of the area of duty in negligence in respect of positive obligations to act for the benefit of others. Formerly, tort law, echoing the law of contract (which of course grew originally out of tort), [9] generally required what in effect constituted a contractual consideration before it would impose a positive duty to act. This development of the law was made at the expense of the residual areas of positive obligations, which were "of small importance, of rare occurrence, and so they remain today, little understood and disturbing anomalies in the body of the law of tort." [10]

No legal system, however, can sustain indefinitely, principles of such monstrous inhumanity that virtually no one can be found to defend them in terms of justice. [11] The man who sits idly on the quay watching children drown in shallow water before his eyes [12] may be a good example to first year students of the separation of law and morals, but he hardly contributes to the acceptability of tort law in contemporary society. The approach of the Canadian courts to problems of humanity similar to this has been gradualist—not to create a complete *volte face* on the matter but rather, through the creation of "special relationships," to impose positive duties in the particular circumstances of the case. The classic decision in this area is *Horsley v. MacLaren.* [13] In the view of one commentator, the case is "[f]actually . . . probably the most interesting tort case to arise in Canada.

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[6] McDonald, J., in Nova Mink Ltd. v. Trans-Canada Airlines, [1951] 2 D.L.R. 241, at 256, constitutes one of the rare Canadian harbingers of recent developments.

[7] Spartan Steel & Alloys Ltd. v. Martin & Co., [1973] 1 Q.B. 27, at 36.

[8] *Id.* at 37-39.

[9] See, Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217, 316 (1908); Ames, *History of Assumpsit*, 2 HARV. L. REV. 1, 53 (1888); MacDonald, *Wrongful Dismissal: Tortious Breach of Contract*, SPECIAL LECTURES OF THE LAW SOCIETY OF UPPER CANADA: NEW DEVELOPMENTS IN THE LAW OF TORTS 477, at 479-82 (1973).

[10] Bohlen, *supra* note 9, at 226.

[11] *Cf.* Seavey, *I Am Not My Guest's Keeper*, 13 VAND. L. REV. 699 (1960), where the author traces the growth of restrictions on the scope of the general rule of immunity for inaction.

[12] Cf. Osterlind v. Hill, 263 Mass. 73, 160 N.E. 301 (1928); Handiboe v. McCarthy, 114 Ga. App. 541, 151 S.E.2d 905.

[13] [1972] Sup. Ct. 441, 22 D.L.R.3d 545, *aff'g* [1970] 2 Ont. 487, 11 D.L.R.3d 277, *rev'g sub nom.*, Matthews v. MacLaren, [1969] 2 Ont. 137, 4 D.L.R.3d 557.

From the aspect of tort theory it is certainly one of the most important. It will rightly assume a prominent place in the common law tort world." [14] The facts of the decision have been set out in a previous survey [15] and elsewhere in the *Review*. [16] Since the publication of the previous survey, the appeal to the Supreme Court has been reported. By a majority, [17] the appeal was dismissed. Mr. Justice Ritchie, who delivered the majority judgment, recognised that the defendant was under a duty to rescue Matthews and that such duty "was a pre-existing one arising out of Matthews' position as a guest and passenger," [18] although his Lordship was unwilling to speculate on what the origins of such duty were. Since, however, the defendant's conduct had not resulted in an apparent position of "increased danger subsequent to and distinct from" [19] the danger in which Matthews found himself so "as to induce Horsley to risk his life by diving in after him," [20] the defendant was not liable to Horsley's dependants for Horsley's death. In finding that the defendant had not increased the dangerous situation of Matthews, Ritchie adopted with approval the finding of Mr. Justice Schroeder in the Court of Appeal which described the evidence of two boating experts on spelling out "a standard of textbook perfection given at a time when all the evidence had been sifted and all the facts ascertained in the calm and deliberate atmosphere of a judicial investigation." [21] Mr. Justice Laskin, who read the dissenting judgment, agreed that the defendant was under a preexistent legal duty to rescue Matthews. In an interestingly explicit abandonment of the "consideration" requirement referred to above, his Lordship stated: "This was a duty which did not depend on the existence of a contract of carriage, nor on whether he was a common carrier or a private carrier of passengers. Having brought his guests into a relationship with him as passengers on his boat, albeit as social or gratuitous passengers, he was obliged to exercise reasonable care for their safety. That obligation extends, in my opinion, to rescue from perils of the sea where this is consistent with his duty to see to the safety of his other passengers and with concern for his own safety. The duty exists whether the passenger falls overboard accidentally or by reason of his own carelessness." [22] In respect of the factual issue of MacLaren's negligence, Laskin considered that the defendant's conduct was more than simply an error of judgment:"this was not a case where the defendant had failed to execute the required manoeuvre properly, but rather one where he had not followed the method of rescue which, on the

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[14] Alexander, *One Rescuer's Obligation to Another: The "Ogopogo" Lands in the Supreme Court of Canada*, 22 TORONTO L. J. 98, at 122 (1972).

[15] Johnson, Desjardins and Grabowski, *Torts Survey*, 5 OTTAWA L. REV. 210 at 213 (1971).

[16] Stewart, *Note*, 4 OTTAWA L. REV. 325 (1970).

[17] Judson, Ritchie, Spence, J.J., Hall and Laskin, J.J. dissenting.

[18] *Supra* note 13, at 444, 22 D.L.R.3d 545, at 546.

[19] *Id.* at 445, 22 D.L.R.3d 545, at 547.

[20] *Id.* at 444, 22 D.L.R.3d 545, at 546.

[21] [1970] 2 Ont. 487, at 494, 11 D.L.R.3d 277 at 284.

[22] *Supra* note 13, at 461, 22 D.L.R.3d 545, at 559.

uncontradicted evidence, was the proper one to employ in an emergency." [23] Furthermore, the fact that another passenger had been able to rescue his wife (who had also dived overboard) and recover the body of Horsley, through the adoption of the correct navigation procedure "[t]here [being] no external reasons [for the defendant's] failure to do so" [24] militated against the defendant's plea of simple error of judgment. Once the defendant was negligent, Laskin was able to find the rescue attempt of Horsley foreseeable, involving neither contributory negligence nor voluntary assumption of risk on his part.

Menow v. Jordan House Hotel [25] is another "significant" [26] case in this context. The facts, again, are set out in the previous survey; [27] briefly, the plaintiff, a familiar patron of the defendant's beer parlour, was struck by a car on a busy highway on his way home from the beer parlour, having been ejected therefrom a short time previously. He had been drinking for five hours in the beer parlour, and his increasing intoxication had been apparent to the defendant's employees, who nevertheless continued to supply him with drink in breach of the criminal law. The plaintiff's argument that the defendant in such circumstances owed him a duty of care in respect of his physical safety, which duty they had breached by ejecting him in circumstances where they appreciated the risks which awaited him, was accepted by all the Courts, which found the defendant and the plaintiff equally responsible for the accident. [28]

It would be difficult to cavil with the actual decision in the circumstances of the case. The default of the defendants was obviously considerable in that, for their own profit, they aided and abetted the plaintiff in rendering himself incapable of protecting himself, and then simply "faced" their responsibilities by availing themselves of a statutory right to evict the plaintiff. [29] The limits of the decision should, however, also be stressed. Both at the trial and in the Supreme Court, it was explained that nothing like an absolute liability was being imposed on institutions which serve alcoholic beverages, so that anyone who has made himself drunk at a tavern can come back and sue the proprietor when consequent misfortune befalls either himself or another. [30] The plaintiff in the present case was, long before the

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[23] *Id.* at 466, 22 D.L.R.3d 545, at 562.

[24] *Id.*

[25] 38 D.L.R.3d 105 (Sup. Ct. 1973), *aff'g, sub nom.*, Menow v. Honsberger and Jordan House Ltd., [1971] 1 Ont. 129, 14 D.L.R.3d 545, *aff'g*, [1970] 1 Ont. 54, D.L.R.3d 494.

[26] A. LINDEN, *supra* note 4, at 223.

[27] *Supra* note 15, at 212.

[28] The driver of the car which struck the plaintiff was also held to be liable, but this aspect of the decision is not relevant in the present context.

[29] Under § 53(4)(6) of the Liquor Licence Act, ONT. REV. STAT. c. 218 (1960) now ONT. REV. STAT. c. 250, § 56(4)(*b*) (1970).

[30] The Liquor Licence Act, ONT. REV. STAT., c. 250, § 68 (1970), imposes liability on persons who sell liquor to an individual whose condition is such that consuption of the liquor would apparently intoxicate him so as to make him likely to cause injury either to himself or another, such liability only extending to a) the drunken individual's suicide and b) injury to the person or property of another caused by such drunken individual. Similar "Dram Shop" Acts are widespread in the

fateful night, well known to the defendant's servants. His propensity to get drunk was apparent both before and during the night in question. A weakness of the decision, however, is the very casual treatment given to the defence of *Volenti non fit Injuria*; it is not mentioned at all by Mr. Justice Aylesworth in the Ontario Court of Appeal and Mr. Justice Laskin, the only judge to refer to it in the Supreme Court, considers no precedents in its context. His Lordship holds the defence to be inapplicable because no agreement to exempt the defendant from responsibility could be inferred before the plaintiff commenced drinking, and after he had started drinking he was in no condition to provide the necessary free consent. With all respect, such an interpretation is far too indulgent to the plaintiff. He was a man who frequently became drunk in the defendant's beer parlour, so frequently and so troublesomely that he had previously been barred from the premises for some time. [31] Is it reasonable or fair to say that if the defendant proprietor and the plaintiff had met before the plaintiff commenced drinking and the plaintiff had said "you are to give me enough to make me very drunk, you then can evict me, but if I injure myself on the way home you are to pay up," the defendant proprietor would have agreed? Is this not letting the plaintiff have his cake and eat it? Surely, the more reasonable foundation of the implied agreement on which the *volenti* defence is based is that the plaintiff, in being granted the (illegal) indulgence by the defendant of being allowed to get quite or very drunk on the premises, must have traded away his right to protest in a court of law in the event of his suffering an injury as a result of his indulgence? Clearly the plaintiff could not have sued the defendant if he had eventually contracted cirrhosis of the liver. Is falling drunkenly under a car any less foreseeable? Whilst certainly more immediate, the danger in the latter case may, on reflection, be, in the long run less extensive than in the former. It seems that the application or refusal to apply the *volenti* defence has become a process something similar to the way whereby the absolute defence of contributory negligence became discredited prior to the introduction of the comparative negligence legislation. He who is morally less "reputable" will be made to take the burden of liability—all very well in the context of contributory negligence but constituting a conceptual abuse in regard to *volenti non fit injura,* which should be the subject for factual rather than an evaluative adjudication.

The decision of the Ontario Court of Appeal in *Schacht v. The Queen in right of Ontario* [32] involves another important extension of the area of positive duties, this time in the context of the conduct of the police. Briefly, the facts were that a well lighted barrier, which was marking a detour from a highway on account of the construction of a culvert, was knocked down by a driver late at night. The police who investigated the accident removed

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United States, and are being supported, as in Canada in the instant decision, by an increasingly wide "common law" area of liability. *See, e.g., Anon, Note,* 49 MINN L. REV. 1154 (1965); McClintock, *Note,* 5 TULSA L.J. 288 (1968).

[31] [1970] 1 Ont. 54, at 64.

[32] [1973] 1 Ont. 221, 30 D.L.R.3d 641 (Ont. 1972).

the vehicle, but left flares to mark the detour which would cast a light for only twenty minutes. The Highways department was not notified of the situation by the police for over ninety minutes and its workmen did not arrive at the location for a further ninety minutes. In the meantime, the flares went out, and the plaintiff, driving along the highway, sustained injuries when his car crashed into the unmarked culvert. Clearly, from a factual viewpoint, the police officers who investigated the accident were negligent for not having taken more active steps to protect traffic from the hazard. A simple solution, suggested by the judge, would have been to have parked the police car itself with its flashing lights in front of the culvert. But the substantial issue in the case was whether such "factual" negligence constituted a breach of duty on the part of the police (for which, if established, the Commissioner of the Provincial force would, by statutory provision, [33] be legally responsible).

The trial judge [34] found against the plaintiff, especially on the grounds that the public policy requires the police to be comparatively unfettered in the exercise of their powers and duties. [35] The plaintiff's appeal was however, successful. The Court of Appeal looked to the statutory provisions in respect of police powers and duties but found them "by no means exhaustive." [36] Accordingly, the court considered it "infinitely better that the Courts should decide as each case arises whether, having regard to the necessities of the case and the safeguards required in the public interest, the police are under a legal duty in the particular circumstances." [37]

The use of precedent, however, by the Court of Appeal may be questioned. Reference is made to *Haynes v. Harwood* [38] and *Priestman v. Colangelo,* [39] primarily, one suspects to provide hard evidence of tort cases involving policemen in which the magic word "duty" was applied. *Haynes v. Harwood* does not, however, assist in the present context, since it refers to a "discretionary duty" [40] in contra-distinction to a "positive legal duty" [41] Lord Justice Maugham conceding that "[i]t is true that [the Plaintiff policeman] was under no positive legal duty to run out into the street and at the risk of his life to stop two galloping horses." [42] Nor does the passage extracted from *Priestman* seem to be of any relevance. Cartwright comments simply amount to the proposition that in the exercise of their duty to appre-

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[33] The Police Act, ONT. REV. STAT. c. 351, (1970).

[34] In an unreported judgment, December 7, 1971.

[35] Schroeder, J.A., on appeal, dissents from the trial judges view that "to hold the police liable in the circumstances of this case was a course fraught with undesirable consequences. The language of the learned trial Judge almost borders on the suggestion that it would be contrary to public policy so to determine," *supra* note 32, at 232 and 652 respectively.

[36] *Id.* at 226 and 646 respectively.

[37] *Id.*

[38] [1935] 1 K.B. 146.

[39] [1959] Sup. Ct. 615, 19 D.L.R.2d 1.

[40] *Supra* note 38, at 162 (per Mangham, L.J.).

[41] *Id.* at 161 (per Maugham L.J.).

[42] *Id.*

hend suspects the police must exercise reasonable care toward others,[43] a far cry from establishing positive legal duty to protect others in circumstances where no other positively dangerous act is being performed by the police in the exercise of their duties. The third case referred to by the Ontario Court of Appeal is, however, of considerably more assistance. This is *Millette v. Coté*[44] yet another decision discussed in the previous survey[45] and yet another one which had not at the time of writing reached its final appeal. In *Millette v. Coté,* certain provincial police officers had failed to notify the Department of Highways of the dangerously icy condition of a particular stretch of highway, on which the plaintiff thereafter was injured. Mr. Justice Galligan had found the Police Commissioner and officer partially liable since, following *Bittner v. Tait-Gibson Optometrists Ltd.,*[46] he considered that "there is a basic and fundamental duty on the part of a police officer to observe and report dangerous conditions seen by him on his patrol."[47] The Ontario Court of Appeal, however, upheld the appeal of the police on the grounds of lack of causal connection (since even if the Department of Highways had been informed there was no evidence that they would have prevented the accident). However, Mr. Justice Aylesworth desired it to be made clear that "we are not to be taken in these proceedings as passing upon the submissions—one way or another—that there was, in fact, in the circumstances a duty upon the police and that the police were negligent in the discharge of that alleged duty."[48]

In *Schacht,* the Court of Appeal rendered explicit what it had declined to do in *Millette v. Coté.*

> Negligence as commonly defined includes both acts and omissions which involve an unreasonable risk of injury. In earlier times the Common Law furnished redress only for injury resulting from affirmative misconduct, and inaction was regarded as too remote to furnish a ground for the imposition of legal liability. Much as the humanitarian spirit which motivated the conduct of the good Samaritan has been lauded, it was rooted in a moral philosophy, hence from the legal standpoint the lassez-faire attitude of the priest and the Levite was condoned. A member of a traffic detachment of the Ontario Provincial Police in the situation of Constable Boyd and Corporal Johnston is in an entirely different position from the ordinary citizen or the priest and the Levite. These officers were under a positive duty by virtue of their office to take appropriate measures in the face of a hazardous condition such as they encountered here to warn approaching traffic of its presence.[49]

With regard to the trial judge's hesitation to curtail the police in the exercise of their powers, the Court of Appeal responded with the trump card

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[43] *Supra* note 39, at 634 and 15 respectively.
[44] [1971] 2 Ont. 155, 17 D.L.R.3d 247 *rev'd,* [1972] 3 Ont. 224, 27 D.L.R.3d 676.
[45] *Supra* note 15 at 223.
[46] [1964] 2 Ont. 52, 44 D.L.R.2d 113.
[47] [1971] 2 Ont. 166, at 174.
[48] [1972] 3 Ont. 224 at 226.
[49] *Supra* note 32, at 231.

of *Home Office v. Dorset Yacht Co.*,[50] where a substantially similar argument was rejected emphatically by the House of Lords. With respect to the argument that a distinction in liability could be made in regard to misfeasance the court was clear in its rejection of any such approach (although Mrs. Justice Schroeder was prepared to interpret the conduct of the defendant police officers in the present case despite its "passivity" as constituting misfeasance).[51]

III. Foreseeability

Despite some initial doubts,[52] the foreseeability concept as a criterion relevant to both the duty and remoteness issues has become ensconced in Canadian negligence law.

As has been seen in respect of the duty issue, rescuers have presented the courts with intriguing problems of foreseeability,[53] stretching the efficacy of the concept to its limit.[54]

Causation has also presented some difficulties. In *Thompson v. Toorenburgh*,[55] Mr. Justice Kirke Smith, of the British Columbia Supreme Court, was required to decide on the extent to which negligent treatment of a negligently caused injury which exacerbates the original injury may be laid at the door of the original defendant as well as the doctor. In *Thompson*, a lady had been injured in a collision negligently caused by the defendant. Her condition of acute pulmonary adema was not diagnosed by the hospital to which she was brought after the accident until it was too late to be efficacious, and, as a result of such neglect of remedial treatment, the lady died.

The Canadian position in respect of deficient medical treatment seemed

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[50] [1970] A.C. 1004.

[51] *Supra* note 32, at 231.

[52] See Gibson, *The Wagon Mound in Canadian Courts*, 2 Osgoode Hall L.J. 416 (1963); Smith, *The Limits of Tort Liability in Canada: Remoteness, Foreseeability and Proximate Cause*, Studies in Canadian Tort Law 88, at 104 *et seq* (ed. A. Linden 1968).

[53] See Linden, *Down With Foreseeability! Of Thin Skulls and Rescuers*, 47 Can. B. Rev. 545, at 558-570 (1969).

[54] Without wishing to enter into a jurisprudential dispute, especially in a footnote, one must record the view that Professor Linden's vehement and persistent condemnation of the foreseeability concept as "verbiage," being less just than the discredited Polemis directness test, having "failed to dissipate the fog that pervades the law reports," is misplaced. No linguistic formula can satisfactorily provide a ready solution to all the factual contingencies which affect human relationships. To expect such semantic omnipotence would be naive; to become downhearted at the "failure" of the determinative capacity of the concept in freak or morally complicated situations (as are rescues) is surely to be far too harsh a taskmaster of the language of the law. To abandon a concept of relatively certain efficacy in the overwhelming majority of fact situations in favour of a more uncertain and potentially arbitrary criterion of "policy," as Professor Linden suggests, can hardly be an appealing solution. *Cf.* Lord Denning's attempt to do so in Spartan Steel & Alloys Ltd. v. Martin & Co. Ltd., [1973] 1 Q.B. 24.

[55] [1972] 6 W.W.R. 119.

to have been clearly set out in *Mercer v. Gray,*[56] where the Ontario Court of Appeal had distinguished between medical "errors of judgment" and medical negligence. In the event of the former, the original defendant would be liable for all the damages sustained by the plaintiff; in the event of the latter, the plaintiff would be obliged to sue the doctor for the increase in his damages caused by the doctor.

Kirke Smith's resolution of the issue is inscrutable. Having purported to apply the *Mercer v. Gray* criterion, his Lordship, referring with approval to the Criminal Law decision of *R. v. Smith*[57] that had applied a criterion which, translated into the language of tort, would be far more indulgent to the plaintiff,[58] concluded:

> As I view the situation, the conduct of the medical attendants did not constitute, to quote Lord Wright[59] . . . 'a new cause which disturbs the sequence of events'. Rather is the opposite true; the chain of events set in motion by the accident itself was permitted to develop undisturbed until it was too late to reverse it.[60]

In effect, his Lordship contends that, if the intervening medical treatment constitutes negligence by omission, its causal potency will not be sufficient to interrupt the causal flow from the original negligent act. This is a strange proposition. If the plaintiff in the present case had elected to sue the *hospital* for negligence, it would seem clear that she would have succeeded,[61] and that the negative dimension of the hospital's causal role would not have entitled it to escape liability. Why, then, should there be a disparity of approach on the facts of the instant decision? Perhaps the solution lies in the world of "practical politics" that in cases of intruding medical negligence, whether active or passive, the plaintiff should not be hampered in the pursuit of a remedy by being obliged to sue two defendants rather than one.[62]

The right of action of an unborn child to sue for negligently caused

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[56] [1941] Ont. 127. The late Dean Wright was less certain as to the clarity of this decision: "The . . . judgment seems to manifest a desire to avoid the last wrongdoer rule, but it may be questioned whether the judgment did not, in avoiding it, pay lip service to the rule and thus leave the situation in as confused a state as it was before." *Comment,* 19 CAN. B. REV. 610, at 611 (1941).

[57] [1959] 2 Q.B. 35.

[58] *Id.* at 42-43.

[59] The "Oropesa," [1943] P. 32, at 39. Perhaps significantly, Kirke Smith, J. did not continue Lord Wright's sentence, the next words of which are "something which can be described as either *unreasonable* or extraneous or extrinsic" (stress added). Surely the hospital's conduct in Thompson v. Toorenburgh was unreasonable, thereby coming within the scope of Lord Wright's definition?

[60] *Supra* note 55, at 124.

[61] *Cf.* Barnett v. Chelsea and Kensington Hospital Management Committee [1969] 1 Q.B. 428 (Q.B.D., 1967) where the passive negligence of a hospital in failing to treat adequately the victim of poisoning would clearly have involved liability if the hospital had not succeeded in establishing that even if the correct procedures had been adopted the victim would still have died.

[62] See W. PROSSER, HANDBOOK OF THE LAW OF TORTS at 278-79 (4th ed. 1971) Linden, *Foreseeability in Negligence Law,* SPECIAL LECTURES OF THE LAW SOCIETY OF UPPER CANADA 1973: NEW DEVELOPMENTS IN THE LAW OF TORTS 55, at 85-86 (1973).

injuries has at last been clearly recognised by a court in a Canadian common law province.[63] In *Duval v. Seguin*,[64] an infant plaintiff was injured before birth when her mother was in an automobile collision negligently caused by the defendant. The infant plaintiff was subsequently born alive.

Fraser J. considered that "[t]o refuse such a right of action would be manifestly unjust and unreasonable . . . such a refusal would not be consonant with relevant legal principles as they have developed and have been applied in the last 50 years."[65]

His Lordship had no difficulty in disposing of the foreseeability issue:

> Procreation is normal and necessary for the preservation of the race. If a driver drives on a highway without due care for other users it is foreseeable that some of the other users of the highway will be pregnant women and that a child *en ventre sa mere* may be injured.[66]

His Lordship considered that "[w]hen the unborn child becomes a living person and suffers damages as a result of prenatal injuries caused by the fault of the motorist the cause of action is completed . . . . In the instant case the plaintiff sues, as a living person, for damages suffered by her since her birth as a result of prenatal injury caused by the fault of the defendant".[67]

As may be seen from such an analysis, no rights are recognised in respect of unborn children unless they pass the hurdle of live birth—indeed his Lordship recognised this when he stated that he refrained from "expressing any opinion as to what, if any, are the legal rights of a child *en ventre sa mere* or of a foetus. Many difficult problems in this area remain to be resolved."[68]

The Supreme Court of Canada in its recent judgment in *Bradford v. Kanellos*[69] adopted a singularly restrictive interpretation of the scope of

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[63] The Supreme Court of Canada decision of Montreal Tramways Co. v. Leveille, [1933] Sup. Ct. 456, recognises the right of recovery in civil law. The classic common law decision denying recovery is Walker v. Great Northern R. Co. of Ireland, 28 L.R. Ir. 69 (1881). (The Irish legislature has subsequently remedied this default of the judiciary; the Civil Liability Act 1961, § 58, provides a remedy for pre-natal injuries to plaintiffs subsequently born alive. Similar legislation seems likely in England, particularly after the considerable controversy aroused by the thalidomide tragedy. The Law Reform Commission in its working Paper No. 44, "*Injuries to Unborn Children*" (1972) has proposed a considerable extension of liability in this area: see D'Arcy, *Comment*, 9 MELBOURNE U.L. REV. 318, at 322 (1973).

[64] 1972 2 Ont. 686 (High Ct.) (Fraser, J.).

[65] *Id.* at 702.

[66] *Id.* at 701.

[67] *Id.* at 702.

[68] *Id.* at 702. The Australian decision of Watt v. Rama, [1972] Vict. R. 353, (Sup. Ct. 1971) to which Fraser, J., refers, decides the same issue in substantially the same way as in *Duval v. Seguin*, although at considerably greater length. Professor Fleming has critised Australian decisions as often involving "prolonged and irritating self-agonizing." *Book Review*, 11 OSGOODE HALL L.J. 349, at 350, (1973): *Watt v. Rama* is an excellent example. Both *Seguin v. Duval* and *Watt v. Rama* are analysed in a perceptive article by Veitch, *Delicta In Uterum*, 24 N. IR. L.Q. 40, at 50-54 (1973).

[69] Supreme Court of Canada, judgment delivered June 29, 1973, as yet unreported.

foreseeability in respect of conduct of persons responding to a situation of apparent peril. Briefly, the facts were that the defendant was a restaurant proprietor whose grill caught on fire one morning, as a result of the presence of excessive grease thereon. The fire was a flash type and was quickly put out by using a fire extinguisher which was attached to the grill. No damage was done by the fire. The extinguisher, however, made a hissing or popping noise as the extinguisher gas was being emitted, and one patron, described by the judge as an "idiotic person," yelled that gas was escaping and that there might be an explosion. This caused the other patrons to become panic-stricken and they rushed for the exits, trampling on the plaintiff, a lady patron, on their way. The trial judge [70] awarded the plaintiff damages, but the Ontario Court of Appeal allowed the appeal [71] on the basis that "the inescapable conclusion is that the *cause proxima* of the plaintiff's injuries was the unauthorized and unforeseeable act of the patron who made the exclamation referred to and the disorderly exit made by the other customers who took to sudden fright. This affords a clear example of a novus actus interveniens." [72]

The Supreme Court, by a majority, [73] upheld the Court of Appeal. Mr. Justice Martland, speaking for the majority, briefly rejected the plaintiff's claim in the following terms:

> It is apparent that her injuries resulted from the hysterical conduct of a customer which occurred when the safety appliance properly fulfilled its function. Was that consequence fairly to be regarded as within the risk created by the respondents' negligence in permitting an undue quantity of grease to accumulate on the grill? The Court of Appeal has found that it was not and I agree with that finding.

Mr. Justice Spence, for the minority, [74] argued that the consequences of the fire *were* foreseeable: "I am . . . of the opinion that the persons who shouted the warning acted in a very human and usual way and that their actions . . . were utterly foreseeable and were part of the natural consequence of events leading virtually to the plaintiffs injury." [75] Even if such warning constituted negligence, which his Lordship did not consider to be the case, the defendants should still be liable since such negligent response was foreseeable. [76]

IV. Standard of Care

A. Doctors

During the survey period, the number of malpractice actions taken

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[70] Lane, Co. Ct. J., unreported.

[71] [1971] 2 Ont. 393 (1970).

[72] *Id.* at 394-95 (per Schroeder, J.A.).

[73] Martland, Judson, Ritchie, JJ.

[74] Spence, Laskin, JJ.

[75] His Lordship cited J. Fleming, The Law of Torts at 192 (4th ed. 1971)), in support of imposing liability in this context.

[76] His Lordship cited the comments of Lord Du Parcq in Grant v. Sun Shipping Co. Ltd. [1948] A.C. 549, at 563-564 (H.L. Sc.) in support.

against doctors has increased significantly.[77] The reported decisions, however, do not indicate that the courts are disposed to extend the frontiers of medical negligence, rather they appear content to apply with rigour the standard of care previously enunciated in earlier decisions.[78]

It is regrettable, therefore, to record in regard to the first decision in the area to be discussed in the present article that the court applied a criterion which has generally been considered to have been discredited. In *Karderas v. Clow,*[79] Mr. Justice Cromarty invoked the frequently criticised statement of Lord Alness in *Vancouver General Hospital v. McDaniel*[80] to the effect that "[a] defendant charged with negligence can clear his feet if he shows that he has acted in accord with general and approved practice." Cromarty commented: "I find that [the first defendant] followed standard, approved and widely accepted procedures in allowing a competent resident to do the abdominal closure on the [plaintiff] in his absence and that he was neither in breach of contract nor negligent in doing so."[81] Whilst it is true that a doctor charged with negligence "is virtually assured of being exonerated"[82] if his conduct has complied with the customary practice of his profession, it is regrettable that Cromarty J. appears to have revived the indulgently dangerous approach that proof of custom should be *per se* dispositive of the issue of negligence.

In *Karderas v. Clow,* the plaintiff had sued the surgeon and a hospital for negligently leaving a sponge in her abdominal cavity after an operation. The surgeon, following the operation, left the theatre while the abdominal closure was still taking place. The closure was performed by an assistant, the most senior intern in the hospital, who had been closing abdomens for a year before the incident.

No explanation was forthcoming as to how the sponge came to be left inside the plaintiff's abdomen. The assistant was held to have been negligent, the court adopting the language of Lord Justice Goddard in *Mahon v. Osborne,*[83] when he stated: "As it is the task of the surgeon to put swabs in, so it is his task to take them out, and in that task he must use that degree of care which is reasonable in the circumstances, and that must depend on the evidence. If, on the whole of the evidence, it is shown that he did not use that standard of care, he cannot absolve himself, if a mistake be made, by saying: 'I relied on the nurse.'" Since the surgeon had already, and without negligence, left the theatre, he was not held liable, but, since "[t]he facts here are almost exclusively within the knowledge of [the assistant] and he

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[77] *See,* WEEKEND, May 5, 1973, at 1.

[78] Part I of Vol. II of the OSGOODE HALL LAW JOURNAL (1973) is entirely devoted to medico-legal issues, in particular in the context of the law of torts, and contains valuable products of Canadian research in the area.

[79] [1973] 1 Ont. 730 (High Ct. 1972).

[80] [1934] 4 D.L.R. 593, at 597 (P.C.).

[81] *Supra* note 79 at 738.

[82] Linden, *The Negligent Doctor,* 11 OSGOODE HALL L.J. 31, at 32 (1973).

[83] [1939] 2 K.B. 14, at 47.

has come forward with no explanation," [84] the assistant was held negligent, by virtue of the maxim of *res ipsa loquitur*. Cromarty went on to hold that the defendant hospital was vicariously liable for such negligence on the part of the assistant as well as that of the theatre nurses, (although the finding of negligence against the nurses is implied rather than openly stated up to this point of his Lordship's judgment). [85]

Two actions which raised the issue of battery [86] were *Johnston v. Wellesley Hospital* [87] and *Villeneuve v. Sisters of St. Joseph of Sault Ste. Marie*. [88]

In *Johnston's* case, the plaintiff, aged twenty at the time of the treatment which gave rise to the action sued the defendant hospital for damage which he alleged was caused to his cheeks and forehead by a doctor who "was on the active staff of the hospital" [89] at the outpatient department of the hospital. The plaintiff had suffered from bad acne and the treatment was administered to remove certain scars and pitting on his face. The treatment, known as the "slush" treatment, consisted of the application to the face of a mixture ("slush") of frozen carbon dioxide and acetone. Two modes of treatment could be adopted: the "swab" and the "doughnut." The plaintiff, who had previously received the "swab" mode, presented himself at the outpatient department and "specifically requested" [90] to be given the slush treatment. The defendant doctor, after an examination and tests, a week later, applied the "doughnut" mode of the slush treatment to the plaintiff's face. The procedure, which was painful, lasted about fifteen seconds, during which the plaintiff complained, but on being asked by the doctor if he wished it to stop, the plaintiff requested the doctor to continue. The operation was not a success, and the plaintiff suffered considerable pain with aggravated scarring.

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[84] *Supra* note 79, at 739.

[85] The plaintiff's action was, however, dismissed since the statutory six month limitation period had expired. Cromarty, J., did not accept the plaintiff's contention that the defendant hospital should be estopped from raising such a plea on the basis that active negotiations within the limitation period induced the plaintiff not to issue a writ until the time had expired. His Lordship followed Parmentee v. The Queen [1956-60] Ex C.R. 66, (1960) where Thornson, P., stated, at 69, "It is well settled that there cannot be an estoppel to defeat the requirements of a statute or prevent its operation . ."; with all respect to his Lordship, this is not only bad morals, but also bad law: see Andrews, *Estoppels Against Statutes*, 29 MODERN L. REV. 1, *passim esp.* at 6-7 (1966).

[86] Although, from a conceptual viewpoint, these aspects of the decisions should be treated in the context of intentional torts, it is considered more appropriate to consider them at present in the general context of medical malpractice. *Cf.* the trend in the United States to conceive of such actions as being grounded in negligence rather than battery: *See, e.g.*, Cobbs v. Grant, 8 Cal.3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972). The practical implications in respect of such aspects as damages, limitations periods and insurance cover are enormous: See Novack, *Informed Consent and the Right to Say "No"*, 6 LOYOLA OF LOS ANGELES L. REV. 384 (1973).

[87] [1971] 2 Ont. 103 (High Ct. 1970).

[88] [1971] 2 Ont. 594 (High Ct.).

[89] *Supra* note 87, at 116 (per Addy, J.).

[90] *Id.* at 105.

In an action by the plaintiff against the hospital based on battery and negligence, the plaintiff alleged that since, at the time of the treatment he was a minor,[91] he was incapable of providing the necessary consent to render the action of the doctor not a battery, and that the consent which he *did* provide, if capable of doing so, related to a different treatment namely the "swab" rather than the "doughnut" treatment.

Both contentions were rejected by Mr. Justice Addy. In regard to the former, it was admitted that no parental consent had been obtained, and that there was no question of the treatment being of an emergency nature. Nevertheless, his Lordship considered that "it would be ridiculous in this day and age, where the voting age is being reduced generally to eighteen years, to state that a person of 20 years of age, who is obviously intelligent and as fully capable of understanding the possible consequences of a medical or surgical procedure as an adult, would, at law, be incapable of consenting thereto." [92]

Moreover, no cases could be found in which the proposition that a person under twenty-one years is legally incapable of consenting to medical treatment was upheld. Such a view was refuted by the obvious fact that other forms of bodily contact, as, for instance, sexual intercourse, do not constitute batteries on persons over the "criminal" age of consent. [93] Further, the Anglo-Canadian bible on this area of the law, *Nathan* [94] was against the plaintiff's proposition. [95]

In respect of the latter allegation of absence of specific consent, his Lordship held against the plaintiff on the basis that "there is no necessity, in my view, for a doctor to explain in detail the actual medical techniques being used so long as the nature of the treatment is fully understood." [96] Furthermore, the plaintiff had been given an opportunity to stop the treatment when it had commenced, but he had requested the doctor to continue.

In respect of the negligence action, the plaintiff was also unsuccessful. Addy's treatment of *res ipsa loquitur* is puzzling. Having held that "the

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[91] *See* now the *Age of Majority and Accountability Act*, Ont. Stat. 1971 c. 98.

[92] *Supra* note 87, at 108.

[93] His Lordship should have added "even in the absence of parental consent"!

[94] MEDICAL NEGLIGENCE at 176 (1957).

[95] In the United States, the concept of the "mature minor" has been accepted either legislatively, *e.g.*, Miss. Code Ann. § 7129-81 (1966); Ala. Code Ann. Tit. 22 § 104 (15) (Cumm. Supp. 1972), cited by Wadlington, *Minors and Health Care: The Age of Consent*, 11 OSGOODE HALL L.J. 155, at 121, *n.*28 and 122 *n.*41 respectively (1973), or judicially, Younts v. St. Francis Hospital, 205 Kan. 292, 469 P.2d 330, cited by Wadlington, *supra* at 121 *n.*79). Wadlington's article is of direct relevance in the present context, especially at 117. England is no different: *see* Skegg, *Consent to Medical Procedures on Minors*, 36 MODERN L. REV. 370, at 372-4 (1973). Skegg goes so far as to surmise that "many children under the age of ten would probably be capable of consenting to relatively minor and straight-forward medical procedures" *Id.* at 373.

[96] *Supra* note 87, at 109. This approach to the specific consent issue appears to be consistent with other Canadian decisions: see Rozovsky, *Consent to Treatment*, 11 OSGOODE HALL L.J. 103, at 107-8 (1973).

doctrine . . . does not apply in the present case as the cause of the damage to the plaintiff is known," [97] his Lordship goes on to consider the procedural effect of *res ipsa loquitur* (which can only be relevant on the basis that the doctrine is applicable to the case), concluding that "[t]he explanation has been given, and it is just as consistent with an error in judgment as with negligence, and, since in the former case there would be no liability, the provisional burden has been satisfied and the final burden remains on the plaintiff." [98]

On the general issue of negligence, the defendant doctor was held not to have been negligent since he had "acted throughout in accordance with generally accepted *good* medical practice in the field of dermatology." [99]

In *Villeneuve v. Sisters of St. Joseph of Diocese of Sault Ste. Marie,* [100] the plaintiff, aged just under five years, attended the defendant hospital for a small hernia operation. At the time, there was no specialist anaesthetist practising in the area and it was the practice of the surgeons to call in as needed one of a number of general practitioners who devoted a large proportion of their time to anaesthetics. The anaesthetist who was to take the plaintiff's operation was selected casually in this manner by the plaintiff's family physician on the morning of the operation. [101] The plaintiff was very agitated when the anaesthetist was preparing to inject a vein in the crease of his elbow, so much that he had to be held by two nurses. Although pentathol is a dangerous substance, "an irritant which can cause the death of tissues in an artery", [102] the defendant did not wait until the boy had become quiet, but proceeded to attempt to locate the appropriate point of entry in the elbow. At the wrong moment, the plaintiff jerked and the pentathol was injected into an artery, causing, eventually, the partial amputation of the plaintiff's hand.

In an action for battery [103] against the anaesthetist, it was argued on behalf of the plaintiff that his parents had given no valid consent to *him* to touch the plaintiff. This contention received short shrift:

> "I cannot accept this view. It is clear that [the family physician] was given authority by the boy's parent or parents to proceed with the operation. [He] brought in [the anaesthetist] to give the anaesthetic. The parents here are intelligent persons and I think they could not have been unaware that the operation involved anaesthetic and that this would be given by someone other than [the family physician]. There is no suggestion in the

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[97] *Id.* at 110.

[98] *Id.* at 111.

[99] *Id.* at 116 [emphasis added]. Note the inclusion of the word "good" by way of contrast to Cromarty J.'s statement in Karderas v. Clow, *supra* note 79, at 738 (text above *supra* note 5).

[100] *Supra* note 88.

[101] *Id.* at 594-95.

[102] *Id.* at 601 (*per* Donohue J.).

[103] *Sub nom. assault.* This *communis error* is harmless but irritating, although treated indulgently by MacPherson, J., in Fillipowich v. Nahachewsky, 3 D.L.R.3d 544, (Sask. Q.B. 1969).

> evidence that they did or said anything contrary to learning (sic) the selection of the anaesthetist to [the family physician]. Therefore, the operation consent to [the family physician] carried with it the implied authority to engage [the anaesthetist]." [104]

The plaintiff was, however, successful in his action based on negligence, since, having regard to the danger involved, the anaesthetist should not have proceeded with the operation at the time, having witnessed the extremely agitated condition of the plaintiff. [105] On appeal to the Ontario Court of Appeal, [106] the consent issue was not reargued. The Court of Appeal reaffirmed the finding of liability in negligence against the doctor but also found vicarious liability on the part of the hospital [107] for the negligence of the two nurses holding the plaintiff who was at the time "but four years of age and . . . said to have weighed but 37 pounds." [108]

In *Crichton v. Hastings,* [109] the defendant surgeon performed surgery on the plaintiff's left leg for the removal of a cartilage. As the plaintiff had a tendency to phlebitis, the defendant prescribed an anti-coagulant drug. Two years later the plaintiff underwent a further operation by the defendant surgeon at the defendant hospital, and again the surgeon prescribed an anti-coagulant drug. Very shortly thereafter the surgeon left the hospital for a period of two weeks, leaving the plaintiff under the care of another doctor, a resident who was completing the last six months of a fellowship in surgery. On no occasion was the plaintiff warned of the possible side-effect of haemorrhaging from continued or over-use of the drug. Shortly after returning home the plaintiff suffered a severe haemorrhage at the base of her tongue. Her action against the doctor was successful at trial, [110] and the Court of Appeal, by a majority, did not disturb the verdict. Mr. Justice Aylesworth summarized the basis of negligence as follows:

> Since immediately after surgery [the surgeon] was relinquishing to others the care of his patient, I think it was incumbent upon him to foresee this possibility and to arrange for adequate warning to the patient concerning the dangers of development of side effects from the use of the [anti-coagulant] and instructions to her as to the importance of immediately reporting the appearance of any such side effects to her physician. His failure to take these steps, in my opinion, constituted actionable negligence. His own expert witness . . . testified that it was consistent with good medical practice

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[104] *Supra* note 88, at 608. Apparently the British Columbia decision of Burk v. S. 4 W.W.R. (n.s.) 520 (B.C.S.C. Farriss, C.J.S.C. 1951), to similar effect, was not cited to his Lordship. *See* Rozovsky, *supra* note 96, at 109-10.

[105] The anaesthetist was also found negligent for not having remedied the situation as far as possible *after* the misplaced injection.

[106] [1972] 2 Ont. 119 (1971).

[107] Nurses have come under increased scrutiny in recent years. The standard of care required of them is becoming more sophisticated, influenced no doubt by the fact that the principles of vicarious liability will ensure that the hospital pays up. *Cf.* MacDonald v. York County Hosp. Corp., *infra* note 112.

[108] *Supra* note 106, at 125 (per McGillvray, J.A.).

[109] [1972] 3 Ont. 859.

[110] Donoghue, J., extracted in the report of the Court of Appeal's judgment, *supra* note 32, at 860.

> to continue with [the anti-coagulant] after a patient leaves hospital and [the surgeon] should have been more alert to protect his patient relative to the happening of this event through adequate warning and instruction. [111]

In *MacDonald v. York County Hospital Corp.* [112] the plaintiff was brought to the defendant hospital when he fell off his motorcycle, causing a fracture dislocation of his left ankle. The defendant doctor applied an unpadded cast to the plaintiff's leg. Although the nurses attending the plaintiff recorded the fact that the plaintiff's toes were becoming swollen and cold and informed the defendant doctor of this fact with increasing urgency as the plaintiff's condition deteriorated, the defendant doctor failed to take appropriate action for over eighteen hours, by which time a gangrenous condition, ultimately requiring amputation, had developed.

In a learned and lengthy judgment, Addy found the doctor to have been negligent and the hospital to be vicariously liable for the nurse's negligence. His Lordship held that the doctor was negligent both in respect of the application of the tight cast [113] and in respect of his failure to remove it at a time "when not only the nurses' notes indicated a definite change in the condition of the toes but when the nurses themselves advised him of their concern as to [that] condition." [114] Since "[n]o acceptable or reasonable explanation was offered for his failure to act," *res ipsa loquiter* applied. [115]

Moreover, the hospital was vicariously liable for the nurses' negligence in not responding sooner to the manifest evidence of circulatory impairment to the plaintiff's toes. "Any person who has even the most elementary knowledge of first aid or of the human anatomy, including even a school child of fairly tender years who has been taught the first elements of first aid, knows that circulatory impairment is a very serious matter and that time is of the essence in relieving such impairment." [116]

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[111] *Supra* note 109, at 867.

[112] [1972] 3 Ont. 469 (High Ct.).

[113] *Id.* at 493.

[114] *Id.* at 494.

[115] After a clear exposition of the English and Canadian approaches to the issue of *res ipsa loquitur*, his Lordship sides strongly with the intermediate view as to its procedural effect (categorised by A. LINDEN, CANADIAN NEGLIGENCE LAWS at 185, as "prima facie evidence or presumption") favoured by the Ontario Court of Appeal in Cudney v. Clements Motor Sales Ltd., [1969] 2 Ont. 209, at 217. Addy, J., in *MacDonald* stated his position in the following terms:

> the defendant can satisfy this evidential burden by introducing a reasonable explanation of the happening of the accident that is consistent with the proven facts, and is as consistent with there being no negligence on his part as with the inference that there is negligence. *Res Ipsa Loquitur* does not have the effect of shifting the legal burden of proof to the defendant so that he must disprove negligence on his part, . . .

Supra note 112, at 490. *Cf.* Addy, J.'s handling of the *res ipsa loquitur* issue in the present case with Johnston v. Wellesley Hospital, *supra* note 87 (*see* text above *note* 97 and *note* 98).

[116] *Supra* note 112, at 498. *Note*, Ostrowski v. Lotto, referred to in the previous *Torts Survey*, *supra* note 2, at 219, was appealed to the Supreme Court of Canada without success, *Cf.* [1973] Sup. Ct. 220 (1972).

B. Children

Canada differs from England [117] and Australia [118] in regard to the standard of care to be demanded of young persons. Whereas, in England and Australia, the courts contrast the defendant's behaviour with that of the normal child of his age, Canadian courts, with the blessing of the Supreme Court in *McEllistrum v. Etches,* [119] extend the criterion to consider intelligence and experience as well as age. Such a subjectively-oriented enquiry is a two-edged sword. It undoubtedly has the effect of exempting dull-witted children who would have been found liable under the English and Australian list; conversely, exceptionally bright children are more likely to be found liable in Canada.

In *Heisler v. Moke,* [120] Mr. Justice Addy, in the Ontario High Court, expressed a personal preference for the English and Australian position. Having quoted from the judgment of Mr. Justice Kitto in the Australian case of *McHale v. Watson,* [121] his Lordship stated:

> Now if I were not otherwise bound by authority I would think that is the proper test to be applied to negligence on the part of a child. It seems however, that in Canada, the test is considerably more subjective in determining this question . . . It . . . . . seems to be quite clear on the authority of the Supreme Court of Canada, in our Province the test would be based not only on the age but on the intelligence of that particular child or a child of similar intelligence and also on the question of the experience of the child. [122]

Other decisions in this context have applied the "age, intelligence and experience" formula without dissent. [123]

C. Occupiers' Liability

Professor Linden's frank, if indelicate, comment that "it is pretty well agreed that the Canadian law of occupiers' liability is a mess" [124] is as true

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[117] *Viz.* Gough v. Thorne, [1966] 1 W.L.R. 1387 (C.A.).

[118] *Viz.* McHale v. Watson, 111 COMM. L.R. 384 (1964) (Windeyer J.), *aff'd,* 115 COMM. L.R. 199 (1966) (High Ct. Aust.).

[119] [1956] Sup. Ct. 787.

[120] [1972] 2 Ont. 446.

[121] *Supra* note 2.

[122] *Supra* note 4, at 449-50.

[123] *Viz.* Porter v. McNutt, 3 N.S.R.2d 201 (N.S. Sup. Ct., Trial Div., 1970, per Hard J.); Cuffe v. Mayer, 3 N.S.R.2d 440 (N.S. Sup. Ct. Trial Div., 1970, per Dubinsky J.); Howell v. Hall, 2 Nfld. & P.E.I.R. 404 (1972) (Nfld. Sup. Ct. Trial Div. 1970. per Puddester J.); *cf.* DeWeever v. Meister, 3 N.S.R.2d 265 (N.S. Sup. Ct. Trial Div. 1970, per Hart J.), where no consideration to the subjective criterion was given by the court in respect of a darkly clad fourteen year old struck by a car on the highway at night, other than that he "was 14 years of age and a student in Grade VII at the time and must have realised the danger he was creating for himself by his actions." *Id.* at 269. American courts persist in imposing on children who indulge in adult pursuits in or on vehicles a rebuttable presumption that they can act according to the appropriate adult criterion of care: Sadler v. Purser, 182 S.E.2d 850 (1971).

[124] *A Century of Tort Law in Canada. Whither Unusual Dangers. Products Liability and Automobile Accident Compensation?* 45 CAN. B. REV. 831, at 836 (1967).

today as it was when made six years ago. Countless cases appear in the recent reports which regrettably provide ample fodder for critics such as Professor Atiyah who has stigmatised Canadian judicial decision making as "mechanical jurisprudence . . . often seen at its worst." [125] The authors of the previous Torts Survey expressed the hope that "the House of Lords will . . . bury the *Addie* doctrine . . . ."; [126] the ironic and depressing outcome of recent developments is that although the House of Lords has indeed brought about such a change, [127] Canadian courts, no longer bound by Privy Council decisions, still prefer the rigorous classification of *Quinlan* [128] imposed on the Australian courts by the Privy Council, whilst the forward-looking Australian courts are obliged to resort to intellectually unsatisfying devices in their attempts to break away, *sub silento* from the shackles of *Quinlan.* [129] Not only the Canadian courts, but also the provincial legislatures (save Alberta, whose Occupiers Liability Act, 1973, came into force on January 1, 1974), appear all but impervious to clamours (principally from academics) for reform. [130] The categorical distinctions between entrants onto property continue to thrive, and insofar as trends in tort law can ever be firmly identified, it would appear that only action from the legislature will enable the judges to abandon this socially archaic approach.

That the *Addie* [131] criterion of occupiers' liability to a trespasser was effectively abandoned by the House of Lords in *Herrington* [132] is clear; what is less clear is the precise nature of the criterion which has taken its place. Lord Reid's proposed substitution of "culpable" [133] for "reckless" carries with it echoes of the Roman Law origins of the Scottish law of delict, to which, as a Scots lawyer, Lord Reid should be attached; it does not, however, assist one in understanding the precise relationship between "culpability" and negligence. Nor does the "common humanity" formula, adopted by

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[125] *Book Review*, 10 J. Soc. Teachers L. (N.S.) 232, at 234 (1969).

[126] Johnson, Desjardins and Grabowski, *Torts Survey*, 5 Ottawa L. Rev. 210, at 236, (1971).

[127] *In* British Ry. Bd. v. Herrington, [1972] A.C. 877 (H.L.).

[128] Comm'r for Rys v. Quinlan, [1964] A.C. 1054 (P.C.).

[129] Munnings v. Hydro Electric Comm'n, 45 Aust. L.J. 378 (1971); Cooper v. Southern Portland Cement Ltd., 46 A.L.J.R. 302 (1972), noted in 46 Aust. L.J. 253 (1972), *aff'd* in [1974] 1 All E.R. 87 (P.C.). *See also* P.G., *Comment*, 46 Aust. L.J. 409 (1972).

[130] *See*, Institute of Law Research and Reform (Alta.) Report No. 3, Occupiers' Liability (Dec. 1969) (considered by Alexander, in *Occupiers Liability; Alberta Proposes Reform*, 9 Alberta L. Rev. 89 (1971); and Ontario Law Reform Commissions's Report on Occupiers' Liability (1972), discussed by Percival in *Recent Trends in Occupiers' Liability*, Special Lectures of the Law Society of Upper Canada, New Developments in the Law of Torts 105, at 116 (1973).

[131] R. Addie & Sons (Collieries) Ltd. v. Dumbreck, [1929] A.C. 358 (H.L.).

[132] *Supra* note 127. The facts of this classic decision, as well as an account of its progress as far as the Court of Appeal are considered by the authors of the previous *Survey*, *supra* note 125, at 235-36.

[133] *Supra* note 127, at 898.

Lord Morris [134] and (more expansively) by Lord Pearson [135] bring one very much further. Their Lordships were adamant that, in abandoning *Addie* [136] on social grounds, they should not go too far; an explicit admission that the time had come to introduce a common duty of care to *all* entrants onto private property was just too much for their Lordships to provide, especially having regard to the fact that the Legislature, when it considered the matter fifteen years previously, had not seen fit to bring about such a change. [137] Commentators [138] on *Herrington* have debated whether the new criterion may be applied to only known or likely trespassers or whether all unlawful entrants are entitled to benefit from it. [139] In practical terms, however, the difference of opinion will make little or no difference, since an occupier, even if burdened with a "common humanity" duty towards all unlawful entrants, will have little difficulty in discharging such duty in the case of such unlikely entrants such as burglars and off-course balloonists.

In respect of trespassers, the Canadian Courts have, until recently, clung happily to the *Addie* criterion, indulging in devices such as the "fiction" [140] of implied licence to provide a remedy for particularly deserving claimants. The sop to progressivists offered by the Privy Council in *Quinlan* to the effect that the *Addie* formula "may embrace an extensive and, it may be, an expanding interpretation of what is wanton or reckless conduct towards a trespasser in any given situation" [141] has received no strong endorsement in Canada.

Very few Canadian decisions have considered the possible effect of *Herrington.* In *Veinot v. Kerr-Addison Mines Ltd.,* [142] the plaintiff was injured when struck by a steel pipe placed at head-height, while driving his snowmobile on the defendant's property. His action against the defendant failed on the ground that no implied licence could be shown by reason merely of the fact that the defendant had seen snowmobile tracks on his property of a few months prior to the accident. Furthermore, *Herrington,* even if applicable in Ontario, could not assist the plaintiff since, as Mr. Justice Arnup pointed out, their Lordships in *Herrington* required "a substantial probability" or "extreme [likelihood]" of the trespasser's presence before the more liberal criterion could take effect. Arnup's comments on *Herrington* hardly constitute a warm reception of the decision into Canadian jurisprudence: "It is not easy to appreciate, this recently after the delivery of the five separate

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[134] *Id.* at 910, adopting the approach of Pearson, J. (as he then was) in Videan v. Br. Transp't Comm'n, [1963] 2 Q.B. 650, at 680-1.

[135] *Id.* at 929. His Lordship relied on the change in the technological and social conditions as the basis of the rule in *Addie*'s case, having become obsolete: *Id.* at 929-30.

[136] *Supra* note 131.

[137] Occupier's Liability Act, 1957, 5 & 6 Eliz. 2.

[138] *E.g.*, McMahon, *Comment,* 6 IR. JUR. (N.S.) 331, at 333-5 (1972).

[139] *Cf.* Veinot v. Kerr Addison Mines Ltd., [1973] 1 Ont. 411, [1973] 31 D.L.R.3d 275, (Ont. 1972), discussed *infra.*

[140] *Supra* note 127, at 894 (per Lord Reid).

[141] *Supra* note 128, at 1084. See McMahon, *Occupiers' Liability in Canada,* 27 INT'L. & COMP. L.Q. 515, at 524 (1973).

[142] *Supra* note 139.

judgments of the House of Lords, what its precise effect is or will be (rather cautious commentaries have been made by Professor Goodhart in 88 L.Q.R. 305 (1972) and by C.J. Miller in 35 Mod. L.R. 409 (1972)." [143]

In *Lichty v. K. E. Holdings Ltd.*, [144] an intoxicated lady fell down a manhole on the property of the second defendant, which adjoined a parking lot, the properties of the first defendant. [145] The manhole was concealed by weeds and other kinds of vegetation. The second defendant alleged that the plaintiff was at the time a trespasser on the properties, since although admittedly an invitee in respect of the first defendant, she had nevertheless entered the properties of the second defendant without his permission, express or implied. Mr. Justice Munroe held that she was a licensee and that the defendant was in breach of its duty to warn her of a concealed danger of which it was aware. His Lordship, however, went further to consider *Herrington*, and stated:

> "Applying the common-sense principles therein enunciated, the liability of the [defendant] for the damages sustained by the plaintiff becomes more certain than it was before, even assuming that the plaintiff was a trespasser, which, I think she was not." [146]

Haynes v. C.P. Ry Co. and Boland [147] provides a good example of the current Canadian solution to the problem of trespassing plaintiffs, not so much in what the British Columbia Court of Appeal had to say on the matter, but, rather in respect of what the court did *not* consider itself obliged to express. In this case, the plaintiff was seriously injured when his car had been struck by one of the defendant's trains. The plaintiff was at the time a trespasser. The jury were asked a number of questions including one as to whether the Railway Company's servants had done "any act in reckless disregard of the plaintiff's safety. If so, what was it?" The jury had replied in the affirmative, specifying "(1) inadequate supervision and delegation of responsibility in securing and locking gates, and (2) a lack of warning signs on gates to indicate restricted entry." The jury also found contributory negligence on the plaintiff's part to a degree of 82%. Although the trial judge expressed the opinion that the acts of negligence on the company's part fell very short of negligence he felt obliged to record a judgment for the plaintiff in accordance with the findings of the jury.

The appeal of the company was successful on the basis that the findings of the jury were not such as to be incapable of amounting in law to negligence. The major part of their Lordship's judgments relate to the propriety of reversing the trial judge in such a manner. What small consideration of the duty problem as is given goes no further then to record that *Quinlan* [148]

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[143] *Id.* at 281 and 417 respectively.

[144] 35 D.L.R.3d 561 (B.C. Sup. Ct., 1973, per Munroe, J.).

[145] When the plaintiff regained consciousness at the bottom of the manhole, she thought initially that she was on a beach because she felt water and pebbles. When the reality of her plight dawned on her however, she panicked: *id.* at 563.

[146] *Supra* note 144, at 565-6.

[147] [1972] 6 W.W.R. 296 (B.C.).

[148] *Supra* note 128.

had retained the *Addie* criterion and that *Quinlan* had been approved in the British Columbia decision of *Stanton v. Taylor, Pearson & Carson (B.C.) Ltd. & Carson* [149] (later affirmed in the Supreme Court of Canada). [150] In *Stanton,* Mr. Justice Davey had stated approvingly that "'wanton', 'reckless' and the other epithets that have been used to describe this duty to a trespasser, import some moral element going beyond mere heedlessness. That is the sense in which I understand the learned trial judge to have used the expression 'reckless or wanton' in his judgment." [151] It is regrettable to record that in *Haynes,* where the British Columbia Court of Appeal handed down judgment on 29th August, 1972, no reference was made to the *Herrington* decision. *Herrington* was decided at Court of Appeal level on 2nd December 1970, and by the House of Lords on 16th February 1972. [152]

However odious the consistent use of categorization of entrants may be, it is doubly offensive to logic when the court misapplies the criteria: In *Bigcharles v. Merkel,* [153] such a confusion is evident. The deceased husband of the plaintiff had entered the defendant's furniture store with four other persons in the early hours of the morning. The defendant, who resided on the premises, was wakened, took a rifle from his gun locker and pursued the intruders. When the deceased and his associates responded to the order by the defendant and his wife to stop, by jumping through the windows the defendant "[i]n this moment of excitement . . . aimed the gun at one of the departing figures, but he did not fire. After the last invader had gone out the windows the defendant . . . fired through the open window into the night," [154] killing the deceased. In an action brought by the deceased's widow and children, the defendant was found liable in negligence, subject to a finding of 75% contributory negligence. The judge found that the deceased was struck "about 35 feet away from the building," [155] off the property of the plaintiff. Accordingly, the deceased was at the time of the shooting not a trespasser, but simply an ex-trespasser. Mr. Justice Seaton

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[149] 54 W.W.R. 449, 56 D.L.R.2d, 240 (1965).

[150] [1966] Sup. Ct. 641, 56 W.W.R. 768.

[151] *Supra* note 149, at 453, 56 D.L.R.2d 240, at 244. *See also,* MacKeigan v. Peake, [1971] 3 W.W.R. 294 (B.C.), where a child trespasser was unsuccessful in her claim, McFarlane, J.A., declaring that "[w]hile not binding on this Court . . . the law is stated correctly in the judgment of the Privy Council in Commissioner for Railway v. Quinlan." *Id.* at 298. No reference to an expanding concept of reckless was made by the Court. *See also,* Donald, *Comment,* 7 U.B.C.L. REV. 138, at 144-5. The Supreme Court of Alberta, Appellate Division, however, adopted what seems to be a more expanded concept of "recklessness," similar to that adopted by the English Court of Appeal in *Herrington,* [1971] 2 Q.B. 197, in Marquardt v. De Keyser & De Keyser Enterprises Ltd., [1972] 2 W.W.R. 49; see Argue, *Recent Cases on Occupiers' Liability,* 19 MCGILL L.J. 99, at 102 (1973).

[152] Reported in [1972] 2 W.L.R. 537, published on March 17th, 1972.

[153] [1973] 1 W.W.R. 324 (B.C. Sup. Ct., 1972, per Seaton J. *Cf.* the very similar fact situation in Charette v. Dorais [1972] C.S. 618 in which the concepts of faute and faute commune yielded a satisfactory resolution with far less conceptual dross than in *Bigcharles.*

[154] *Id.* at 325.

[155] *Id.* at 326.

was not disposed to justify the shooting on the basis of prevention of a crime, a step in an arrest process, protection of property or person or repulsion of a trespasser. "Giving full weight to the agonising circumstances inflicted upon the defendant by the deceased and his associates I am unable to reach any conclusion other than that the firing, under the circumstances, constituted an unjustifiable and negligent act." [156] So far so good. Why was it necessary, therefore, for his Lordship to make such strange pronouncements in the context of occupiers' liability, when, having found that the deceased was not a trespasser at the time of the shooting, he had considered himself able to identify an independant basis in common law for a straightforward breach of duty of care? Referring to the argument on behalf of the defendant that occupiers' liability should apply, in which case *Quinlan* [157] would exempt the defendant, his Lordship stated that he did "not understand *MacKeigan v. Peake* [158] to hold that all litigation arising out of acts done by a person who happens to be an occupier to a person who happens to be a trespasser necessarily fall to be decided by examining the duty of an occupier to a trespasser when the activity of the occupier is directed to the trespasser. The facts in that case are wholly different from those present here." [159] His Lordship expressed his preference for following the statement of Lord Gardiner in *Comm'r for Rys. v. McDermott* [160] to the effect that "whenever there is a relationship of occupier and licensee, the special duty of care which arises from that relationship exists. If there is no other relevant relationship, there is no further or other duty of care. But there is no exemption from any other duty of care which may arise from other elements in the situation creating an additional relationship between the two persons concerned." Why does Seaton proceed down such a sideroad? His Lordship has already decided that *no* occupier's liability, whether to trespasser or to licensee, exists since deceased at the time of the shooting was not on the defendant's property. Why, therefore, raise the issue of whether concurrent duties may exist on the shoulders of on occupier in respect of entrants onto his property? And, if this *is* a relevant issue, why not resolve it correctly? If anything is clear from a study of *Quinlan* and *McDermott* it is that these decisions establish that only in the case of *lawful* entrants will a concurrent duty of care be permitted to be recognised in the company of the occupational duty. Viscount Radcliffe could hardly have been more explicit when he stated in *Quinlan* that "[w]hat the law does not admit . . . is that a trespasser, while incapable of being described otherwise than as a trespasser should be elevated to the status of an ordinary member of the public to whom, if rightfully present, the occupier owes duties of foresight and reasonable care. It does not alter a trespasser's description merely to christen him a neighbour." [161]

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[156] *Id.*
[157] *Supra* note 128.
[158] [1971] 3 W.W.R. 294, 20 D.L.R.3d, 81 (B.C.).
[159] *Supra* note 153, at 328.
[160] [1967] A.C. 169, at 186-87 (P.C.).
[161] *Supra* note 128, at 1084.

Reneging on his relatively clearly expressed position in *S.C.M. (United Kingdom) Ltd. v. Whittal & Son Ltd.* [229] his Lordship stated:

> At bottom I think the question of recovering economic loss is one of policy wherever the courts draw a line to mark out the grounds of *duty*, they do it as a matter of policy so as to limit the responsibility of the defendant. Whenever the courts set bounds to the damages recoverable saying that they are, or are not, too remote — they do it as a matter of policy so as to limit the liability of the defendant . . .
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> The more I think about these cases, the more difficult I find it to put each into its proper pigeon-hole. Sometimes I say: 'There was no duty'. In others I say: 'The damage was too remote'. So much so that I think the time has come to discard those tests which have proved so elusive. It seems to me better to consider the particular relationship in hand, and see whether or not, as a matter of policy, economic loss should be recoverable. [230]

Lord Denning's use of the policy criterion in *Spartan Steel* is an object-lesson in the inadvisability of adopting such a crude and arbitrary tool. Very briefly the facts in *Spartan Steel* were that the defendant contractors had caused considerable physical and economic loss to the plaintiff's factory by negligently cutting off its electricity supply. Lord Denning's policy solution was to the following effect: If the defendant had been a statutory undertaking there would have been no liability, [231] therefore the same principle should apply to private contractors: "If such be the policy of the legislature in regard to electricity boards, it would seem right for the common law to adopt a similar policy in regard to contractors. If the electricity boards are not liable for economic loss due to negligence which results in the cutting off of the supply, nor should a contractor be liable." [232]

This is not a syllogism, nor is it even to the slightest extent obvious that judicial policy towards statutory undertakings is necessarily coincident with that directed towards private enterprises. [233] Rather the reverse would seem the case. Fleming is certainly of this opinion in respect of that popular but confusing decision of the House of Lords in *East Suffolk Rivers Catchment Board v. Kent,* [234] when he compliments their Lordships for their approach which "was clearly unexceptionable, demonstrating as it did the wisdom of judicial self-restraint in reviewing, in the context of a tort action, the exercise of administrative judgment which may, in any event, not have been uninfluenced by competing demands upon the defendant's limited resources." [235]

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[229] *Supra* note 214.

[230] *Supra* note 225, at 36-37, Goodhart has described Lord Denning's final sentences as "an admirable statement of the law as it is or ought to be"; *Comment*, 89 L.Q.R. 10, at 12 (1973).

[231] His Lordship cited in support, the following decisions: Atkinson v. Newcastle & Gateshead Water Works Co., L.R. 2 Ex. D. 441 (1877); Clegg, Parkinson & Co. v. Earby Gas Co., [1896] 1 Q.B. 592; Stevens v. Aldershot Gas, Water and District Lighting Co., 102 L.J.K.B. 12 (1932).

[232] *Supra* note 225, at 563.

[233] See the criticism to this effect by Jacobs, *Comment*, 35 MODERN L. REV. 314, at 316 (1973).

[234] [1941] A.C. 74 (1940).

[235] J. FLEMING, THE LAW OF TORTS at 142 (4th ed., 1971).

The second policy consideration enunciated by Lord Denning is to the effect that the cutting of the supply of electricity "is a hazard which we all run," [236] potentially due to either negligent or non-negligent causes such as lightning. Usually such interruption is brief and does not cause much loss, at all events rarely physical loss, and "such a hazard is regarded by most people as a thing they must put up with without seeking compensation from anyone. . . . when the supply is cut off, they do not go running round to their solicitor. They do not try to find out whether it was anyone's fault. They just put up with it. They try to make up the economic loss by doing more work next day. This is a healthy attitude which the law should encourage." [237]

With all respect to his Lordship, this passage can hardly be taken seriously by those under eighty. The "grin-and-bear-it" philosophy which it espouses is an interesting fossil of the "yes, we have no bananas" [238] spirit of the wartime forties, but it can hardly provide a cutting edge of policy to determine in a court of law whether or not a plaintiff should succeed in his action. Carried to its logical conclusion, such a hostile attitude to plaintiffs would re-establish the old areas of immunity from a duty of care,[239] since, undeniably, in former times, uncompensated victims in such circumstances were accustomed to look elsewhere, if anywhere, for relief.

Lord Denning's next two policy considerations are familiar ones, although the latter is inverted in respect of its usual rationale. The first is the old reliable "floodgates" consideration: the second is to the effect that the community rather than one individual is better able to bear the losses in circumstances such as in *Spartan Steel.* The irony of the latter socialised insight is that the "accepted doctrine" of contemporary tort law uses the loss distribution argument to *impose* liability on a defendant in such circumstances [240] rather than relieve him of it, as Lord Denning here advocates.

A vitally important extension of the area of recovery for economic loss in Canada has been made by the Supreme Court of Canada in *Rivtow Marine Ltd. v. Washington Iron Works.* [241]

There, the plaintiff was the charterer of a log barge which used a special type of crane supplied by the defendant. The defendant was aware that similar cranes had developed cracks which required repairs to be effected, but it did not inform the plaintiff of this fact. When a workman on a sister barge was killed as a result of one of the cranes collapsing, the plaintiff

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[236] *Supra* note 225, at 563.

[237] *Id.* at 564.

[238] *Cf.* the facts of Seaway Hotels Ltd. v. Gragg (Canada) Ltd., *supra* note 212; Jacobs, *supra* note 233 describes Lord Denning's endeavours in this area as "reintroducing the Puritan ethic to the English Law."

[239] The shrinkage of such areas of immunity in recent years is strikingly evident when one compares Heuston, *Donoghue v. Stevenson in Retrospect,* 20 MODERN L. REV. 1 (1957) with *id., Donoghue v. Stevenson: A Fresh Appraisal,* 24 CURRENT L. PROB. 37, at 38-52 (1971).

[240] A. LINDEN, *supra* note 211, at 471-472.

[241] [1973] 6 W.W.R. 692.

withdrew its cranes from service for repair, thereby incurring considerable loss of profits since the logging season was at its height at the time.

The plaintiff's action for recovery for such economic loss caused by the defendant's negligence succeeded at trial, [242] based on the *Hedley Byrne* [243] principle, but failed in the British Columbia Court of Appeal, [244] where Mr. Justice Tysoe narrowly interpreted the scope of *Hedley Byrne,* relying instead on obsolete American authorities to deprive the plaintiff of its claim. [245]

The Supreme Court of Canada agreed [246] with the court of Appeal that *Hedley Byrne* did not provide an easy solution to the instant case, but strongly dissented from Tysoe's extremely restrictive interpretation of its scope. [247] Mr. Justice Ritchie stated: "In the present case there is no suggestion that liability should be based on negligent misrepresentation and to this extent the *Hedley Byrne* case is of no relevance. I refer to it for the sole purpose of indicating the view of the House of Lords that where liability is based on negligence the recovery is not limited to physical damage but extends also to economic loss." [248]

However, his Lordship, in such an interpretation of *Hedley Byrne,* presents a novel and liberal approach. Hitherto, "negligent mis-statement" was conceived as a narrow exception to the rules relating to economic loss. In Ritchie's view, *Hedley Byrne,* far from constituting a unique area of "economic" recovery, represents a signpost for recovery in respect of other areas of economic loss (outside the context of contract, which has been declared a forbidden territory by the regressive decision of *J. Nunes Diamonds Ltd. v. Dominion Electric Protection Co.* [249]

Having referred to the recent English decisions [250] in the area of recovery

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[242] 74 W.W.R. 110 (B.C. Sup. Ct. 1970).

[243] Hedley Byrne & Co. v. Heller & Partners Ltd., [1964] A.C. 465 (H.L. 1963).

[244] [1972] 3 W.W.R. 735, 26 D.L.R.3d 559.

[245] Harvey has strongly criticised the Court of Appeal in this respect: "Had Tysoe J.A. had the advantage of an up-to-date survey of American law he would have found a wealth of authority to support the plaintiff's claim in *Rivtow* and to discredit the loss distinction which he accepted." *Economic Losses and Negligence: The Search for a Just Solution,* 50 CAN. B. REV. 580, at 615 (1972).

[246] *Per* Ritchie, J., with whom Fauteux, C.J.C., Martland, Judson, Abbott, Spence and Pigeon, JJ. concurred.

[247] His Lordship had observed that "[a]ll that case decided was that, in view of the express disclaimer of responsibility by the defendant, a special duty of care and a liability to the plaintiff for negligence were absent and so the latter could not recover," *supra* note 244, at 748 and 570. Such an interpretation is generally considered to be ridiculous. Dias has described it as "absurd." *Comment,* [1963] CAMB. L.J. 216, at 221; Salmond states that "[i]t would be pedantic and unreal to describe as *obiter dicta* the fully considered judgments of five Law Lords delivered after hearing eight days of argument"; SALMOND, THE LAW OF TORTS at 265-266, (15th ed. by R. Heuston 1969).

[248] *Supra* note 241, at 709-710.

[249] [1972] Sup. Ct. 769, 26 D.L.R.3d 699.

[250] S.C.M. (United Kingdom) Ltd. v. W. J. Whittal & Son Ltd., *supra* note 214; Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors) Ltd., *supra* note 225; Ministry of Housing & Local Government v. Sharp, *supra* note 219.

for economic loss, without discussing their merits, Ritchie concludes as follows.

> I am conscious of the fact that I have not referred to all relevant authorities relating to recovery for economic loss under such circumstances, but I am satisfied that in the present case there was a proximity of relationship giving rise to a duty to warn, and that the damages awarded by the learned trial judge were recoverable as compensation for the direct and demonstrably foreseeable result of the breach of that duty. This being the case, I do not find it necessary to follow the sometimes winding paths leading to the formation of a "policy decision." [251]

One must admire Ritchie's solution in this context combining as it does a shrewd legal approach with a healthy distaste of embarking upon a gratuitous journey down the treacherous lanes of policy considerations.

Mr. Justice Laskin, delivering a partially dissenting judgment, [252] approached the problem in even more broad and liberal terms than Ritchie. Nevertheless, his Lordship's judgment contains anachronistic streaks, which, if accepted in subsequent decisions, can only serve to introduce unnecessary complications into Canadian jurisprudence. The essential basis of liability, as his Lordship conceived the matter, was that if a defendant manufacturer of a deficient product places a plaintiff at *physical* risk, then such plaintiff can sue for direct *economic* loss caused as a result of the defendant's conduct. The "floodgates," in the opinion of his Lordship, were not thereby opened unduly wide.

> Liability here will not mean that it must also be imposed in the case of any negligent conduct where there is foreseeable economic loss; a typical instance would be claims by employees for lost wages where their employer's factory has been damaged and is shut down by reason of another's negligence. The present case is concerned with direct economic loss by a person whose use of the defendant['s] product was a contemplated one, and not with indirect economic loss by third parties, for example, persons whose logs could not be loaded on the appellant's barge because of the withdrawal of the defective crane from service to undergo repairs. It is concerned . . . with economic loss resulting directly from avoidance of threatened physical harm to property of the appellant if not also personal injury to persons in its employ. [253]

A strong argument against such an approach can be made. Indeed, it has already been presented in respect of the "directness" requirement which Widgery postulated in *Weller,* [254] for which he was roundly condemned by Lord Denning in *S.C.M. (United Kingdom) Ltd. v. W. J. Whittell & Son Ltd.* [255] There are striking similarities in the approach of Laskin and

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[251] *Supra* note 241, at 711.

[252] Hall, J., concurring. The minority would also have provided the plaintiff with a remedy in damages in respect of the cost of repairs to the crane.

[253] *Supra* note 241, at 713.

[254] *Supra* note 213.

[255] "The distinction between 'direct' and 'indirect' has been attempted before, but it has proved illusory. It was decisively rejected in a parallel field in *The Wagon Mound* [1961] A.C. 388 and should not be revived here." *Supra* note 214, at 343.

the English Court of Appeal in *Re Polemis*.[256] It would be ironic if Polemis were introduced as such a late stage as part of the scaffolding to support the concept of recovery for economic loss when its rationale has been so effectively destroyed by the argument presented by the *Wagon Mound*[257] and countless articles thereafter.

VII. VOLENTI NON FIT INJURIA

Volenti Non Fit Injuria may be falling on hard times in the common law world[258] but in Canada it shows some signs of vigour. It would however, be fair to conclude that in nearly all instances of the defendant successfully raising the defence, the plaintiff's case could have been defeated equally comfortably by the invocation of that other Latin maxim *ex turpi causa*.[259] A short summary of the cases where the defence was raised is provided below. In *Conrad v. Crawford*[260] the plaintiff, the defendant and a third man went on "a beer drinking joy ride"[261] in the plaintiff's car. Their purpose was to buy beer, place it in the defendant's car, "consuming it as they went driving around the countryside and varying this routine with occasional stops at wayside taverns to drink more beer as a supplement to the supply kept in the car."[262] It was admitted that the three had on previous occasions gone out on similar expeditions. After the party had consumed a considerable proportion of the drink purchased and after the defendant driver had travelled at high speeds, the car, as a result of the defendant's erratic driving, was waved down by a policeman with a flashlight. The defendant with the encouragement of the third man in the car, proceeded to attempt to escape from the police by driving along a winding road at fifty miles per hour. After negotiating two bends, the defendant lost control of the car and crashed, injuring the plaintiff. The plaintiff's case was rejected by Mr. Justice Hughes, his Lordship stating:

> I am firmly of the opinion that in the case at bar the obligation on the defendant to show that the plaintiff not only assumed the physical, but the legal risk has been met and that the inference to be drawn from the cir-

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[256] *In Re* An Arbitration Between Polemis and Furness, Withy & Co., Ltd., [1921] 3 K.B. 560. *Cf.* Scrutton, L.J., at 577: "[i]t was negligent in discharging cargo to knock down the plants . . . for they might easily cause some damage either to workmen, or cargo, or the ship. The fact that they did directly produce an unexpected result . . . does not relieve the person who was negligent from the damage which his negligent act directly caused."

[257] *Supra* note 255.

[258] In Nettleship v. Weston, [1971] 2 Q.B. 691 at 701, Lord Denning stated that since contributory negligence has been reduced to a comparative issue, "the defence of *volenti non fit injuria* has been closely considered, and, in consequence, it has been severely limited."

[259] *See* Fridman, *The Wrongdoing Plaintiff*, 18 McGILL L.J. 275 (1972).

[260] [1972] 1 Ont. 134, 22 D.L.R.3d 386 (High Ct. 1971).

[261] *Id.* at 135 and 387 respectively.

[262] *Id.*

> cumstances of the whole transaction is that the plaintiff agreed, by necessary implication of his conduct and the evidence he gave, to exempt the defendant from liability for any damage suffered by him as a result of the latter's negligence. The preconcerted expedition undertaken by the three young men in this case, and not for the first time, resulted in drinking by all of them while the car was being driven by the defendant and the encouragement of the defendant to continue drinking in their company. This course of conduct developed at the end of the venture into a run from the police against which no protest was made which was a foreseeable consequence of it. It is difficult to think of a clearer case except perhaps that of *Shwindt v. Giesbrecht.* [263] [264]

Hughes went on to state that as a practical matter it is difficult to see how in any case of contributory negligence in a situation like this a higher apportionment than 50% against the plaintiff could possibly be made in the face of a finding of gross negligence on the part of the defendant. [265] With respect, such may very well not be the case. In *Conrad v. Crawford,* Hughes referred to the fact that the plaintiff at no time tried "to suggest that he had been victimized by (the defendant)." [266] What if the boot were on the other foot? Imagine circumstances where a young girl or boy having had too much to drink at a party is encouraged by an overbearing boyfriend or colleague to drive fast and dangerously? Depending on the degree of "victimization" of the defendant, surely it would be unwise to suggest binding oneself *a priori* to a maximum finding of fifty per cent contributory negligence against the plaintiff bully in the event of an accident resulting from the defendant's gross negligence?

The illegality of the venture in *Conrad v. Crawford* appears to have weighed heavily against the plaintiff.

> (The plaintiff) admitted that he knew that (the defendant) was a fast and indeed a reckless driver, that he knew that the law was being broken, not only by (the defendant) driving while he was intoxicated, but by the members of the party drinking beer in the car as it was being driven, that it was unlawful to attempt to elude the police, that after leaving Barrie for the second time he had kept a lookout behind expecting the police to follow. [267]

Three other decisions which involved illegal consumption of drink in a motor vehicle, drunken and dangerous driving, and other illegal aspects also involved a finding of *volenti* against the plaintiff. In *Tomlinson v. Harrison* [268] the plaintiff was a girl—usually a factor in favor of rejecting the *volenti* defence. [269] Other circumstances were, however, strongly against her. When she was picked up from work by the defendant and another

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[263] 13 D.L.R.2d 770, 25 W.W.R. 18 (1958).

[264] *Supra* note 260, at 145-46 and 397-98 respectively.

[265] *Id.* at 146 and 398 respectively. *See also* Priestley v. Gilbert, [1972] 3 Ont. 501, 28 D.L.R.3d 553, at 505-506 aud 557-58 respectively, where Osler, J., approved of Hughes J.'s approach to this problem.

[266] *Id.* at 137 and 389 respectively.

[267] *Id.*

[268] [1972] 1 Ont. 670, 24 D.L.R.3d 25, (High Ct. 1971).

[269] *Cf.* Car & General Insurance Corp. v. Seymour, [1956] Sup. Ct. 322, 2 D.L.R.2d 369, and Stevens v. Hoberg, *infra* note 295.

man, the defendant had already consumed about ten to fifteen glasses of beer. In the next three hours about another ten draughts were drunk by the defendant, the plaintiff consuming about the same amount. Having stolen one car which they abandoned because it was not high powered enough, the party stole a second car, a Mustang, and proceeded along Highway 401 from Toronto to Ottawa. The plaintiff had a case of beer and she passed some beer to the defendant driver and his friend as the journey progressed. When the defendant driver "got cold feet" about the safety of the party, the party decided to return to Toronto. On the way back, it passed a police car at a very high speed. When the police car attempted to intercept it, the defendant drove at over 100 miles per hour, passing cars which were already in the passing lane. During the chase the plaintiff was periodically looking over her shoulder at the police car. The defendant lost control of the car, which shot across the highway and crashed, injuring the plaintiff. The plaintiff's case was defeated by the defence of *Ex turpi causa,* but Mr. Justice Addy approving *Conrad v. Crawford,* also found against her on the *volenti* issue:

> The case before me is far from being one where the passenger passively accepts a gratuitous ride in a car driven by a person who is in fact and who appears to be intoxicated. There was a joint venture created from the very beginning when it was decided in the tavern to steal a car in order to get to Ottawa and the active participation of the plaintiff throughout continued the joint dangerous venture until the moment of the accident. The unfortunate result could easily have been foreseen and was natural (sic) consequence of the many reckless actions taken up to that moment. The case is one which in my view, falls in the category of those referred to as a joint dangerous ventures or common dangerous enterprises such as the case of *Conrad v. Crawford* . . . and the cases of *Deauville v. Reid,*[270] *Shwindt v. Giesbrecht*[271] . . . and *Mason v. Burke.*[272] [273]

In *Boulay v. Wild,*[274] four youths, including the deceased and the defendant, decided one afternoon to go out that evening, the decision to use the defendant's car being made by a flip of a coin. Having each consumed sixteen glasses of beer at an hotel, the party went to a cocktail lounge where each had a further drink. The party then entered the defendant's car, drove down some of the centre-city streets of Edmonton and harassed another driver by threatening to injure him and by bumping against his car. Following a sojourn at a drive-in restaurant, the party showing "obvious signs of the effects of drinking"[275] continued on their way until the car was involved in a

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[270] 52 M.P.R. 218 (1966).

[271] 25 W.W.R. 18, 13 D.L.R.2d 770 (Alta. Sup. Ct. 1958).

[272] [1968] 2 Ont. 5, 68 D.L.R.2d 10.

[273] *Supra* note 268, at 680 and 36 respectively.

[274] [1972] 2 W.W.R. 234, 25 D.L.R.3d 249 (Alta.). A fuller account of the evidence in this case (albeit in a criminal context) may be gleaned from a study of Wild v. R. [1971] Sup. Ct. 101, [1970] 4 Can. Crim. Cas. 40, 11 D.L.R.3d 58 (1970). The report of this decision was admitted, by consent as an exhibit in the civil action.

[275] *Id.* at 237 and 250 respectively.

crash in which three of the party were killed, the defendant being the only survivor.

The plaintiff family of one of the deceased lost its action for negligence against the defendant, and its appeal was dismissed by the Alberta Supreme Court, Appellate Division.

Johnson J.A., delivering the judgment of the court stated:

> In the present case, as in *Miller v. Decker* [276] the facts are quite different [to where a person *accepts a ride* from one who was known to have consumed a quantity of alcohol that may have impaired his ability to drive. In the present case] several persons deliberately decided to spend the evening drinking. The consequences of such a venture are that all are likely to become intoxicated. If transportation is a part of the programme, it is equally inevitable that if one of them is to drive the vehicle, he will be doing so while his ability to do so is impaired with alcohol. The risk of injuries or death to those who ride with him is extremely high. These things must be assumed to be within the knowledge of all who participate and (to use the words of Rand J., in the passage that has been previously quoted,) [277] 'the obvious hazards were theirs equally and jointly.' In such circumstances, it would be idle to attempt to differentiate between physical and legal risk. [278]

Observing that the three deceased young men had not availed themselves of three opportunities to dissociate themselves from the defendant after the majority of the drink had been consumed, his Lordship concluded. "The *locus poenitentiae* offered by these occasions to withdraw from their implied agreement was rejected by all." [279]

The Saskatchewan Court of Appeal came to a similar finding of *volenti* against the plaintiff in *Allan v. Lucas.* [280] There the plaintiff and defendant had purchased a carton of beer and had driven to a spot on the highway where they turned out the lights of their vehicle, opened the carton and started consuming the beer. They then saw a car approaching about an eighth of a mile away. When the car stopped the pair became apprehensive that it might be the police and they decided that they would try to get rid of the beer. They turned on their lights and drove toward the car, which was, as they feared, indeed a police car. The police car turned on its flasher which the defendant ignored. The defendant's car accelerated away at a high speed. After they had passed the police car, the plaintiff opened the door of the defendant's car and threw out the beer. At the time there was no conversation between the pair, but as they passed a turn in the road the plaintiff asked the defendant to slow down. At a later turn in the road, the defendant, on account of his speed was unable to keep the car on the road, and it hit a bank, injuring the plaintiff.

The trial judge found that the evidence established a common plan by

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[276] [1957] Sup. Ct. 624, 9 D.L.R.2d 1.
[277] *Id.* at 630 and 3 respectively.
[278] *Supra* note 274, at 239 and 252 respectively.
[279] *Id.*
[280] [1972] 2 W.W.R. 241, 25 D.L.R.3d 218, (1971).

the pair to drive away and ditch the beer, but, notwithstanding this, that the plaintiff was neither *volenti* nor contributorily negligent. With respect to the *volenti* defence the trial judge could find no evidence from which an inference of waiver by the plaintiff of his legal right of action could be drawn.

> He did nothing other than report the presence of the car as he had been requested to do and informed [the defendant] of an alternative route which may have been a safer one. He personally had no reason to run from the police — the beer having been disposed of. That he did not want to be involved in the accident may be inferred from his request to [the defendant] to slow up or his suggestion of an alternative route. He knew where they were. [281]

The Court of Appeal held that the trial judge erred in that, having found a common undertaking to ditch the beer and to avoid police detection he had failed to give this aspect sufficient consideration. In the view of Mr. Chief Justice Culliton,

> the evidence is clear that [the plaintiff] and [the defendant] were acting together in a common purpose — to avoid apprehension by the police. I think, in so doing, both would foresee and realise the dangers inherent therein and voluntarily accepted those dangers. I am satisfied that [the plaintiff] would realize the risks to which he would be subjected by the type of driving necessary to avoid apprehension by the police — risks which he voluntarily assumed. In these circumstances, I do not think the conduct of [the plaintiff] can be construed other than as a consent to the assumption of the risks without compensation, and as a consent to absolve [the defendant] from the duty to take care. [282]

If it should be imagined that Canadian Courts are blood-thirsty in their desire to wreak vengeance on errant plaintiffs for their participation in antisocial activities, a number of decisions in which the *volenti* defence was raised unsuccessfully must be considered.

In *Halliday v. Essex* [283] "a group of highly spirited young men" mostly under the legal age, had purchased a large quantity of beer with spirits, to spend a weekend snowmobiling at a cottage belonging to one of them. After having purchased the drinks, the party agreed to share gas and automobile expenses for the weekend. Having reached the cottage the party indulged in "foolish and excessive drinking." [284] During the evening the plaintiff and the defendant became separated though it was clear that the plaintiff would have known that the defendant was drinking when not in his presence. Late in the evening, the party went on a "midnight drive" during which the defendant drove recklessly, thereby injuring the plaintiff.

Mr. Justice Lacourcière, in the Ontario High Court, approached the *volenti* issue in a twofold manner. As regards the initial undertaking to go to the cottage in the defendant's car and to pool resources for automobile

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[281] Quoted by Culliton, C.J.S., on appeal, *id.* at 245 and 221-2, respectively.
[282] *Id.* at 247 and 223-4 respectively.
[283] [1971] 3 Ont. 621, 21 D.L.R.3d 293 (High Ct.).
[284] *Id.* at 625 and 297.

and drinking expenses, his Lordship, adopting the criterion formulated by the Privy Council in *Létang v. Ottawa Ry. Co.* [285] that for the defence to succeed the plaintiff must have "freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly *agreed* to incur it" [286] held that he could not find "that by agreeing to be a passenger, the plaintiff impliedly agreed to release the defendant from his responsibility for care, and agreed to assume the risk involved in continuing as a passenger." [287] The other question was whether, at the time of the "midnight drive," the plaintiff had "modified the initial responsibility of the driver." [288] Lacourcière concluded from the evidence that "while he had been separated from the defendant for most of the evening and would not know the extent of his drinking, he knew that the defendant had been drinking, although he was probably unaware of the degree of drunkenness attained by him." [289] However, since the plaintiff was himself drunk at the time he went on the midnight drive, "the plaintiff was probably too drunk to form any valid opinion as to the state of intoxication of his driver. In that respect, he was in no position to appreciate the nature and extent of the risk and to freely release the defendant of his obligation to drive safely." [290] Accordingly the plaintiff was held by Lacourcière not to be *volens* but, instead, 40% contributorily negligent since the "plaintiff's conduct in the venture was such as to lead to the necessary inference and conclusion that he was not at the material time taking reasonable care for his own safety." [291]

Having regard to the other recent decisions in this context, one must count the plaintiff a fortunate young man. The humanity of Lacourcière, evident in other decisions, [292] is apparent in the instant case when his Lordship states that he, "must confess that this issue (of *volenti non fit injuria*) has caused me considerable anxiety, particularly in this case where a group of teenagers and immature adults were engaged in the joint enterprise of a drinking weekend necessarily involving the use of a motor vehicle." [293] His Lordship was confident that the temporary abandonment of the motor vehicle and the separation of plaintiff and defendant from each other at the cottage were sufficient to "discharge" what, it would seem safe to say, would undoubtedly have been a case of *volenti* had the same drinking as occurred at the cottage taken place in a car or hotel prior to

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[285] [1926] 3 D.L.R. 457, [1926] A.C. 725.

[286] *Id.* at 461 and 731 respectively, per Lord Shaw of Dunfermline quoting Wills, J., in Osborne v. London and North Western Railway Company, 21 Q.B.D. 220, at 223 (1887).

[287] *Supra* note 283, at 624-25 and 296-97 respectively.

[288] *Id.* at 625 and 294 respectively.

[289] *Id.*

[290] *Id. Cf.* Van Der Zouwen v. Koziak, [1972] 2 W.W.R. 225, 25 D.L.R.3d 354, where the plaintiff was not held *volenti* although he and the defendant had consumed alcoholic drinks prior to a journey, since the plaintiff had fallen asleep before the defendant's dangerous driving commenced.

[291] *Id.* at 626 and 298 respectively.

[292] *Cf.* Matthews v. MacLaren, [1969] 2 Ont. 137, 4 D.L.R.3d 557.

[293] *Supra* note 283, at 624 and 296 respectively.

returning to a car. Having regard to the evidence, this is perhaps somewhat indulgent to the plaintiff. It was clearly contemplated that large quantities of drink would be consumed at the cottage within a short time of arriving there. Is it not somewhat artificial to argue that if, after such anticipated consumption, the plaintiff "chooses" to the best of his deficient abilities, to drive with a known drunken driver, he should be excused? The unfortunate plaintiff in *Miller v. Decker* [294] was not permitted to place the time of choice at the end rather than before the commencement of the drinking activities. Why should the plaintiff in *Halliday v. Essex* do so, simply because there was evidence of separation of plaintiff and defendant during the evening and also because of the fact that the cottage constituted the end of the (first) journey rather than an intermediate stopping off point, as the beer parlour did in *Miller v. Decker?* [295]

VIII. PRIVACY

The issue of whether there is a right to privacy at common law has, since the last survey, [296] been placed squarely before the Court of Ontario, and equally squarely sidestepped by the trial judge. In *Krouse v. Chrysler Canada Ltd.*, [297] Mr. Justice Haines stated: "I specifically decline to rule on the issue of whether there is a common law right to privacy in Ontario." [298] In that case, his Lordship preferred to base his decision in favour of the plaintiff, a footballer whose picture had been used without his permission for commercial gain by the defendant, on the concept of invasion of a right of property, precisely the approach condemned by Warren and Brandeis in their classic article, [299] as involving "the fiction of property in a narrow sense" [300] instead of as "merely an instance of the enforcement of the more general right of the individual to be let alone." [301]

It would seem probable that the legislature in Ontario will step in [302] where the courts have feared to tread by introducing a statutory right to

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[294] *Supra* note 276.

[295] *See also* Stevens v. Hoeberg, [1972] 3 Ont. 840, 29 D.L.R.3d 673 (High Ct.) where the *volenti* defence failed against a female plaintiff who sustained injuries in a single vehicle collision. The driver was intoxicated. The plaintiff, however was found to have been contributorily negligent to the extent of 25% because she had failed to leave the vehicle when suitable opportunities presented themselves.

[296] Johnson, Desjardins and Grabowski, *Torts Survey*, 5 OTTAWA L. REV. 210, at 238 (1971). Recent Canadian articles considering the privacy issue include Williams, *Invasion of Privacy*, 11 ALBERTA L. REV. 1 (1973), and Rowan, *Privacy and the Law*, LAW SOCIETY OF UPPER CANADA, SPECIAL LECTURES: NEW DEVELOPMENTS IN THE LAW OF TORTS 259 (1973).

[297] [1972] 2 Ont. 133 (Ont. H.C.).

[298] *Id.* at 140.

[299] *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

[300] *Id.* at 204.

[301] *Id.* at 205.

[302] *See* the ONTARIO LAW REFORM COMMISSION'S REPORT ON PROTECTION OF PRIVACY IN ONTARIO (1968), which supports legislation in this sphere.

privacy, as already exists in British Columbia [303] and Manitoba. [304] England has faced similar pressure to introduce legislation creating a statutory right to privacy, [305] but the most recent investigation by the Younger Committee [306] has counselled against the enactment of any such general right, preferring specific recommendations in respect of unlawful surveillance and the disclosure of information unlawfully acquired. The Committee expressed its approval of the reawakening of interest in the concept of breach of confidence, [307] arguing that the extent of its potential effectiveness as not yet been widely recognised.

The British Columbia Provincial Court decision of *Re MacIsaac and Beretanos* [308] is interesting in regard to the confidence of the trial judge in invoking the privacy concept when considering a section of the Landlord and Tenant Act. [309] In this case, a landlord had ousted a tenant from the demised premises in circumstances which constituted a breach of section 46 of the Act. Judge Levey, in giving judgment for the plaintiff tenant in an action for damages against the landlord, stated:

> In my view, S. 46 of Part II of the *Landlord and Tenant Act* creates a statutory right to privacy. The right to privacy was considered by two eminent legal minds, S. D. Warren and Louis Brandeis in an article entitled '*The Right to Privacy*' in 4 *Harv. L. Rev.* 193 (1890). This article, perhaps treatise, on the right to privacy in the United States, dealt with an analysis of that right in common law, and at p. 21 the authors suggested:
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> 'The right of property . . . including all rights and privileges, and hence embracing the right to an inviolate personality, affords alone that broad basis upon which the protection which the individual demands can be rested.'
>
> In legislating S. 46, the provincial Legislature must have considered the common law right to privacy, and the need to incorporate that right in a statute, thereby creating a statutory tort. That this is so, is evidenced by the fact that there has been provided no remedy, either by way of a penalty pursuant to s. 62 of the *Landlord and Tenant Act*, Part II, or by way of summary application to the Small Claims Court for a violation of s. 46. [310]

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[303] Privacy Act, B.C. Stat. 1968 c. 30.

[304] Privacy Act, REV. STATS. MAN. c. 125 (1970).

[305] THE JUSTICE REPORT, PRIVACY AND THE LAW (London, 1970), incorporated a draft Bill creating a (loosely framed) statutory tort of invasion of privacy. Such draft Bill came before Parliament as a Private Member's Bill but did not meet with success, see Taylor, *Privacy and the Public*, 34 MODERN L. REV. 288 (1971).

[306] REPORT OF THE COMMITTEE ON PRIVACY, CMND. 5012 (1972), criticised by Dworkin in 36 MODERN L. REV. 399 (1973).

[307] The classic recent decision in this area, described by Rowan, *supra* note 296, at 301 as a "case of great importance to the law of privacy" is Argyll v. Argyll, [1967] C. 302. For accounts of recent developments, see Jones, *Restitution of Benefits Obtained in Breach of Another's Confidence*, 86 L.Q.R. 463 (1970) and North, *Breach of Confidence: Is There a New Tort?* 12 J. SOC. PUBLIC TEACHERS L. 149 (1972).

[308] 25 D.L.R.3d 610 (1972).

[309] B.C. Stat. 1970 c. 18, § 46.

[310] *Supra* note 308, at 514. *Cf.* Cunningham v. Moore, [1973] 1 Ont. 357, 31 D.L.R.3d 149 (1973). *affg*, [1972] 3 Ont. 369, 28 D.L.R.3d 277, where, in a liberal interpretation of the civil liability of a landlord for failure to repair under the Ontario

What is interesting—and misleading—about his Lordship's statements is that he appears to think that there is, in Canada, such a clear acknowledgement of the right to privacy in common law that he need simply refer to it as "*the* common law right to privacy." [311] Further, the fact that the legislature of British Columbia saw fit four years previously to create a statutory right to privacy [312] seems to have evaded his Lordship's attention. Accordingly, little, if any, weight can be attached to this apparent judicial recognition in Canadian jurisprudence of a common law right to privacy.

IX. INTENTIONAL TORTS

The conceptional reorientation of tort law from the issue of directness of causation to that of the *mens rea* of the defendant has not yet taken place in Canada, [313] thereby entitling the judiciary of this country to be vilified as neanderthal perpetuators of the discredited forms of action or hailed as plaintiff-orientated loss distributors in the spirit of Ehrenzweig, depending on one's ideological position. [314]

A recent Ontario decision confirms the hegemony of the *Cook v. Lewis* [315] conceptualisation. In *Bell Canada v. Bannermount Ltd.*, [316] the defendant company's servants were digging post holes on Bank Street in Ottawa when they negligently severed a cable belonging to the plaintiff. The evidence disclosed that, although the defendant company had been aware of precisely this risk, there had been a breakdown of communication because of language difficulties between the foreman and other employees of the defendant company. On the basis that this might constitute something approaching a good excuse, [317] the issue of where the onus of proof lay became important. The plaintiff succeeded in its action in the Ontario Court of Appeal. [318]

Mr. Justice Schroeder stated: "The case against the defendant lies in trespass, and it is common ground that the onus of establishing the absence of negligence in connection with the trespass rests upon the trespasser, in

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Landlord and Tenant Act, ONT. REV. STAT. c. 236 (1970), a tenant was held entitled to claim for damages, despite the specific alternative avenues of compensation available to him under other sections of the Act.

[311] Emphasis added.

[312] *Supra* note 303.

[313] Not in judicial decisions, but, following the lead of American scholars, the academic literature of this country has adopted the intention/negligence-bifurcation to the satisfaction, no doubt, of the authors, but to the confusion of the student and the irritation of this teacher.

[314] See A. LINDEN, CANADIAN NEGLIGENCE LAW at 205 (1972).

[315] [1951] Sup. Ct. 830.

[316] [1973] 2 Ont. 811.

[317] The late John Austin's *A Plea for Excuses*. 57 PROC. ARISTOTELIAN SOC. 1 (1956) should be compulsory reading for negligence lawyers instead of being consigned to the list of unread philosophical works dismissed in general by practitioners as "irrelevant," in breach of the principle of *audi alteram partem*.

[318] *Supra* note 316.

this case the defendant. There was no intentional wrongdoing. The question is, was there any negligent wrongdoing on its part?" [319]

Having reviewed the evidence, his Lordship, applying the rule in *Cook v. Lewis,* concluded that the defendant had not established that it had not been negligent. Legal purists might object to his Lordship's final comment: "Even if there were a doubt in the matter the plaintiff would be entitled to succeed." [320] If such doubt really existed, it would surely be indicative of the defendant having discharged the burden of proof. Schroeder's reference to "a doubt" raises visions of the criminal onus (in reverse) which would impose far too harsh an evidential burden upon the defendant.

The issues of defence of a third person and provocation were raised in the Saskatchewan decision of *Cachay v. Nemeth.* [321]

There the plaintiff attended a "house-warming" party, also attended by the defendant and his wife. After drinking for some time, the plaintiff participated in the dancing which was taking place at the time. His exuberance extended to throwing a scarf around the neck of the defendant's wife and pulling her head back to kiss her. The kiss "was merely a brush on the cheek," [322] but the defendant, who had taken lessons in karate, struck the plaintiff a violent blow on the head, injuring him severely.

Not surprisingly, the plaintiff succeeded in his action for battery. [323] The defence of "defence of others" was rejected, Mr. Justice Tucker stating that "[the blow] was unnecessary, *i.e.,* greater than requisite for the purpose of deterring the plaintiff and also disproportionate to the evil to be prevented—an unlikely further attempt to give the defendant's wife a playful kiss." [324]

The defendant's further argument that in a situation of provocation he "was not required by law to nicely measure the weight of his blow" [325] was also rejected, Tucker stating that "the flirtation of the plaintiff with the defendant's wife could not justify the violent blow struck by the defendant without warning." [326]

However, perpetuating the Canadian position on provocation in distinction to that of the English courts [327] his Lordship held that the provocation in the present case "should mitigate the damages substantially." [328]

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[319] *Id.* at 813.

[320] *Id.*

[321] 28 D.L.R.3d 603 (Sask. Q.B., 1972).

[322] *Id.* at 604.

[323] *Sub nom.* "assault." *Cf. supra* note 103.

[324] *Supra* note 321, at 606.

[325] *Id.* at 606-07 (per Tucker, J.).

[326] *Id.* at 607.

[327] *Cf.* Lane v. Holloway, [1968] 1 Q.B. 379 (C.A.), and see Mr. Weir's devastating criticism thereof in T. WEIR, A CASEBOOK ON TORT at 301 (2d ed. 1970).

[328] *Supra* note 321, at 606. Another decision raising the issue of excessive defence is Cave v. Ritchie Motors Ltd., 34 D.L.R.3d 141 (B.C. 1972). There, the customer of an automobile salesman struck him. The salesman and another salesman violently removed her and assaulted her. The customer's action for battery against the

Perry v. Fried [329] is a decision in the context of intentional torts which will probably be included in future casebooks since it raises issues of liability in respect of so many torts—assault and battery, false imprisonment and malicious prosecution.

Very briefly the facts were that the plaintiffs went for a meal late one night at the restaurant of the first defendant. Drinks were served to them but, since the time limit for legally serving drinks was at hand, were removed before they had a reasonable opportunity to consume them. The male plaintiff refused to pay for these drinks, although he was both willing and able to pay the remainder of the bill. The first defendant called the police, surrounded the plaintiffs with members of his staff and told the policeman on his arrival to "book" the plaintiffs for obtaining by false pretences. [330] This the policeman did, subjecting the plaintiffs to humiliating searches, finger printing and photographing, and refusing to permit them to use the telephone that night. Liability was imposed on both the first defendant and the policeman for false imprisonment, there being no justification for the charge of false pretences.

> There was merely a refusal to pay for all or some part of a bill rendered for food and drinks. It is quite clear on the evidence of the [first] defendant . . . that he had used this tactic on several occasions and it had always worked with no back-fire, and he thought that this would happen on this present occasion. I find, therefore, that there was no justification for what was done by the [first] defendant . . . and his employees with respect to . . . the false imprisonment. [331]

With respect to the policeman, Mr. Justice Cowan conceded that he

> was perhaps put in a difficult position. He was being asked by a businessman to take action to protect the interest of that businessman. He should, however, have investigated more carefully, and there was no evidence on which he could act on reasonable or probable grounds in coming to the conclusion that a criminal offence had been committed. [332]

The plaintiffs also succeeded in their action for malicious prosecution against the first defendant. Although it had been an employee of the first defendant who had laid the complaint the day after the incident, his Lordship held that, in doing so the employee was acting in her capacity as servant and agent of the first defendant and that "he [should be] responsible to the extent

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automobile sales company, based on vicarious liability, failed since the salesman were not acting within the course of their employment, but Berger J. made it clear that an action would lie against the salesmen personally, since their treatment of her could not be justified as reasonable self-defence.

[329] 22 D.L.R.3d 589 (N.S. Sup. Ct. Trial Div. 1972).

[330] *Cf.* Chaytor v. London, New York & Paris Assoc. of Fashion, 30 D.L.R.2d 527 (Nfld. Sup. Ct. 1961), very similar to the instant decision on this point.

[331] *Supra* note 329, at 598-99 (per Cowan, C.J.T.D.).

[332] *Id.* at 599. The problem of when the police can act and the increased freedoms which it might be desirable to bestow on them are well discussed by Weiler *The Control of Police Arrest Practices: Reflections of a Tort Lawyer*, STUDIES IN CANADIAN TORT LAW 416 (ed. A. Linden 1968).

that she would have been responsible" [333] if she had been joined as a party to the action. Moreover, malice was established by proof of the improper purpose of the defendant. "[T]he prosecution was threatened and carried through for the sole purpose of forcing the plaintiffs . . . to pay the civil debt. This is an entirely improper use of prosecution and . . . is evidence of want of probable cause and constitutes, in my opinion, malice." [334]

A. Nuisance

In recent years the action for nuisance, formerly capable of being stigmatised as an enforcement of bourgeois propriety [335] has become a potentially important weapon in the environmental battle. [336] Clearly the present scope of the action is defined in such an arbitrary and uncertain manner that its future course is difficult to predict, but the signs are hopeful that the old barriers may shortly collapse under the pressure of changed community value judgments. [337]

At the outset of this brief discussion of the present state of the law, one must record the paradoxical situation of nuisance, one of the oldest torts, [338] being utilized as a weapon in a most modern context, rather than the far younger tort of negligence, which *prima facie* would seem to be a more obvious choice. Various factors have combined to produce this anomaly. Firstly, nuisance was the established mode of recovery for such injuries as are now encompassed under the umbrella of "pollution" long before negligence became a "growth" tort. [339] Secondly, the causation issue poses less

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[333] *Supra* note 329, at 601.

[334] *Id.* at 601-02 (per Cowan, C.J.T.D.).

[335] See, e.g., Thompson-Schwab v. Costaki [1956] 1 W.L.R. 355 (C.A.), Howard v. Etchieson, 228 Ark. 809, 310 S.W. 2d 473, A.G. for Ontario v. Orange Productions Ltd. [1971] 3 Ont. 585 (High Ct.), (Wells C.J.H.C.); *Cf.* Kennedy v. The Queen in Rt. of Ontario [1970] 3 Ont. 546. *See also*, McLaren, *The Common Law Nuisance Actions and the Environmental Battle—Well-Tempered Swords or Broken Reeds?* 10 OSGOODE HALL L.J. 505, at 533-36 (1972).

[336] McLaren's article, *supra* note 335, constitutes the most authoritative call-to-arms for hesitant environmental lawyers. Among much good writing in this area, the following articles are of particular present relevance. Lucas, *Legal Techniques for Pollution Control: The Role of the Public*, 6 U.B.C.L. REV. 167 (1971); Juergensmeyer, *Common Law Remedies and Protection of the Environment*, 6 U.B.C.L. REV. 215 (1971); Estey, *Public Nuisance and Standing to Sue*, 10 OSGOODE HALL L.J. 563 (1972); Elder, *Environmental Protection Through the Common Law*, 12 W. ONT. L. REV. 107 (1973); McLaren, *The Law of Torts and Pollution*, SPECIAL LECTURES OF THE LAW SOCIETY OF UPPER CANADA: NEW DEVELOPMENTS IN THE LAW OF TORTS 309 (1973). McLaren's optimism in respect of future trends, *supra* note 335, at 560-61, may be contrasted with Estey's qualified pessimism, *id.* at 583 and Elder's undisguised depression, *id.* at 170-71.

[337] *See* the most interesting comments of former Supreme Court Justice Emmett Hall in regard to the general issue of "judicial legislation," in *Law Reform and the Judiciary's Role*, 10 OSGOODE HALL L.J. 399 (1972).

[338] *See* Winfield, *Nuisance as a Tort*, 4 CAMB. L.J. 189, at 189-92 (1931).

[339] *Cf. e.g.*, Newman v. Conair Aviation Ltd., [1973] 1 W.W.R. 315 (B.C. Sup. Ct. 1972) a decision proceeding on classic historical lines. It is interesting that Professor Heuston, the present editor of SALMOND ON TORTS, now in its 16th edition, considers it judicious to retain the *ipsissima verba* of the author in respect of (inter alia) nuisance,

of a problem in a nuisance action than in negligence.[340] Thirdly, the concept of "reasonableness" in a nuisance action is far more blinkered than in negligence. The social value of the defendant's activity or the economic repercussions of curtailment of its industry are of far less consideration in nuisance than negligence.[341] Finally, the dividing line between financial and physical loss was far easier to be drawn in negligence rather than in nuisance.[342]

The most contentious decision in the area of nuisance which was reported during the survey period must be *Hickey v. Electric Reduction Co.*[343]

There, Mr. Chief Justice Furlong, of the Newfoundland Supreme Court, had to decide a preliminary legal objection that the plaintiffs' statement of claim disclosed no cause of action and that the damages claimed were too remote in law. The plaintiffs, who were fishermen, alleged that the defendant had discharged poisonous material into Placentia Bay, thereby polluting the waters of the bay and poisoning the fish rendering them of no commercial value. The plaintiffs based their claim on public nuisance, and contended that their loss of livelihood as a result of their inability to fish profitably[344] in the Bay constituted sufficient particular damage to entitle them to sue. Their claim was rejected by his Lordship, involving a singularly restrictive interpretation of special damage combined with an unorthodox interpretation of recent English developments relating to negligently caused economic loss. Two relatively old decisions from the Maritime provinces were adopted by his Lordship in support of his argument.[345] Furlong stated:

> What has happened here? The defendants by the discharge of poisonous waste . . destroyed the fish life of the adjacent waters, and the plaintiffs, as all other fishermen in the area suffered in their livelihood. I have said 'all other fishermen' but the resulting pollution created a nuisance to all persons — 'all Her Majesty's subjects' — to use Stephen's

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66 years after the first edition. *See* SALMOND ON TORTS, *Preface*, at vii by R. Heuston (1969).

[340] There are also, of course, causation problems in nuisance actions, McLaren is, perhaps, overoptimistic as to how they may be overcome. *Supra* note 335, at 541.

[341] This presents "political" problems both in respect of the issue of liability and of the appropriate judicial remedy once liability has been established. *See* McLaren, *id.* at 528-31 and 547-60. *Cf.* Gauthier v. Naneff, [1971] 1 Ont. 97 (Dunlap, Co. Ct. J.) (1970), a decision sounding in riparian rights, in which an injunction was granted against a speed-boat regatta, organised for charity, his Lordship stating, at 103, that "the most honourable of intentions alone at no time can justify the expropriation of common law rights of riparian owners."

[342] The recent Supreme Court of Canada decision of Rivtow Marine Ltd. v. Washington Iron Works Ltd., [1973] 6 W.W.R. 692, *supra* note 241, should have exciting repercussions in respect of recovery for environmental damage, whether by negligence or nuisance.

[343] 2 Nfld. and P.E.I.R. 246, 21 D.L.R.3d 368 (Sup. Ct. 1970).

[344] Had physical damage been proved in respect of their property, the plaintiffs' prospects of success would have been considerably enhanced. *See* Suzuki v. The Ionian Leader, [1950] 3 D.L.R. 790 (Ex.). considered by Lucas, *supra* note 336, at 170-71.

[345] McRae v. British Norwegian Whaling Co., 12 NFLD. L.R. 274 (Sup. Ct. 1929). Filion v. New Brunswick International Paper Co., 8 M.P.R. 89, [1934] 3 D.L.R. 22 (N.B. Sup. Ct.).

> phrase.[346] It was not a nuisance peculiar to the plaintiff's, nor confined to their use of the waters of Placentia Bay. It was nuisance committed against the public.
>
> I think the right view is that any person who suffers peculiar damage has a right of action, but where the damage is common to all persons of the same class, then a personal right of action is not maintainable.[347]

The other argument of the defendant that the damages sustained by the plaintiffs were too remote in law was also accepted by his Lordship, who applied what he understood to be the import of the judgment of Lord Denning M.R., in *S.C.M. (U.K.) Ltd. v. W. H. Whittell & Son Ltd.*[348]

Furlong C. J. stated:

> [T]hough that action . . . was in negligence, I would be prepared to adopt the view of Lord Denning, M.R., that economic loss without direct damage is not usually recoverable at law. Similar considerations apply in this case; I think it would be a matter of extreme difficulty to say what direct damages the plaintiffs could pin-point as deriving from the defendant's operations. In negligence the damages would not likely be recoverable, and I think that is equally so in an action in nuisance.[349]

With all respect to his Lordship, Lord Denning, far from advocating the directness criterion, specifically condemned Widgery for having adopted it in *Weller's* case.[350] Furthermore, it is surely unconvincing to argue that the loss allegedly sustained by the plaintiffs was essentially the same as that suffered by all the rest of their Majesty's subjects.[351] The loss of a right to do something which one rarely exercises, however annoying and unjust it may be, is surely, in common-sense language, not the same thing as the loss of the same right when one's livelihood depends on the continued exercise of it.[352] Whether or not one is bound by the substance—attribute dichotomy, surely any reasonable person would say that the plight of a person involved in the latter position constituted "special," "peculiar" or "substantial" damage

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[346] J. STEPHEN, DIGEST OF THE CRIMINAL LAW at 179 (9th ed. 1950).

[347] *Supra* note 343, at 248, 251, and 369-70, 372 respectively.

[348] *Supra* note 214.

[349] *Supra* note 343, at 252 and 372-73 respectively.

[350] *Supra* note 213. *Cf.* the strange decision of Dominion Tape of Canada Ltd. v. L.R. McDonald & Sons, [1971] 3 Ont. 627, where, after an approving reference was made by his Lordship to Lord Denning's comments in *S.C.M.*, liability was imposed in respect of wages an employer was obliged to pay (as "positive outlays"), but denied in respect of profits, the latter being too remote.

[351] McLaren appears to interpret Furlong, C.J.'s remarks in this context as being to the effect that because a large number of other *fishermen* actually availed themselves of the privilege to fish, there could be no special damage. *Supra* note 335, at 512-13. This is surely a misunderstanding of his Lordship's remarks.

[352] *Cf.* Newell v. Smith, 20 D.L.R.3d 598 (N.S. Sup. Ct., 1971) (Dubinsky, J.), where special damage was recognised to exist in respect to a plaintiff who, by reason of obstruction placed on a public road by the defendants, suffered financially from prospective buyers losing interest in her property. In Connery v. Government of Manitoba, 21 D.L.R.3d 234 (Man. 1971), the plaintiff, a market gardener, suffered a heart attack when his market garden was flooded by the defendant. The Manitoba Court of Appeal held that, although a nuisance had been committed, this head of damages was too remote.

over and above the other members of the public. Critics [353] of *Hickey* have pointed to a number of Ontario decisions [354] which display a far more common-sense approach to "special" damage, and it would seem that future decisions involving fact situations similar to *Hickey*, especially having regard to *Rivtow Marine*, [355] will in all probability hold for the plaintiff.

X. DAMAGES

A. Punitive Damages

The more exciting developments in this area of the law during the survey period occurred in Britain rather than in Canada.

The adventurous arrogance of the Court of Appeal in *Broome v. Cassell & Co. Ltd.* [356] in holding in respect of *Rookes v. Barnard* [357] that "if ever there was a decision of the House of Lords given *per incuriam*, this was it" [358] constituted a rebellion which was put down without mercy by the House of Lords in the subsequent appeal. [359] Lord Hailsham, speaking "with studied moderation" [360] condemned the Court of Appeal for having put the litigants "to immense expense, of which most must be borne by the loser, discussing broad issues of law unnecessary for the disposal of their dispute." [361] Reasserting the authority of the House of Lords, the Lord Chancellor stated: "The fact is, and I hope it will never be necessary to say so again, that, in the hierarchical system of the courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers." [362]

The majority of their Lordships [363] reaffirmed *Rookes v. Barnard* as having correctly formulated the principles of law governing the circumstances [364] in which exemplary [365] damages might be awarded.

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[353] McLaren, *supra* note 335, at 514; Estey, *supra* note 335, at 572-73.

[354] Crandell v. Mooney, 23 U.C.C.P. 212 (C.A. 1878); Rainy River Navigation Co. v. Ontario & Manitoba Power Co., 26 Ont. W.R. 752 17 D.L.R. 850 (1917); Rainy River Navigation Co. v. Watrons Island Boom Co., 26 Ont. W.R. 456, 6 Ont. W.N. 537 (1914); Drake v. Sault Ste. Marie Pulp & Paper Co., 25 Ont. App. R. 251 (1898); Ireson v. Hold Timber Co., 30 Ont. 209, 18 D.L.R. 604.

[355] *Supra* note 342.

[356] [1971] 2 Q.B. 354, discussed by Johnston, Desjardins and Grabowski in the previous *Torts Survey*, 5 OTTAWA L. REV. 210, at 240 (1971).

[357] [1964] A.C. 1129.

[358] *Supra* note 356, at 382 (per Lord Denning).

[359] *Sub nom.* Cassell & Co. Ltd. v. Broome, [1972] A.C. 1027.

[360] *Id.* at 1053.

[361] *Id.* In fact, the unsuccessful appellant was ordered to pay only one half of his taxed costs in the House of Lords and Court of Appeal. Cassell & Co. v. Broome (No. 2), [1972] A.C. 1136.

[362] *Id.* at 1054.

[363] Lord Hailsham, L.C., Lord Reid, Lord Morris; Viscount Dilhorne and Lord Wilberforce, dissenting.

[364] Enunciated by Lord Devlin in Rookes v. Barnard, *supra* note 357, at 1227-28.

[365] "Punitive" and "exemplary" are interchangeable words; "aggravated," however, is not. *See* Veitch, *Comment*, 23 N. IR. L.Q. 501 at 503. "Disputes as to [such] terminology . . . have served to disguise the real fight which is whether or not there ought to be powers in the civil courts to punish defendants." (1972).

Canadian courts, with few exceptions, have not followed *Rookes v. Barnard,* preferring the liberty to award punitive damages in appropriately outrageous cases, without the restrictions imposed by Lord Devlin in *Rookes v. Barnard.*

It is regrettable to record that such liberty was hopelessly abused in the Newfoundland Supreme Court decision of *Mayo v. Hefferton.*[366] There, the defendant had constructed a motel which encroached one acre onto the plaintiff's eleven acre lot, in the mistaken belief that he was not trespassing in so doing. The findings of Mr. Justice Puddester, in this context must be set down in some detail. His Lordship considered that:

> [e]ven though the defendant may have been somewhat precipitous in going ahead before he had a survey done, this was not a case of deliberate and defiant trespass without colour of right, or of sharp practice or trying to steal a march on the [plaintiff], though his conduct might have been unfair; nor is it an irremedial damage but rather one in which damages can be regarded as reasonable and adequate compensation. The defendant had reason for believing that he was on the land he purchased from [a third party]; he did consult people in Fortune who seemed to be familiar with the . . . property, and he did have a survey made on which, until I found it erroneous, he depended. But he was rather stubborn in going ahead when he had been warned by [the plaintiff] that he was on [the plaintiff's] land and rather brusque, as I see it, when the Moultons[367] visited him in St. John's. He could at least have been more cooperative.[368]

His Lordship rejected the plaintiff's claim for an injunction, since, apparently following the criteria laid down in the classic decision of *Shelfer v. City of London,*[369] the balance of considerations was such that a mandatory order to remove the building "would in the circumstances bear oppressively upon the defendant, and would be an inconvenience to the general public."[370]

Indulgence for the defendant terminated at this point of his Lordship's judgment, since Puddester awarded punitive damages of $10,000 against the defendant.[371] The basis for such award was that

> "[t]he measure of damages should . . . . make it clear that one is not at liberty to expropriate another's land merely for a nominal purchase price,[372] and the damages must be such as would deter such actions in defiance of

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[366] 3 Nfld. & P.E.I.R. 236, at 238-9.

[367] Unidentified in either the statement of facts or in his Lordship's judgment.

[368] *Supra* note 366, at 238-9.

[369] [1895] 1 C. 287. In this perversely reported, perversely reasoned judgment, there appears a "schedule", *supra* note 366, at 242-244, referring to twelve decisions, one textbook and one work of reference. Precisely what weight is intended to be attached to this strange bibliography is never indicated.

[370] *Supra* note 366, at 239.

[371] As well as $1,750 general damages, being the agreed value of the one acre of the plaintiff's land, on which the defendant encroached.

[372] But the "purchase price" in the present case, far from being "nominal" had been agreed by the parties to represent its market value. *Supra* note 371.

> another's legal right; they must be damages rather than a mere licence fee." [373]

With all respect to his Lordship, such an approach displays two manifest errors. Firstly, on the particular facts of the case, it is nonsense to apply punitive damages as a deterrent for *mistaken* trespass in error about one's legal title to the property, since it must be inefficacious unless all persons are to abandon all claims to property once an opposing voice has been heard. Moreover, judging the defendant morally, it would be difficult to describe his conduct as "high-handed," "insolent," "malicious," or "disregarding every principle which actuates the conduct of gentlemen," [374] which are the types of epithet adopted by the courts to describe conduct meriting punitive damages. [375] Secondly, in his anxiety to deter future trespassers [376] from imagining that, if an injunction is *not* granted against them, the damages award will, in effect, be a licence to trespass. his Lordship completely misunderstood the effect of the concept of damages in lieu of an injunction, for that is precisely what a damages decree, in such circumstances, amounts to. [377] The concept of refusing to grant an injunction because to do so would be oppressive on the defendant, but rather of adding $10,000 exemplary damages onto the award to deter others from attempting to follow a path similar to the defendant would be an amusing example of "Alice in Wonderland" logic if the real Mr. Hefferton had not been obliged to divest himself of this large sum to go to the plaintiff as a windfall in order to comply with a judgment based on a manifestly incoherent grasp of legal (and moral) principle.

In *Canadian Ironworkers Union No. 1 v. International Assoc'n of*

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[373] *Supra* note 366, at 241.

[374] *See* 2 HALSBURY, THE LAW OF ENGLAND (3d ed), para. 391, at 225.

[375] These descriptions from decisions in the area are adopted also by Catzman, *Exemplary Damages: The Decline, Fall and Resurrection of Rookes v. Barnard*, SPECIAL LECTURES OF THE LAW SOCIETY OF UPPER CANADA: NEW DEVELOPMENTS IN THE LAW OF TORTS, 41 (1973).

[376] A. Loudon v. Ryder, [1953] 2 Q.B. 202 (CA.) was admittedly a case of trespass based on mistaken belief of title, in which substantial exemplary damages were awarded, but it may be distinguished from *Mayo v. Hefferton* in that it was coupled with a physical assault (by a foreigner!) on a girl. A case of trespass more deserving of punitive damages is Unrau v. Barrowman, 59 D.L.R.2d 168 (Sask., Q.B. 1966) which involved a "cruel and heartless" trespass (per Davis, J. at 185) by the defendants. Although the defendants were asserting a claim of title to the property, they committed certain acts "akin to arson" (*id.* at 188) not referable to such claim. Significantly in the present context, his Lordship did "*not* consider these aspects [of mistaken claim] in assessing exemplary damages." (*Id.* emphasis added).

[377] P. WINFIELD AND J. JOLOWICZ, ON TORT at 599 (1971), (9th ed. by J. Jolowicz), frankly admit that the award of a damages decree in such circumstances "in effect, is to allow the defendant to purchase the right to commit a tort in the future," but make it clear that this is a price worth paying since "[o]therwise there is a danger that proceedings for injunctions [would] be used by unscrupulous plaintiffs not to protect their rights, but to extort from defendants sums of money greater in value than any damage that is likely to occur." *Id.* at 600. Puddester, J., did not appreciate that deterrence is a two-edged sword, affecting not just the defendant, even though he may be "brusque" and uncooperative.

Bridge Structural & Ornamental Ironworkers Union, Local No. 97, [378] Munroe J., in the British Columbia Supreme Court, awarded the plaintiff union exemplary damages of $30,000 against the defendant union for its "illegal acts" done with the purpose [379] of driving the plaintiff union out of business. It is interesting to note that his Lordship justified the granting of exemplary damages on the basis of the second category of Lord Devlin in *Rookes v. Barnard,* [380] namely, where the defendant calculates to make a profit out of his wrongdoing, and that his Lordship also cited *Cassell & Co. Ltd. v. Broome* [381] in further support in this regard. Whilst he conceded that "[t]his award of damages falls short of completely accomplishing the objective of proving that illegal acts do not pay," [382] Munroe considered that it would "serve to illustrate that competing trade unions in British Columbia must carry on their quest for members within the law." [383]

[378] [1973] 1 W.W.R. 350 (1972).

[379] Which purpose was strikingly successful. The membership of the plaintiff union, once as high as 600, finally decreased to nil.

[380] *Supra* note 357, at 1226-7.

[381] *Supra* note 359, at 1079 (per Lord Hailsham, L.C.).

[382] *Supra* note 378, at 353.

[383] *Id.* at 353-54. At the conclusion of his judgment his Lordship stated that he had considered two decisions, Eagle Motors (1958) Ltd. v. Makaoff, [1971] 1 W.W.R. 527 (B.C.) and McKinnon v. F. W. Woolworth & Co., 66 W.W.R. 205 (Alta. 1958) and that he had assessed damages "in the light thereof." What is puzzling about this passage is that the *Eagle Motors* decision expressly rejected the limitations laid down by Rookes v. Barnard whilst, in the *McKinnon* case, the court held that, applying the second criterion of Devlin, J., the defendant must be liable, Johnson, J.A., stating that, if this category was not wide enough, he would adopt the statement of Spence, J., in McElroy v. Cowper-Smith, [1967] Sup. Ct. 425, at 432, when Spence, J. stated that he was "of the opinion that in Canada the jurisdiction to award primitive damages in tort actions is not so limited as Lord Devlin outlines in Rookes v. Barnard."