THE LAW OF TORTS: 1923-1947

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I

In some branches of the law, for example property and parts of the law of contracts dealing with formal validity, it is of paramount importance to be able to prophesy accurately a court's reaction to a given pattern of conduct. Men act and plan consciously with a view to achieving a result which courts have indicated would involve certain consequences. It is, therefore, possible to state with some degree of accuracy the rules of property by which the public, aided by men of law, plan the effectual acquisition and disposition of property. When, however, law is concerned not with settling norms of human conduct, but with the adjustment of losses (torts), the distribution of uncontemplated contract risks (performance of contracts) or the reallocation of unmerited benefits (quasi-contract) the situation is far different. Instead of laying out guides for the conduct of human beings in modern society, here the law is faced with the results of modern living and must seek some method of solving the conflicting claims which have arisen and will continue to arise so long as men are human and continue to live in association with their fellows. While lawyers sometimes like to consider that all law regulates the conduct of human beings, in fields such as these the law is certainly not regulatory of the conduct of the immediate actors, and it is becoming increasingly evident that the law as regulatory of the adjudicating process — as dictating inexorably and immutably to the judge a given result — is a piece of professional folklore.

As folklore, the formerly taught tradition of the profession, that for every case there was waiting some "rule of law" that had but to be discovered and which, when discovered, would lead the judge to the "right", indeed the only "legal" decision, may not have misrepresented too badly the judicial process when there was more or less unanimity with regard to the aims and objects of legal ordering. To the extent, however, that lawyers and judges profess to believe in this tradition and to seek "binding precedent" for the complex problems of a modern society whose aims and objects are uncertain, varying and opposed, this folklore becomes downright dangerous, in that it prevents an examination of the social factors involved in every problem of "loss compensation" and thus permits a judge unconsciously and unknowingly to

make value judgments under the guise of legal concepts. Not the least important development in the law of torts in the last twenty-five years has been the recognition of the need for some rationalization of the underlying problems of the reconciliation of conflicting claims, and an appreciation of the fact that under the "rules" in the books any one of three or four results may be obtained in a given case depending on the "philosophy" of the judge, which in itself will be determined by the impact of the philosophies — or ideas — held by the people with whom he lives, or has lived, or of whom he has read, or is willing to read.

To speak of "philosophy" directing the solution of a negligence action is, of course, to court disaster from the English or Canadian profession who pride themselves on their "practicality" and their complete separation from "continental philosophizing". Indeed the common-law lawyer has frequently refused to generalize and has boasted that he proceeds only from case to case — in direct opposition, in theory, to his civilian brother in law. If this be so, it is amazing to find how the process from case to case changes direction — how at one time a line of cases will represent one view of social or economic policy and how gradually it may come to represent an entirely different outlook. Among other reasons — equally bad — for the introduction of the doctrine of "common employment" was the notion that the servant by contract agreed to assume the risks of his fellow-servants' negligence. At one time, in the traditional individualistic approach of the early and nineteenth century judges, a servant by his employment even assumed the risks of dangerous machinery and plant.[1] Today we have both the Supreme Court of Canada[2] and the House of Lords[3] imposing a liability on the master for the safety of premises and safety of working system that is, to all intents and purposes, a strict one, independent of negligence. *Mirabile dictu*, this new high liability is again based on contract. This is not merely new wine in old bottles; it is an entirely new product. While the label indicating a continuity of manufacturing process remains the same there is little doubt that the original judicial purveyors would have been horrified at the modern transformation. It is easy to see what happened. The whole attitude with regard to employer's liability had changed, first in public opinion and then reflected in legislation. Judicial philosophy merely reflected this change.

[1] Compare the entirely different starting points in the reasoning of Bowen L. J. and Fry L. J. in *Thomas* v. *Quartermaine* (1887), 18 Q.B.D. 685. Bowen L. J. represents the earlier individualistic approach.

[2] *Marshment* v. *Borgstrom*, [1942] S.C.R. 374, 4 D.L.R. 1.

[3] *Wilsons and Clyde Coal Co.* v. *English*, [1938] A.C. 57.

It is strange how the common law-lawyer will fight to resist the suggestion of the creative role, when every jury action in a common garden variety of negligence action is its living embodiment. We speak of the jury's findings with respect to negligence as being "fact" as opposed to "law". In so far as a jury discovers and finds what happened in an automobile case (and of course not once in a thousand cases is this ever possible) the findings are fact. When a jury finds the defendant negligent, however, the field of fact is left behind.[4] We now have an "ought" judgment, a value judgment depending on all the diverse elements actuating the mental processes of the twelve men in the jury box. Their conduct is as legislative in character as an act of Parliament. Perhaps it would be more accurate to say, an Act subject to judicial review, because courts by one technique or another have endeavoured to substitute their views of "ought" for those of the jury. The extent to which this might be done resulted, some years ago, in a strong and long difference of opinion between the Ontario Court of Appeal and the Supreme Court of Canada.

Although juries are thus daily making "law" for the actual cases before them — as most trial lawyers would have to admit — we seldom think of this common phenomenon in that way. Judges and lawyers only are competent to deal with law. When they decide an issue they write opinions or short essays purporting to state why they so decide.

These "essays", to the common-law lawyer, represent "the law". There has been a great deal written concerning the question whether these opinions are really explanatory of the moving factors which produce a given decision. We are willing to believe that they play a part in the decision simply because in the main we believe the bench to be composed of honest men. What we do not concede is that they are solely, or even preponderantly, conclusive, particularly in such a field as the law of torts. Although there are many in this country and in England who would deny that factors other than the "legal reasoning" in opinions are just as important as the reasons themselves, it is the belief of the present writer that advance in legal thinking on the subject of torts is to be found in the ability to appreciate this factor. To the extent that we believe legal concepts and historical tags alone dictate decisions we are in danger of failing to perceive what courts are doing, and to that extent we are in danger of falling short in our estimate of what courts may do.

[4] See Bohlen, Mixed Questions of Law and Fact (1924), 72 Univ. of Penn. L. R. 111; Bohlen, Studies in the Law of Torts, 601.

Further, the court that believes, naively, that it is moved inexorably to a given result by legal concepts, frequently has either failed to appreciate the problem before it or has been unable to see the choices open to it in solving the problem.

There has been much discussion among the English writers whether there is a general law of tort, or whether there are only a series of nominate torts.[5] While the support of writers is fairly evenly divided,[6] it seems to make no difference in the actual treatment of the subject in texts.[7] All the English books proceed to discuss nominate torts with their own peculiar cluster of rules. No English text has sought either to rationalize the law of torts or to seek common or basic grounds of the problem of torts. Indeed many of the English books still delight in such recondite learning as the possibility of "trespass" lying for the direct application of force. The fact that England, until recently, has lived in isolated splendour in matters legal, concerned only with decisions of its own jurisdiction, may account for this. Or, again, it may be that rigid professionalism, shunning attempts to get under or behind the facade of legal jargon on which pure professionalism as a priestly cult thrives, has opposed disturbing the pillars of the temple. At any rate, the fact remains that the English texts in the main have not, save in general terms which are dropped almost as soon as they are raised, discussed or approached the law of torts as a dynamic process which must attempt to reconcile conflicting claims. This is merely another way of saying that the English texts on torts are mainly concerned with legal concepts, legal rules, definitions and standards rather than with facts. "Nuisance" is neatly parcelled off and distinguished from "negligence"— as a matter of legal phraseology. Negligence is dealt with in comparatively small space because, after all, you can state the "rules" shortly. And so it goes generally. The law is stated in terms of past conclusions — not present problems. Yet it is with present problems that the law of torts is vitally concerned. The legal concepts may be tools with which to reach a solution but are they determinative?

American writing on torts has for some years taken an entirely different approach. Recognizing the basic problem of this department of the law as one of reconciling the claim to security with the claim to freedom of action it examines the

[5] See Salmond, Torts (10th ed., Stallybrass), pp. 13 *ff.*; Winfield, Torts (2nd ed.), pp. 15 *ff.*; Williams, The Foundations of Tortious Liability (1939), 7 Camb. L. J. 111.

[6] See the list in Williams, *op. cit.*

[7] Compare Salmond, who with his present editor, Stallybrass, does not believe in any "general principle of liability", with Winfield, who does.

subject with an eye to both fundamental claims. What interests or claims asserted are deemed worthy of protection? Against what conduct are given interests protected? The claim to physical integrity of the body and the interest in tangible physical property are clearly entitled everywhere to protection against conduct intended to invade such interests — unless such conduct be otherwise privileged for the protection of some other equally important private or public interest. They may be entitled to protection against negligence. This, however, raises the fundamental question of what we mean by negligence, for it seems clear that if we extend liability far enough, we may be protecting these interests against conduct which is, with regard to that interest, neither intentional nor negligent. To what extent are such claims entitled to "strict" protection? So, likewise, with other interests: freedom from emotional disturbance (which at least helps to separate the problem of "nervous shock" from that of physical harm resulting through "nervous shock"); the interest in reputation; the various interests in the domestic relations; the growing complexity of interests asserted in economic relations, and many others. In each case the interest asserted is examined with regard to the type of conduct invading it and the question of privilege. This approach is found admirably developed in the texts of Prosser on Torts,[8] and Harper on Torts. It furnishes the basis on which the American Law Institute's Restatement of Torts was developed.

Are there advantages in such method over the orthodox English treatment? In this writer's opinion, the answer is emphatically yes.[9] Not only does such treatment expose the basic problem which arises in every case of "tort", but it clarifies the problem by placing first things first. Frequently the English treatment suggests that there has been a too rigid adherence to the scriptural prophecy that "the last shall be first". By way of illustration we may recall the celebrated remark of Lord Halsbury in *Mayor of Bradford* v. *Pickles*[10] to the effect that "if it was a lawful act, however ill the motive might be, he had a right to do it. If it was an unlawful act, however good his motive might be, he would have no right to do it." This, of course, is indicative of the fact that a conclusion in law had

[8] See a review by the present writer in (1941), 19 Can. Bar Rev. 551. The view expressed six years ago that this was the best common-law text on torts in print has been strengthened and confirmed by actual use during that period.

[9] See the introductory chapter in the writer's mimeographed material for use in teaching torts, which was printed in (1944), 8 Camb. L. J. 238 under the title, Introduction to the Law of Torts.

[10] [1895] A.C. 587.

already been reached that the plaintiff's interest in a continued supply of water was not protected against the defendant's intentional conduct in stopping that supply. We are not here concerned with the moot question whether the decision was "right" or "wrong" in principle. There is no question, however, that the opinions in the House of Lords do not state the economic or social reasons for or against the decision.[11] If the decision can be regarded as meaning that a person can do anything he likes on his own land regardless of motive or economic reason then how explain *Hollywood Silver Fox Farm* v. *Emmett*?[12] A controversy between Professors Holdsworth and Goodhart[13] with regard to this decision discloses adequate reason, in our opinion, for using the interest approach. The plaintiff clearly had an interest in the quiet enjoyment of his property. Was it to be protected against maliciously intentional conduct devoid of any economic interest of comparable value? The court thought not. In the course of the argument between Holdsworth (who thought the decision wrong) and Goodhart (who supported it) the latter said the defendant's conduct was a "nuisance in fact" which if not privileged became a "nuisance in law". Holdsworth took issue with such language. Had the question been simply, will the law permit a substantial interest of this kind to be invaded by conduct of this nature, we believe the language difficulty is solved and the real economic or social problem clearly raised.

How this speaking "within the law", in the discourse of legal conclusions, rather than speaking of the fundamental fact issues, can at times tend to upset bodies of principle is clearly shown in *Ware* v. *Garston Haulage Co.*[14] There a car broke down on the highway. The driver, having lit his lights, went in search of assistance to remove his car. While absent from the car the lights went out and the plaintiff crashed into the defendant's unlit car and was injured. Was the defendant liable? Disregarding the well-established doctrine that travellers on a highway must put up with normal risks on the highway, the Court of Appeal imposed liability and said that the issue of negligence

[11] The sorry plight of this "fundamental rule" when used in connection with courts' treatment of labour disputes is well known. See, for example, *Allen* v. *Flood*, [1898] A.C. 1, and *Quinn* v. *Leathem*, [1901] A.C. 495. And compare *Crofter Hand Woven Harris Tweed Co.* v. *Veitch*, [1942] A.C. 435.

[12] [1936] 2 K.B. 468, 1 All E.R. 825.

[13] See 52 L.Q.R. 460, 53 L.Q.R. 1 and 3. And see Pollock, Torts (14th ed., London) 325, where the editor states that the *Hollywood* case is irreconcilable with *Bradford* v. *Pickles*.

[14] [1944] K.B. 30.

was immaterial since the unlighted vehicle was a nuisance in law. As Scott L.J. said,

> If anything is left on the road which is likely to cause an accident through being an obstruction to those who are using the road upon their lawful occasions, such as an unlighted vehicle standing there at night, and an accident results, there is an actionable nuisance . . . . there is a dangerous obstruction and if that is so, there is an absolute duty to light it in order to prevent accidents.

Such a decision shows the use of what Bohlen described as the "invocatory" phrase. Of course it was a "nuisance" to the plaintiff in fact. But what type of conduct will involve liability to persons using the highway? We get nowhere by talking "nuisance" in that connection. For negligence a defendant would be liable. For conduct which exceeded the ordinary "give and take" of modern living and thus involved an "extrahazardous activity" (*pace* Scott L.J. in *Read* v. *J. Lyons & Co. Ltd.*[15]) or an "extraordinary user" there *might* be liability in the absence of negligence, but surely these are questions to be solved otherwise than by a "label". So thought a subsequent Court of Appeal in *Maitland* v. *Raisbeck*[16] where the basic problem of interest against type of conduct was clearly brought out and an unsuspected move toward strict liability checked.

Many other illustrations could be given of the advantages in the American approach. Some of them will appear later. One of the chief places in English law where clarification might ensue is in connection with "nuisance" itself. Winfield,[17] and many English courts,[18] are insistent on a rigid separation of the two categories of "nuisance" and "negligence". This we cannot understand, since to us nuisance denotes a legal conclusion. An interest deemed worthy of protection has been invaded by conduct of a type which a court deemed sufficient to involve liability. It is true that conduct might be intentional — throwing out smoke; or negligent — allowing a clogged drain, of whose presence you were or ought to have been aware, to burst and overrun your

[15] [1945] K.B. 217; [1945] 1 All E.R. 106.
[16] [1944] K.B. 689.
[17] Torts (2nd ed.), sec. 138.
[18] See Hamilton L. J. in *Latham* v. *Johnson*, [1913] 1 K.B. 398, at p. 413: "The differences between cases of nuisance and cases of negligence must never be lost sight of". This statement was made in explaining *Lynch* v. *Nurdin* (1841), 1 Q.B. 29 (a child trespassing on a wagon in a highway) as a case of "nuisance". Lord Macnaghten in *Cooke* v. *Midland G. W. Ry.*, [1909] A.C. 229, saw nothing in the distinction save to indicate the place where the wagon was left and the foreseeability of children being there present. See, however, *Liddle* v. *Yorkshire*, [1934] 2 K.B. 101 and *C.P.R.* v. *Anderson*, [1936] S.C.R. 200. Anticipating later parts of this paper we might ask, what is the usual foreseeable "risk" in the "wrongful" act of a nuisance in a highway? See *Donovan* v. *Union Cartage Co.*, [1935] 2 K.B. 71.

neighbour's land; or neither. The cases are far from clear whether the English courts are, under the guise of "nuisance", imposing only a liability for negligence or whether they are imposing a strict liability. Talk of "creating", "continuing", or "permitting" a nuisance are all capable of a negligence interpretation and the House of Lords, in *Sedleigh-Denfield* v. *O'Callaghan*,[19] would seem clearly to have gone on negligence despite the insistence that the liability was in nuisance and not negligence. On the other hand, the much-discussed case of *Wringe* v. *Cohen*[20] talks strict liability while the decision can be explained on grounds of negligence. Whether *Rylands* v. *Fletcher*[21] is an aspect of nuisance — in the sense that strict liability is confined to property damage, as Lord Macmillan stated (in our opinion, wrongly) in *Read* v. *Lyons*[22] — or whether nuisance is part of a wider doctrine represented by both the fields of negligence and *Rylands* v. *Fletcher*,[23] need not detain us here. Had the approach to these cases been on the simple lines suggested of interest and type of conduct, we feel that the issues would be clarified, although it should not be necessary to point out that the approach does not solve the issues. As matters now stand the subject is confused because the basic elements are not clearly differentiated.

In light of these advantages, and others that will become apparent in later parts of this article, it is perhaps not surprising that many Canadian law schools have, in the last twenty-five years, adopted the American method of teaching and discussing torts. To many of the older members of the profession this may be considered anything but an advance in the law of torts itself. Certainly one would be hard pressed to find evidence that the Canadian courts have been influenced to any extent by the different approach. That, however, is only to be expected for at least three reasons. First, the courts, in the main, have been manned by a generation of lawyers bred in the same professionalistic tradition responsible for the English outlook. Secondly, because Canada in matters legal has been timid in adopting anything unless it first received an imprimatur from some English court. Thirdly, because legal education in Canada, for one reason or another not necessary to develop here, has been confined

[19] [1940] A.C. 880. For a further discussion see Part IV of this article.
[20] [1940] 1 K.B. 229. For criticisms see 56 L.Q.R. 3, 140; 3 Modern L. Rev. 305. And see, generally, Friedmann, Incidence of Liability in Nuisance (1943), 59 L.Q.R. 63.
[21] (1868), L.R. 3 H.L. 330; (1866) L.R. 1 Ex. 265.
[22] [1946] 2 All E.R. 471.
[23] See Friedmann, Modern Trends in the Law of Torts (1937), 1 Modern L. Rev. 39.

until quite recently to exposition of "what we did before" rather than exploration of "what to do tomorrow".

In beginning an article for Canadian readers on the law of torts in the last twenty-five years it may seem peculiar to place in the forefront this change in attitude regarding the approach to the subject, since it may, without doubt, be charged as an academic quirk without practical effect. If, however, we believe with Maitland, that "taught law is tough law", the next twenty-five years may well tell a different story. Indeed, at the present time, there are indications in England that a great deal of the theoretical advance in the law of negligence has been directly due to American influence and American ways of thinking with regard to torts. Lord Wright's speech in *Bourhill* v. *Young*[24] is, perhaps, the strongest example in point. Not only does he cite and quote American authority but he also attempts to clear up some of the confusion in the English "remoteness" or "causation" cases by an appeal to the interest theory. This is definitely an advance over his earlier reasoning in *Liesbosch* v. *Edison*[25] where, in refusing to extend liability for negligence to damages resulting from the impecuniosity of the plaintiff, he had merely stated such damage to be "extrinsic". By his reference in the *Bourhill* case to this earlier decision he would seem to adopt the view that a man's interest in his trading position was not entitled to protection against careless conduct. This view of the *Liesbosch* case had already been put forward by some American writers.[26] Whether sound, is not our concern here. That it aids clear thinking cannot be denied.

Development in any part of the law must of necessity come from the impact of ideas or events outside the body of law itself. In the realm of ideas, American thinking and American development of the law of torts in general and negligence in particular has been, as the next part of this paper will show, of peculiar significance. That Canada, with much greater opportunities than England, has largely failed to respond to those ideas, save following England's lead, has been the subject of repeated comment by the present writer in these pages, and we refrain from inquiring further into the reasons for the non-creative and non-receptive role of the Canadian judiciary in this regard. The most significant developments in the general theory of negligence which will be dealt with immediately following have taken place in England.

[24] [1943] A.C. 92.
[25] [1933] A.C. 449.
[26] Tilley, The English Rule as to Liability for Unintended Consequences (1935), 33 Mich. L. Rev. 829.

The impact of events, *e.g.* the automobile and its victim, has, on the other hand, been clearly felt here and has resulted, largely through legislation, in a changed attitude toward fault and negligence in the automobile accident field.

If, in the foregoing, we have appeared to stress unduly the work of American writers and jurists as an influence on the law of torts affecting, if only indirectly, Canada, it is because we feel that too little attention is paid here to a source of comparative common law now being drawn on, to some extent at least, in England. If development of law depends on influence from without, whether of facts or ideas, we simply cannot afford to ignore American thought. At the same time, we must not fail to recognize that during the period of our survey Professor Goodhart in England has done yeoman service in his writings to enlighten many a dark corner of the law of torts by his penetrating analysis and by bringing before the English profession some of the American thought which has found its way into the legal decisions. So in the same period Stallybrass has produced his four editions of Salmond on Torts,[27] each one of which is, in our opinion, an improvement on its predecessor and in each of which he has incorporated references to periodical literature, English, Canadian and American. Further, the appearance of a new book by Winfield on Torts[28] has made the lot of student, practitioner and court easier and their path of progress clearer and better informed. Glanville Williams and Friedmann have, both in book[29] and articles,[30] done much needed critical and exploratory work. All these writers furnish evidence that the law of torts is very much on the march in England. If, to these writers, students and practitioners add the work of the American Restatement and the admirable text of Prosser (both of which have been finally cited by Canadian courts[31]), the past twenty-five years will be seen, without reference to Canadian and American periodical literature, to have produced as rich a harvest in extra-judicial thinking as the courts in their decisions.

There is such an abundance of material in this field that it is impossible for a writer to do more than sketch a few of the

[27] See a review of the eighth edition by the present writer in (1936), 14 Can. Bar Rev. 849.

[28] Reviewed by the present writer in (1938), 16 Can. Bar Rev. 237.

[29] Williams' book on Liability for Animals is a model of what a textbook should be. See a review by the present writer in (1939), 17 Can. Bar Rev. 613.

[30] See Friedmann's articles touching on torts in (1942), 20 Can. Bar Rev. 175, 21 Can. Bar Rev. 79, 369. Some of these formed chapters in his recent book, Legal Theory, reviewed by this writer in (1945), 23 Can. Bar Rev. 267.

[31] See, for one instance, *Applebaum* v. *Gilchrist*, [1946] O.R. 695.

problems which seem significant or which raise issues of more than passing interest. As we cannot hope to deal with details we plead guilty in advance to any charge of incompleteness. The following parts of this paper will deal with (a) changes in the general "theory" of negligence; (b) some "practical" problems in the law of negligence with particular reference to automobile liability; (c) "generalizations" and "particular categories", with special reference to "duties" of land occupiers; (d) some new problems of the last twenty-five years.

II

In the English books it is common to find statements that the development of the "action of negligence" into an "independent tort" is the most significant feature of modern times. The nominate tort notion and the vestigial remains of forms of action lurk in such a sentence. What is an "action of negligence"? How can a type of conduct be "a tort"— independent or otherwise? Only by saying that a man acting negligently commits a "wrong" and by translating "wrong" to "tort" does such a statement make sense. Once we do that, however, do we admit that the wrongdoer is liable to *anyone* for *any* damage sustained? No one has ever admitted such a doctrine, but how do we avoid it? How, indeed!

A little before the beginning of the period under investigation, in 1921, the English Court of Appeal gave its decision in *Re Polemis*[32] — one of the most discussed cases in English legal literature. As is well known the problem concerned the liability of the defendant whose servant, a stevedore, negligently caused a plank to fall into the hold of the plaintiff's ship. By reason of a spark caused in falling, gasoline which had leaked into the hold exploded and the ship was destroyed by fire. It was found that the causing of the spark could not reasonably have been anticipated although some damage to the ship ought to have been anticipated. Should the defendant pay for the entire damage? The argument was based on "remoteness". Admitting the defendant's negligence, liability should not extend beyond foreseeable consequences. This argument the court rejected. Following a suggestion to the same effect in the earlier case of *Smith* v. *L. & S. W. Ry. Co.*,[33] the court said that what could be anticipated determined the "legal quality" of the act as "negligent" or "innocent". Once determined as negligent, it was immaterial whether the resulting damage could be foreseen. So long as such damage was the "direct" result of the negligence liability followed.

[32] [1921] 3 K.B. 560.

[33] (1871), L.R. 6 C.P. 14.

It is apparent that such a decision states, in effect, that negligence is *a* tort and any damage from that tort if "direct" is recoverable. If a defendant negligently knocks down and kills A, who is under contract to sing for B that night, can B collect for his lost profits, or his expense of advertising? Such a result is "direct" enough. So would be the loss of a life insurance company which prematurely had to pay A's widow $100,000. In such cases the law has refused to impose liability[34] and, although occasionally courts speak of the reason as one of "remoteness",[34A] it is difficult here, as elsewhere, to understand why damages are "remote" and at the same time "direct". Is it all a matter of choosing whichever word suits an intuitive judgment? We have already referred to the fact that Lord Wright in *Liesbosch* v. *Edison*[35] could do no better, in deciding that a plaintiff, whose dredger was sunk by the defendant's negligence, could not collect the expense he was put to by his own impecuniosity in hiring at high rentals other dredgers instead of buying a replacement outright, than to say such damages were not "direct"; they were "extrinsic". Another word coined by the same judge, and which is currently used to cloak some concealed thought operation, is the word "ultroneous".[36]

That some limitations must be placed on liability for a negligent act everyone agrees. The attempts to find such limits by talk of "causation" and "remoteness" with their attendant, "proximate cause", "remote cause", "direct cause", "*causa sine qua non*", "*causa causans*", to say nothing of "links", "nets",

[34] Following *Cattle* v. *Stockton Waterworks Co.* (1875), L.R. 10 Q.B. 453, the Supreme Court of Canada has held that a defendant who carelessly creates a risk of physical harm to A is not to be charged "with a prevision of contractual relations with third parties". See *A.-G. Can.* v. *Jackson*, [1946] S.C.R. 489, 2 D.L.R. 481. See also *The King* v. *Richardson*, [1947] 4 D.L.R. 401 (Exch. Ct.) where the court refused to follow *A.-G.* v. *Valle-Jones*, [1935] 2 K.B. 209 and held that the Crown could not collect for wages and medical expenses paid on behalf of a member of the armed forces injured by the defendants' negligence. If a relationship of master and servant exists the action *per quod servitium amisit* may lie, but the status of servant must be proved; a mere contract of hiring is insufficient. See *Taylor* v. *Neri* (1795), 1 Esp. 386 and compare *Mankin* v. *Scala Theadrome Co.*, [1946] 2 All E.R. 615. As to the limits of the *per quod* action, see *The King* v. *C.P.R.*, [1947] 2 D.L.R. 1 (S.C.Can.). Even where a defendant can be deemed to act with knowledge of the likelihood of an existing contract of a third person as, for example, life insurance, courts have not imposed liability. *La Société Anonyme* v. *Bennetts*, [1911] 1 K.B. 243; *Conn. Mut. Life Insce. Co.* v. *N.Y. & N.H. Ry. Co.* (1856) 25 Conn. 265; *Robins Dry Dock & Repair Co.* v. *Flint* (1927), 275 U.S. 303. While Winfield thinks the English law to be clear that a negligent interference with a contract interest involves liability (see his note to the present writer's article in (1944), 8 Camb. L. J. at p. 244) it is submitted that the English authorities do not support his view.

[34A] *The King* v. *C.P.R.*, [1947] 2 D.L.R. 1 (S.C.Can.).

[35] [1933] A.C. 449.

[36] *The Oropesa*, [1943] P. 32.

"chains" and other innumerable analogies drawn from the world of physics, indicate a problem to which there may well be no clear-cut decision — as, indeed, there are few in this branch of the law — but, more seriously, obscure thought or prevent baring the essential issues on which a decision must be made. Cause and effect are pure questions of fact. Did the defendant's conduct cause the injury of which the plaintiff is complaining? In not one case in a thousand is there any question that it did. The only troublesome cases of cause "in fact" are those where acts of two or more persons combine to produce a given injury.[37] The really difficult cases are those where everyone knows that the defendant caused, or was a material factor in causing, the plaintiff's injuries. To say that when a court decides that such injuries were not the "direct" result of the defendant's conduct, or that the defendant's conduct was not the "proximate cause" of the injuries, it is merely deciding a question of fact, is to state a deliberate falsehood. Again we have the "ought" question — a question of individual legislation. If a court feels sure enough of its premises it will not hesitate to rule as a matter of law; if it does not, it will leave the matter to the jury.[38] But what will, or should, be the considerations for either a court or a jury? The English books and English decisions until recently were extremely barren on the topic. True, Goodhart had exposed the weakness in the *Polemis* decision[39] when he pointed out that "consequences [do not] 'flow from negligence'. Consequences are the result of an act. That act may be negligent as to certain consequences, and not as to others." In 1928 he received strong support from a decision of the New York Court of Appeals which, while practically unknown to Canadian courts, is today, along with other decisions of Mr. Justice Cardozo, profoundly influencing the course of English thinking on the theory of negligence.

The decision referred to is *Palsgraf* v. *Long Island R.R.*[40] There, two servants of the defendant, attempting to aid a passenger on to a moving train, carelessly knocked a small package from his arms. The package fell beneath the wheels of the train, and since it contained fireworks (whose presence there was no reason to suspect from the appearance of the package) an explosion occurred. As a result scales some distance from the track were

[37] For example, *Lambton* v. *Mellish*, [1894] 3 Ch. 163; *Arneil* v. *Paterson*, [1931] A.C. 560.

[38] See Green, Judge and Jury (Kansas, 1930); Green, Rationale of Proximate Cause (Kansas, 1927).

[39] Goodhart, Essays in Jurisprudence and the Common Law, 125, being a reprint from Cambridge Legal Essays (1926).

[40] (1928), 248 N.Y. 339, 162 N.E. 99.

caused to fall on the plaintiff, who was standing on the station platform waiting for another train. At the trial, on the jury's finding that the defendant's servants were negligent, judgment was given for the plaintiff, a judgment that was sustained in the Appellate Division. In the Court of Appeals this judgment was reversed by a four to three decision.

A comparison of the majority view, written by Cardozo C. J., and that of the minority, by Andrews J., discloses a fundamental difference not only in legal concepts but in social philosophy as to the direction of tortious liability. To Cardozo C. J. the plaintiff must make out a wrong done to her:

> She might claim to be protected against unintentional invasion [of her bodily security] by conduct involving in the thought of reasonable men an unreasonable hazard that such invasions would ensue . . . . If no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless, at least to outward seeming, with reference to her, did not take to itself the quality of a tort because it happened to be a wrong, though apparently not one involving the risk of bodily insecurity, with reference to some one else . . . Wrong to another cannot be the basis of the plaintiff's claim and even less a wrong to a mere property interest . . . Negligence like risk is thus a term of relation . . . The risk reasonably to be perceived defines the duty to be obeyed and risk imports relation . . . The victim does not sue derivatively or by right of subrogation to vindicate an interest invaded in the person of another. He sues for breach of duty owing to himself. The law of causation remote or proximate is thus foreign to the case.

To the minority, however, causation was anything but foreign. Andrews J., dealt with the situation in language reminiscent, in part, of *Re Polemis:*

> Where there is an unreasonable act, and some right that may be affected there is negligence . . . The act itself is wrongful. It is a wrong not only to those who happen to be within the radius of danger but to all who might have been there — a wrong to the public at large . . . . . Harm to some one being the natural result of the act, not only that one alone, but all those in fact injured may complain . . . But there is one limitation. The damages must be so connected with the negligence that the latter may be said to be the proximate cause of the former . . . What we . . . mean by the word "proximate" is, that because of convenience, of public policy, or a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a given point . . . It is practical politics . . . It is all a question of expediency. There are no fixed rules to govern our judgment . . . There is in truth little to guide us other than our common sense.

The nature of the present paper does not permit a comparison of the value of the two diametrically opposed philosophies.

This has been done elsewhere.[41] Clearly, in the actual case, the uncertain and vague limits which Andrews J. indicates makes towards a strict liability. There can be little doubt that, as Seavey has pointed out,[42] Cardozo's view is more in accord with the underlying theory of negligence and that "the reasons for creating liability should limit it". Limiting liability for breach of a statutory violation to those injuries which the statute was designed to prevent is well known[43] and accords with the Cardozo judgment. Whether one takes the majority or minority view will depend on his general attitude in favour either of security or the more limited doctrine of "fault". What is important for our purpose is the fact that by substituting the word "risk" for the maze of jargon that has crept into the decisions on "remoteness" and "causation", the way is paved for a more realistic approach to the problem inherent in every case of negligence. It is true that the "duty" concept is every bit as fictional as "proximate cause".[44] If, however, attention is concentrated on the question whether a defendant's conduct can be said to have involved an unreasonable risk of the type of harm in question, it is believed the fundamental issue for solution is clarified and not obscured. It is true that talk of "risk" furnishes no solution. The "ought"— or creative legislative problem — will still face a court, but courts should not be hampered in dealing with the problem by stumbling blocks of their own creation.

In the *Palsgraf* case the court had the problem of negligence "to whom"— the "unforeseeable" plaintiff. A question on which there has been much speculation is whether Cardozo C.J. would have decided *Re Polemis* differently. In that case there was an unreasonable risk to the plaintiff. It was also a risk to the plaintiff's interest in property. Cardozo appreciated that one does not have to foresee the exact manner in which harm culminates. If physical harm is involved in the risk created, the fact that death is unlikely will not relieve a defendant if the plaintiff has a thin skull. He did see the possibility of distinguishing risk to different kinds of interests of a plaintiff.[45]

[41] See Goodhart, The Unforeseeable Consequences of a Negligent Act (1930), 39 Yale L. J. 449, reprinted in Goodhart, Essays in Jurisprudence and the Common Law, 129; Seavey, Mr. Justice Cardozo and the Law of Torts (1939), 52 Harv. L. Rev. 372, 48 Yale L. J. 390, 39 Col. L. Rev. 20; Gregory, Proximate Cause in Negligence (1938), 6 U. of Chi. L. Rev. 36; Prosser, Torts, sec. 31.

[42] *Op. cit.*

[43] See, for example, *Gorris* v. *Scott* (1874), L. R. 9 Ex. 125.

[44] See Prosser and Gregory referred to in footnote 41.

[45] "There is room for argument that a distinction is to be drawn according to the diversity of interests invaded by the act, as where conduct negligent in that it threatens an insignificant invasion of an interest in property

In *Re Polemis* junior counsel (the present Lord Porter) had argued that there might be a difference between anticipation of the extent of the damage and the type of damage resulting. This was rejected by Bankes L. J. It is obvious that such a distinction is permissible under the *Palsgraf* decision, and the question, risk "of what", can be used in those cases where negligence to a given plaintiff has been established in place of vague talk of causation and remoteness.[46]

Whether the views of the majority in the *Palsgraf* case could be said to have any claim to recognition in English or Canadian courts was a question on which for many years the present writer had to battle with his classes on torts. Until recently most students, accepting *Re Polemis* as gospel, felt that the minority view of Andrews J. represented the English—and hence, by default, the Canadian situation. To make a proper estimate of this situation one must examine in further detail the manner in which Cardozo in particular developed his "risk" notion to extend the bounds of tortious liability in other fields, and the way in which his influence in those other fields was adopted gradually into the English law. Suffice it to say, at this stage, that in *Bourhill* v. *Young*,[47] the House of Lords accepted the "risk-duty" approach of Cardozo implicitly and expressly. In so doing various members of the House of Lords expressly reserved the right to reconsider *Re Polemis*, while Lord Wright confined the decision to " 'direct' consequences to the particular interest of the plaintiff which is affected". It is, perhaps, not surprising that in a recent English decision,[48] Denning J. states that "it is doubtful whether *In re Polemis* can survive [the *Palsgraf* case, *Donoghue* v. *Stevenson*, and *Bourhill* v. *Young*]."

The inclusion in this last remark of the decision in *Donoghue* v. *Stevenson*[49] indicates again the extent to which the American "risk" theory has influenced English decision. There can be little doubt that *Donoghue* v. *Stevenson* is the most important single judgment in torts in the last twenty-five years. There, by

results in an unforeseeable invasion of another order, as, e.g., one of bodily security."

[46] See *Jeffrey* v. *Copeland Flour Mills* (1922), 52 O.L.R. 617 where the defendant was careless in digging under building A so as to cause it to collapse. Building B was joined to A. It was also owned by the same person. To an argument that the defendant was negligent to the owner of building A, but not the owner of building B, Rose J. said this would be to speak of a duty owed to a thing. He would not admit a duty to a person with respect to different things or, as put here, "interests". This case, in light of subsequent developments, here under discussion, might well be decided differently today.

[47] [1943] A.C. 92.

[48] *Minister of Pensions* v. *Chennell*, [1946] 2 All E.R. 719.

[49] [1932] A.C. 562.

a three to two decision, the House of Lords broke through one hundred years of decisions, based on an erroneous interpretation of *Winterbottom* v. *Wright*,[50] and held that a manufacturer, who carelessly manufactured his product and put it on the market in such a way that it reached the ultimate consumer, who procured it from a retailer, without the "opportunity" of intermediate examination, was liable to such consumer for damages. The old bogey of duty of care being limited to parties with whom there was "privity" of contract was finally demolished — and this in the teeth of what had become accepted English text-book law. Again this House of Lords decision was avowedly influenced by another earlier judgment of Cardozo J. in *MacPherson* v. *Buick Motor Company*.[51] In 1916, New York was faced with the same situation which existed in England up until the *Donoghue* case: no liability of a manufacturer in the absence of privity unless the article was a thing "inherently dangerous". In the *MacPherson* case Cardozo J. used the same notion of "risk" with regard to the liability of a motor car manufacturer which he later expanded in the *Palsgraf* case. The manufacturer knew of the danger to the buying public unless care was used. "If danger was to be expected as reasonably certain, there was a duty of vigilance." Much the same notion, Lord Atkin's famous "neighbour rule", was applied by the majority of the House of Lords when the snail appeared in the bottle of ginger beer. The creation of an unreasonable risk involved a duty with respect to the persons likely to be exposed to the risk created. Whereas "risk" limited liability in *Palsgraf*, here it extended it. It is true, as Seavey says, that "it is probable that the next generation of law students will be led to look upon *Winterbottom* v. *Wright* . . . only as an interesting illustration of judicial frailty".[52]

Be that as it may, there is scarcely any department of the law of torts which does not have to be re-examined in light of the generalization of the "risk-duty" concept in the *Donoghue* case. While it has faced opposition from some professional die-hards[53] it

[50] (1842), 10 M. & W. 109.

[51] (1916), 271 N.Y. 382, 111 N.E. 1050. This judgment was greatly influenced by Bohlen's articles on The Basis of Affirmative Obligations in the Law of Torts (1905), 53 Univ. of Penn. L. Rev. 209, 273, 337, reprinted now in Bohlen, Studies in the Law of Torts. It is interesting to note that in 1929 Bholen made an analysis of the English cases and pointed out that the way was open to the House of Lords to reach the decision ultimately arrived at three years later. See Liability of Manufacturers to Persons Other than Their Immediate Vendees, 45 L.Q.R. 343. Cardozo J. always freely admitted his indebtedness to periodical literature. English and Canadian courts are not so generous—or perhaps find little to merit generosity.

[52] See footnote 41.

[53] Notably P. A. Landon, the learned editor of Pollock on Torts.

has steadily gained ground and the doctrine has now been held to apply to contractors and repairmen.[54] It has not, as yet, been extended to real property,[55] although the reasons for such failure are not convincing.[56] The "opportunity" for intermediate examination which limits the scope of the original decision has now been explained, both in England and Canada, to mean "reasonable probability" of intermediate examination.[57] Such a limitation is lacking in the American cases,[58] and it is difficult on principle to understand why this should operate to insulate from liability a negligent defendant. It is likely a carry-over from the old notion of "last wrongdoer". But, granted the "risk" notion, it is obvious that the possibility of a person, with that opportunity of examination, "slipping up" is not so foreign to the risk created as to require a court to say the risk had ceased. In any event, if the real property cases depend on the "opportunity" of inspection, it is submitted that in leasing property today in Canada it is idle to say a lessor should be able to count on an examination as probable. Canada has an opportunity to refuse to follow the English cases in this connection. To date, no Canadian court has taken the opportunity.[59]

This same notion of risk enabled Cardozo J. to extend the liability of a negligent defendant to the rescuer of a person imperilled by the defendant's negligence. "Danger invites rescue", he wrote,[60] hence the creation of an unreasonable risk of danger involved a risk to the rescuer, whether he acted instinctively or deliberately after weighing the pros and the cons. Prior to this time the Canadian and English cases had been bogged in a mesh of legal conceptualism.[61] "Novus actus interveniens", "volenti non fit injuria" were two common hurdles. Aided by Professor Goodhart's persuasive writing[62] based on Cardozo's line of reason-

[54] *Malfroot* v. *Noxal* (1935), 51 T.L.R. 551; *Stennett* v. *Hancock*, [1939] 2 All E.R. 578; *Haseldine* v. *Daw*, [1941] 2 K.B. 343; *Herchstal* v. *Stewart*, [1940] 1 K.B. 155.

[55] *Otto* v. *Bolton*, [1936] 2 K.B. 46; *Davis* v. *Foots*, [1940] 1 K.B. 116; *Travers* v. *Gloucester Corporation*, [1946] 2 All E.R. 506.

[56] See the article by Glanville Williams, The Duties of Non-Occupiers in Respect of Dangerous Premises (1942), 5 Mod. L. Rev. 194.

[57] *Paine* v. *Colne Valley Electricity Supply Co.*, [1938] 4 All E.R. 803; *Haseldine* v. *Daw*, *op cit.*, footnote 54; *Mathews* v. *Coco-Cola Co.*, [1944] O.R. 207.

[58] See Underhay, Manufacturer's Liability (1936), 14 Can. Bar Rev. 283.

[59] See *Johnson* v. *Summers*, [1939] 1 W.W.R. 362, noted by Laskin in (1939), 17 Can. Bar Rev. 448.

[60] *Wagner* v. *International Ry. Co.* (1921), 232 N.Y. 176, 133 N.E. 437.

[61] See *Anderson* v. *Northern Ry of Can.* (1875), 25 U.C.C.P. 301; Brown, A Study in Negligence (1932), 10 Can. Bar Rev. 557 (Canadian cases up to that date).

[62] Rescue and Voluntary Assumption of Risk, 5 Camb. L. J. 192.

ing the English courts in 1935 swept these hurdles aside and held the defendant liable to the rescuer.[63] It seems obvious that granted such a duty to a rescuer it is an original and not a derivative one. Hence it should not be affected by contributory negligence of the rescued nor, on principle, by the fact that the defendant unreasonably imperilled no one but himself.[64] A Saskatchewan court [65] recently refused to hold liability in the latter case, taking the view that some third person must be jeopardized since a person cannot be negligent to himself.[66] This ignores the question of risk to a rescuer. Recent American authority has imposed liability in such a case.[67]

It is strange that, if the more unusual act of rescue be within the risk created by careless conduct, many decisions still refuse to impose liability where there has been an intervening act of a wrongdoer.[68] These cases, of course, developed on the "causation" route and, with the introduction of the word "proximate", it became easy to pick on the last wrongdoer in point of time as the "sole" cause.[69] Such an idea has largely, but not entirely, disappeared.[70] Canada has refused to say that damages aggravated by negligent medical treatment are not within the "risk" created by a negligent defendant.[71] As pointed out in this Review,[72] the English decision of *Rothwell* v. *Cavershall Stone Co. Ltd.*[73] seems to indicate not only that the English cases have failed to perceive the full implications of the "risk" notion, but it also is an illustration of a common-law court introducing concepts of negligence into a strict liability situation (workmen's

[63] *Haynes* v. *Harwood*, [1935] 1 K.B. 146. See also *Morgan* v. *Aylen*, [1942] 1 All E.R. 489.

[64] See a note by the present writer in (1943), 21 Can. Bar Rev. 758.

[65] *Dupuis* v. *New Regina Trading Co. Ltd.*, [1943] 4 D.L.R. 275.

[66] A view supported by the early American case of *Saylor* v. *Parsons* (1904), 122 Iowa 679.

[67] See *Carney* v. *Buyea* (1946), 65 N.Y.S. (2d) 902, noted in 45 Mich. L. Rev. 918.

[68] See *e.g.*, *Doughty* v. *Tsp. of Dungannon*, [1938] O.R. 684. *Weld-Blundell* v. *Stephens*, [1920] A.C. 956 and *The Paludina*, [1927] A.C. 16 show the strength of the idea. Compare, for the other extreme, *Patten* v. *Silberschein*, [1936] 3 W.W.R. 169 (B.C.). See generally Eldredge, Culpable Intervention as Superseding Cause (1937), 86 Univ. of Penn. L. Rev. 121.

[69] The high-water mark is usually illustrated by *Vicars* v. *Willcocks* (1806), 8 East 1.

[70] See Lord Wright's remarks in *McLean* v. *Bell* (1932), 147 L.T. 262, at page 264, as to the temptation of concluding that the last act or omission in point of time is the determining factor. But, as he says, "responsibility does not necessarily depend only on the last link".

[71] *Mercer* v. *Gray*, [1941] O.R. 127. American case law influenced the result. See Prosser, Torts, p. 362: "It would be an undue compliment to the medical profession to say that bad surgery is no part of the risk of a broken leg".

[72] By the present writer (1945), 23 Can. Bar Rev. 440.

[73] [1944] 2 All E.R. 350.

compensation), where even limitations of this nature are foreign and where cause in fact should alone be considered. Other recent English cases have, however, shown an appreciation of the difference.[74] Granted a fuller appreciation that the question of liability depends on the sufficiency of the risk of the type of harm in question inherent in the defendant's conduct, it may be hoped — not too confidently — that much of the "intervening act", "causation", "remoteness" talk will disappear.

The "risk-duty" approach to liability was discussed most fully in England in connection with liability for physical harm resulting through the intervention of "nervous shock". It is one of the vagaries of the common-law system that this should have occurred in a field where, in the writer's opinion, it may be least useful and where some element of arbitrariness for purely practical reasons is bound to enter. Much of the difficulty in these cases results from failure to recognize certain distinct problems by lumping everything under the non-scientific label of "liability for nervous shock". Whether there is tortious liability for merely causing, either intentionally or negligently, an emotional disturbance is very much in doubt. Many American cases have recognized liability for outrageous conduct intentionally designed to disturb.[75] In the English and Canadian cases there has always been proof, in addition, of actual physical harm.[76] As indicated earlier the interests involved are different: in the one case, emotional tranquility; in the other integrity of the physical person. To require a defendant to refrain from all conduct likely to disturb is to afford too much protection to the thin-skinned,[77] Granted a proven physical impairment, the question may be, whether the defendant's conduct involved a substantial risk of physical harm. Whether the question should be one as to the defendant's conduct involving a risk of nervous shock may be considered as reducing the "risk" theory to one

[74] Claims to "pensions" and compensation for "war injuries" under statute have raised a whole body of case law where "cause in fact", as opposed to the "risk" notion of negligence, is supposed to operate. For a résumé, see *Minister of Pensions* v. *Chennell*, [1946] 2 All E.R. 719: "In pension cases . . . foreseeability is irrelevant".

[75] Compare, Bohlen, Right to Recover for Injury Resulting from Negligence Without Impact (1902), 41 Am. Law Reg. (N.S.) 141; Magruder, Mental and Emotional Disturbance in the Law of Torts (1936), 49 Harv. L. Rev. 1033; Prosser, Intentional Infliction of Mental Suffering: A New Tort (1939), 37 Mich. L. Rev. 874.

[76] See *Wilkinson* v. *Downton*, [1897] 2 Q.B. 57; *Janvier* v. *Sweeney*, [1919] 2 K.B. 316; *Purdy* v. *Woznesensky*, [1937] 2 W.W.R. 116 (Sask. C.A.).

[77] See *Owens* v. *Liverpool Corporation*, [1939] 1 K.B. 394, commented on in 55 L.Q.R. 167; 17 Can. Rar Rev. 56; 52 Harv. L. Rev. 844; 87 Univ. of Penn. L. R. 622. The decision can probably be considered as overruled by *Bourhill* v. *Young*, [1943] A.C. 92.

which requires seeing in advance different kinds of physical damage. Both views have been put forward.[78]

In 1888, in *Coultas* v. *Victorian Railways Commissioners*,[79] the Privy Council refused to impose liability for serious physical harm resulting to a plaintiff through the medium of fright (or "nervous shock") when the plaintiff narrowly escaped death on a railway crossing due to the negligence of the defendant. To say such injuries were "too remote" and that they could not be considered as a consequence "which, in the ordinary course of things, would flow from the negligence of the gate-keeper" seems strange. Death was the very "natural" consequence; anything less on this reasoning was not. As the risk involved such a high potentiality of physical harm it would seem that this injury was well within the "risk". The case, however, by seeming to require impact, has proved embarrassing to Canadian courts who felt themselves bound by Privy Council decisions.[80] From the course of events in England it is clear the English courts would not follow the *Coultas* case and what Canadian decisions there are all indicate that today a Canadian court would feel free to ignore it.[81]

Where a defendant intentionally causes emotional distress and a physical injury results the courts have been able to reach the conclusion that liability should follow.[82] This has been done by saying that the injury was caused intentionally. This is a palpable fiction. The shock was so caused; the injury may have been the result of the creation of an unreasonable risk of harm and therefore a negligently caused injury. Where a defendant assaulted a woman's husband and she, seeing the assault, sustained physical injuries through "shock", a Canadian court imposed liability for this "intentionally wrongful" act.[83] Such reasoning is clearly bad. The act was wrongful with respect to the husband. Whether the defendant should, as a reasonable man, have foreseen that injury to the wife was within the "risk" of an assault on her

[78] Compare the present writer's comments in (1943), 21 Can. Bar Rev. 65 with Goodhart, *Bourhill* v. *Young* (1944), 8 Camb. L. J. 265.

[79] 13 App. Cas. 222.

[80] See, *e.g.*, *Henderson* v. *Can. Atl. Ry.* (1897), 25 O.A.R. 437; *Geiger* v. *G.T.R.* (1905), 10 O.L.R. 511; *Toms* v. *Toronto Ry.* (1911), 44 S.C.R. 268, 22 O.L.R. 204; *Lapointe* v. *Champagne* (1921), 64 D.L.R. 520 (Ont.); *Penman* v. *Winnipeg Elec. Ry.*, [1925] 1 D.L.R. 497; *McNally* v. *City of Regina*, [1924] 2 D.L.R. 1211.

[81] For the various techniques in avoiding the decision, see *Hogan* v. *Regina* (1924), 18 Sask. L. R. 423; *Negro* v. *Pietro's Bread Co.*, [1933] O.R. 112; *Purdy* v. *Woznesensky*, [1937] 2 W.W.R. 116; *Austin* v. *Mascarin*, [1942] O.R. 165.

[82] See the cases in footnote 76.

[83] *Purdy* v. *Woznesensky*, footnote 81.

husband, so that it became a wrong by foreseeability to the wife, was not considered by the court.

In 1925, in *Hambrook* v. *Stokes Bros.*,[84] the English Court of Appeal carried the matter even further. There the defendant had negligently parked his motor truck at the top of a hill on a street used by children going to school. The mother of two children who had left for school, herself being on another street and hence out of the path of the car, heard the truck running down the street on which her children had gone to school. Fearing for the safety of the children, she ran down the street and found that her fear for the children's safety was justified. She collapsed and, as a result, later died. The majority of the court held the defendant liable for the death but indicated an arbitrary limitation confining the decision to the relation of mother and child and to a situation where the shock arose from what the mother saw by her "own unaided senses". Sargant L. J. dissented on the ground that no duty was owing to the mother since she was not put in immediate fear of her own personal safety.[85]

In *Bourhill* v. *Young*[86] the House of Lords was faced, for the first time, with a "nervous shock" case. The plaintiff was getting off a tram, when a motorcycle passed the tram on the other side at an excessive speed and collided violently with a motor car forty to fifty feet from where the plaintiff was standing. As a result the motor-cyclist was killed. The plaintiff saw and heard nothing until the sound of the crash reached her ears. Later she approached, saw blood, collapsed and sustained serious injuries. The House of Lords, *via* the duty approach, held that there was no liability to the plaintiff. Adopting a somewhat similar approach to that of Cardozo C.J. in the *Palsgraf* case, it was held that the plaintiff could make out no wrong to herself since she was not within the "risk" created by the defendant's conduct. Whether the case intended to decide that only persons within the ambit of ordinary physical impact would be entitled, as some American courts have done,[87] whether even within those limits liability should not be confined to persons who sustain injury through fear of their own safety, or whether injury through nervous shock is a different type of harm so that, if it can be foreseen as a risk incidental to certain conduct, liability may

[84] [1925] 1 K.B. 141.

[85] With this decision should be compared the dissenting opinions in the High Court of Australia in *Chester* v. *Waverley Corporation* (1939), 62 Comm. L. R. 1. The limitation of fear for one's own safety was introduced by Kennedy J. in *Dulieu* v. *White & Sons*, [1901] 2 K.B. 669, at p. 682.

[86] [1943] A.C. 92.

[87] See, *e.g.*, *Waube* v. *Warrington* (1935), 216 Wis. 603, 258 N.W. 497

extend beyond the bounds of physical impact, are questions which the decision raises but does not decide. They have been discussed in this Review by the present writer,[88] and by Professor Goodhart in the Cambridge Law Journal.[89] As we have said before, the "risk-duty" approach affords no solutions. It merely paves the way for sound law-making. The present type of situation is bound to proceed by trial and error before any satisfactory bounds are settled. One thing is clear. Impact is not required for liability resulting through nervous shock. *Hambrook* v. *Stokes* cannot, in view of the *Bourhill* case, be relied on as an authority. The road is still open for judicial creativeness.

III

While the last part of this article dealt with changes in the "theory" of negligence, it is a just charge that the cases considered are exceptional and a small fragment of the day-to-day work of the courts. This is true, but at the same time it is in these quantitatively small cases that the qualitatively important principles are usually developed. When we turn to the "practice" of negligence — or the general "run of mine" cases — other trends can be observed below the surface of fault.

One illustration lies in the much abused *res ipsa loquitur* doctrine. Having established the duty of care, manufacturer to consumer, in *Donoghue* v. *Stevenson*, it was suggested, *obiter*, in that case that *res ipsa* would not apply to such a situation.[90] This would have been a Pyrrhic victory indeed. In *Grant* v. *Australian Knitting Mills*[91] and subsequent cases,[92] it has been held consistently that *res ipsa* did apply. It has been pointed out elsewhere that the effect of this has been substantially to change the nature of a manufacturer's liability to one of "absolute responsibility for the sphere of his industrial control".[93] Indeed, in only one case known to the writer,[94] and that, it is submitted, in a decision given *per incuriam*, has a manufacturer succeeded in evading the burden which the courts have placed on him by this seemingly simple procedural device.

It is said that *res ipsa loquitur* means nothing more than that the occurrence of an injury may sometimes be evidence from

[88] (1943), 21 Can. Bar Rev. 65.
[89] 8 Camb. L. J. 265.
[90] See this whole matter discussed in Underhay, Manufacturer's Liability (1936), 14 Can. Bar Rev. 283, at pp. 291 *ff*.
[91] [1936] A.C. 85.
[92] See, in Canada, *Shandloff* v. *City Dairy*, [1936] O.R. 579.
[93] Friedmann, Modern Trends in the Law of Torts (1937), 1 Mod. L. Rev. 39, at p. 59.
[94] *Daniels* v. *White & Sons*, [1938] 4 All E.R. 258.

which an inference of negligence may be drawn — that it reflects a balance of probabilities.[95] If this be so, it is amazing that there is as yet no unanimity of view as to its operation in the course of an actual trial. Indeed, if one looks at *Malone* v. *T.C.A.*,[96] it becomes obvious that *res ipsa* can be used, not merely as a matter of logic but to express social policy. If an airplane is lost in flight, should *res ipsa* apply in actions by dependants of passengers? As a matter of logical inference there is much to be said for the view of some American courts that it is as inapplicable as in the case of a ship lost at sea.[97] In the *Malone* case the Ontario Court of Appeal stated it was applicable, the sole reason being that "with experienced and careful pilots and proper equipment, a passenger has a right to expect that he will be carried safely to his destination". This call to air transit companies, as in the case of manufacturers, to stand behind what they sell, may well lead in future to a rediscovery of the now lost strict *tort* liability of "warranty".[98]

If in such cases *res ipsa* can be, and is used as a straddle between "fault" and "strict liability", one can understand why there has been so much confusion in the cases as to its treatment. Does it create a presumption of negligence? Does it shift the burden of disproof of negligence to a defendant? These are questions which have been agitated for years in American writing. Of the decisions in recent years, that of Evatt J. in *Davis* v. *Bunn*[99] is perhaps most helpful; although it may be questioned whether an English or Canadian court would go all the way with him in permitting a jury to find for a defendant who gave no evidence at all in a case to which *res ipsa* applied. No small part of the trouble for Canada may be traced to a dictum of the Privy Council in *Winnipeg Electric Co.* v. *Geel*,[100] where Lord Wright, dealing with a statute placing the undoubted onus of disproof on a defendant, said that the burden under the statute was the same as under the principle of *res ipsa loquitur*. In Ontario, in *Malone* v. *T.C.A.*,[101] an Ontario Court of Appeal held as misdirection a

[95] See Lords Dunedin and Shaw of Dunfermline in *Ballard* v. *North British Ry.*, [1923] S.C. (H.L.) 43; Evatt J. in *Davis* v. *Bunn*, (1936), 56 Comm. L. R. 43.

[96] [1942] O.R. 453.

[97] See *Cohn* v. *United Air Lines Transport Corporation* (1937), 17 Fed. Supp. 865, reprinted in (1941), 19 Can. Bar Rev. 585.

[98] Some American courts have already reached that position in connection with manufacturers. See, *e.g.*, *Baxter* v. *Ford Motor Co.* (1932), 12 Pac. (2d) 409, 88 A.L.R 521. And see Feezer, Manufacturer's Liability for Injuries Caused by his Products (1938), 37 Mich. L. Rev. 1; Leidy, Another New Tort (1940), 38 Mich. L. Rev. 964.

[99] (1936), 56 Comm. L. R. 43.

[100] [1932] A.C. 690.

[101] [1942] O.R. 453.

charge to a jury, in a *res ipsa* case, that the defendant had the burden of disproving negligence. A Saskatchewan Court of Appeal has recently stated that, in obedience to English decisions, it felt obliged to change from the rule it had formerly followed (which was in accord with the *Malone* judgment) and henceforth a jury should be charged that the burden of disproof was on the defendant![102] How true, even today, that changes in substance may be "secreted in the interstices" of procedure. For lack of space we refrain from further discussion and refer the reader to the work of writers like Bohlen[103] and Morgan,[104] and writers in this Review[105] who have likewise laboured lustily — but in vain.

The "impact" of the automobile on its victims raises one of the most important of modern social problems, as well as providing the most fertile field of modern litigation. It was, undoubtedly, due to the increase of motor accidents, and the difficulty of applying the harsh common law of contributory negligence, with its "all or nothing" conclusion, that we owe the origin of statutes in all the common-law provinces providing for apportionment of damages in accordance with found degrees of fault as between plaintiff and defendant, and more latterly between defendants themselves who have contributed to a plaintiff's injuries. Ontario passed its first Contributory Negligence Act in 1924, almost contemporaneously with the birth of this Review.[106] There can be no doubt of the decided advantages which have resulted to victims of motor accidents since that time and it is significant that England, in 1945, joined with the Canadian provinces in permitting apportionment. Perhaps the most important feature to mention here concerns the fate of "ultimate negli-

[102] *Scrimgeour* v. *Bd. of Management of Can. Dist. of Am. Lutheran Church*, [1947] 1 D.L.R. 677. The Saskatchewan Court felt that the decision of the House of Lords in *Woods* v. *Duncan*, [1946] A.C. 401 compelled this change of attitude. While members of the House of Lords did use language with regard to "shifting the onus of proof", it is doubtful whether they meant more than the burden of adducing evidence. One can sympathize with the dilemma of a court attempting to find the true rationale of a decision which does not define its terms.

[103] The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof (1920), 68 Univ. of Penn. L. Rev. 307, reprinted in Bohlen, Studies in the Law of Torts, 636.

[104] Some Observations Concerning Presumptions (1931), 44 Harv. L. Rev. 906; Instructing the Jury on Presumptions and Burden of Proof (1933), 47 Harv. L. Rev. 59.

[105] Underhay, *op. cit.*; Paton, Res Ipsa Loquitur (1936), 14 Can. Bar Rev. 480; Helman, Presumptions (1944), 22 Can. Bar Rev. 118; comment by the present writer in (1936), 14 Can. Bar Rev. 514 and an article on Evidence (1942), 20 Can. Bar Rev. 714.

[106] See, in the first volume, MacMurchy, Contributory Negligence (1923), 1 Can. Bar Rev. 844.

gence" or "last clear chance". In 1935, writing in these pages,[107] Dean V. C. MacDonald pointed to the fact that ultimate negligence had apparently survived the apportionment acts,[108] and he argued that the "law of causation" really required its continuance. This apparently included the mysterious doctrine of *B. C. Electric Ry. Co.* v. *Loach.*[109] In light of our previous remarks concerning causation, and the fact that in all these cases "cause in fact" is quite clear, we could never share the same enthusiasm for rules which, as McIntyre has pointed out in his admirable article, The Rationale of Last Clear Chance,[110] were invented to permit a comparison of faults in a system of law which avowedly refused to recognize such comparison. Such fictions have not been unknown in the Common Law. When, however, the basic rule disappears and fault can be apportioned, why retain the older and cruder fictions? Glanville Williams has written in England,[111] attempting to guide the English courts away from retaining the older ultimate negligence issue in connection with their new Act. To this writer his argument is unanswerable and the cases in which, when a plaintiff is barred as against a defendant by "ultimate negligence",[112] and yet held liable with the same defendant to a third party, prove that we are not talking cause at all — otherwise we would have to hold the plaintiff as the "sole" cause throughout. After a long struggle, Ontario has, for all practical purposes, decided that an issue of ultimate negligence is not required to be put before a jury who find that the negligence of both plaintiff and defendant contributed to the damage and assess degrees of fault.[113] Other provinces still continue confusing juries with questions asking whether "notwithstanding the negligence of the defendant the plaintiff might have avoided the accident". Cases are not unknown where juries have found ultimate negligence on both plaintiff and defendant![114]

[107] The Negligence Action and the Legislature (1935), 13 Can. Bar Rev. 535.

[108] As, indeed, it had in the earlier days in Ontario. See *Walker* v. *Forbes* (1925), 56 O.L.R. 532; *Farber* v. *T.T.C.* (1925), 56 O.L.R. 537. And as it is still used in some of the other Provinces. See, *e.g.*, *Foster* v. *Kerr*, [1940] 2 D.L.R. 47 (Alta. C.A.); *Wilson* v. *Cline*, [1946] 3 W.W.R. 353 (B.C.C.A.).

[109] [1916] 1 A.C. 719.

[110] (1940), 52 Harv. L. Rev. 1224, reprinted in (1940), 18 Can. Bar Rev. 665.

[111] The Law Reform (Contributory Negligence) Act, 1945 (1946), 9 Mod. L. Rev. 105.

[112] See *Carter* v. *Van Camp*, [1930] S.C.R. 156; *McDonald* v. *Thomas* (1933), 41 Man. R. 657 and the cases collected in 9 Can. Bar Rev. at p. 481. But see 16 Can. Bar Rev. 735. See also the Canadian cases discussed by Williams, *op. cit.*, at p. 115.

[113] *Gives* v. *C.N.R.*, [1941] O.W.N. 376, 4 D.L.R. 625.

[114] Such was the situation in the *Gives* case. The court ignored the "ultimate" negligence findings. On similar findings in a British Columbia

It is true that the Supreme Court of Canada has, at times, given seeming approval to the doctrine of ultimate negligence, for example, in *McLaughlin* v. *Long*.[115] The decision is, however, capable of other explanations. It must be borne in mind that "risk" as explained earlier in this paper should be equally applicable to contributory negligence. If the type of harm resulting to a plaintiff is not made more probable by his careless conduct he is simply not negligent with respect to the resulting harm.[116] This approach, which can explain the *McLaughlin* case, has not been adequately explored in either the English or Canadian cases.

It is obvious that in permitting a negligent plaintiff to recover something, if not everything, from a negligent defendant, the traditional common-law doctrine of compensating the innocent at the expense of a moral wrongdoer has been broken down. While preserving "fault" as a theory, the move is towards a greater protection against risks which are practically, if not legally, inevitable in modern traffic. But the law has gone further and more directly towards the imposition of strict liability. In practically all the provinces the legal onus of disproof of negligence is on the driver of a motor vehicle unless it is a case of collision between motor vehicles.[117] There is not the same logical basis for this shifting of the burden, which lies behind the so-called "presumption" of *res ipsa loquitur*. It is palpably a legislative move in favour of the pedestrian victims of motor accidents, and again, while preserving the theory of negligence, a jury who can be counted on to smell insurance covering the motorist will not act in accord with nice appreciation of charges regarding negligence. Again, owners of cars are made liable by statute for damages caused when their cars are driven by anyone with their consent. No doctrine of agency is involved. It is simply an attempt to extend the owner's purse — and his insurance to the innocent victim. When one adds to these provisions the various devices attempting to make motorists "financially responsible" by way of insurance, including the setting up of unsatisfied judgment funds in at least three provinces,[118] so that a

case, *James* v. *McLennan, McFeely & Prior Ltd.*, [1941] 1 D.L.R. 555, a new trial was ordered.

[115] [1927] S.C.R. 303, 2 D.L.R. 186. See the case discussed by Williams *op. cit.* at pp. 122-3.

[116] See, *e.g.*, *Smithwick* v. *Hall & Upson Co.* (1890), 59 Conn. 261, 21 Atl. 924.

[117] See V. C. MacDonald, The Negligence Action and the Legislature (1935), 13 Can. Bar Rev. 535.

[118] All of these aspects are admirably and fully covered in a Report on the Study of Compensation for Victims of Automobile Accidents prepared by a Special Committee of the Saskatchewan Government (Regina, 1947).

plaintiff who pursues a motorist to judgment can obtain compensation either from the motorist, his insurance company or the government established fund, it is possible to say that the law is ready for the next step — compensation for motor traffic losses without proof of fault.

Indeed, to a limited extent, this step has already been taken in the Province of Saskatchewan. In 1946 a Report on the Study of Compensation for Victims of Automobile Accidents was made by a Government Committee.[119] That Report is now published and, in the writer's opinion, is the most valuable and able contribution to this difficult subject that has yet appeared. It certainly should be required reading for all law students. After examining reports published in the interests of insurance companies — opposed to the plan because of the inevitability of either rate regulation or direct government insurance — and other half way measures, Saskatchewan is the first common-law jurisdiction to put into practical operation, by way of legislation,[120] the same principles of Workmen's Compensation which have worked so satisfactorily in Canada, and which were first recommended in connection with automobiles in 1929 by the Columbia University Committee on Compensation for Automobile Accidents.[121] As such, the experiment is of first-rate importance and should be closely watched by other jurisdictions. There are many exceptions to the compensation scheme and compensation is given to a limited amount for physical injuries only. This, however, is a wise precaution until actual experience in operation permits an extension of coverage. While adjudication on compensation is left to the district courts, all appeals are prohibited and no costs are to be awarded to either party. In the writer's view this is sound. We have witnessed appeals in Workmen's Compensation cases in England and observed the system here where no appeals are allowed. There is no doubt in our mind that the system of appeals bids fair to wreck the principle of compensation itself.

While the Saskatchewan experiment would seem to point the path of future development in connection with automobile traffic cases, one cannot say that the transition from the elaborate and costly "fault" finding will take place soon or easily. The fact that insurance companies, some ten years ago, were able to

To the two provinces with unsatisfied judgment funds mentioned in the Report, at p. 26, namely Manitoba and P.E.I., must now be added Ontario. See the amendments to the Ontario Highway Traffic Act in 11 Geo. VI (p. 152 of the temporary volume).

[119] See footnote 118.

[120] The Automobile Accident Insurance Act, 1946 (Sask.), c. 11.

[121] Discussed in detail in the Saskatchewan report.

prevail on three provinces[122] to eliminate by statute all liability of an operator of a motor car for injuries to a gratuitous passenger, and that in other provinces[123] such a passenger is required to prove "gross negligence" or "wilful misconduct," shows the strength of the opposition. Worse, having obtained the elimination of a driver's liability to a guest, in cases where such driver and another motor car collide and together cause injury to the gratuitous passenger, the degree of negligence attributed to the first driver is now imputed to the unfortunate passenger who is thus deprived of full compensation against the other negligent driver.[124] This reversal of the trend of the common-law doctrine with respect to imputed negligence[125] is scarcely a credit to a system of legislation avowedly enacted to spread protective coverage.

In view of the undoubted swing towards compensation regardless of "fault" in the automobile cases, and considering that negligence, since the decision of *Vaughan* v. *Menlove* in 1837,[126] has tended to exclude the subjective element of moral wrong and to become synonymous with conduct recognized as socially dangerous, it is a little surprising to find an Ontario Court of Appeal[127] in 1946 exonerating a commercial transport company for damage caused by the operation of one of their trucks on the ground that the driver was labouring under an insane delusion that the truck was under remote electrical control of the head office. The effect of lunacy on tortious liability has never been clarified in English law. While the Ontario court indicated that its decision was "supported by English decisions and texts", reference to the English texts will show that English law is destitute of any actual decision on the point.[128] What Ontario authority there is imposed liability on a lunatic,[129] although the facts in each instance involved the intentional application of force. Likewise in the United States[130] and New Zealand[131] liability has been imposed on lunatics. It is true that

[122] Alberta, New Brunswick and Ontario.
[123] Nova Scotia, Manitoba and Saskatchewan.
[124] See, *e.g.*, The Negligence Act, R.S.O. 1937, c. 115, s. 2(2).
[125] See MacIntyre, The Rationale of Imputed Negligence (1944), 5 Univ. of Tor. L. J. 368.
[126] 3 Bing. N.C. 468.
[127] *Buckley and T.T.C.* v. *Smith Transport Ltd.*, [1946] O.R. 798, 4 D.L.R. 721.
[128] See Winfield, (2nd ed.), pp. 120-121; Salmond, (10th ed.), pp. 63-4.
[129] *Taggard* v. *Innes* (1862), 12 U.C. C.P. 77; *Stanley* v. *Hayes* (1904), 8 O.L.R. 81.
[130] See Bohlen, Liability in Tort of Infants and Insane Persons (1924), 23 Mich. L. Rev. 9.
[131] *Donaghy* v. *Brennan* (1900), 19 N.Z.L.R. 289.

in the "trespass" cases the analogy can be made to an intentional act done under mistake.[132] It is difficult to see why the same reasoning could not, if the court felt the policy grounds sound, be used in a negligence action. It is true that to found any tortious liability there must be a voluntary act — a manifestation of the will. Hence, as in *Slattery* v. *Haley*,[133] a driver who, without warning becomes unconscious, is not liable. Where, however, an act is intended, although the mind is warped to such an extent as to believe the act "innocent", there is little difference from that menace to life and limb, who honestly believes that travelling at seventy miles an hour with *his* skill is not dangerous in a crowded municipality, and a lunatic. It is true that the subjective element is not entirely excluded in negligence.[134] Fundamentally the question is one of policy. Had the driver been in charge of a bus with fifty passengers who were killed, it is not unlikely that a court would have been more inclined to follow the lead of the early cases in imposing liability. What is really wanted, of course, is some method of reaching the company without visiting the burden on the individual driver. If judicial ingenuity fails here the question may eventually be solved by legislation. There was certainly no authority compelling the Ontario decision: indeed, the contrary. Had the driver become so intoxicated that he suffered the same delusion, there would seem little doubt as to liability. If so, the answer to both problems can be seen as a conscious choice in which judicial philosophy, earlier referred to, can go either way. In the Ontario case, the decision has the support of many writers. We would hazard a guess that it is completely out of accord with popular sentiment.

IV

There is little doubt that the most important trend in the modern law of torts is the attempt to seek broad generalizations under which the facts of individual instances can be related, not with a view towards automatic solution, but rather with a view to the object or purpose to be attained. Even as the forms of action disappeared and left behind their legacy of rules and concepts, so the work of the twentieth century has been, and will continue to be, concerned with an attempt to see behind the

[132] See Prosser, Torts, pp. 1089-1092. At p. 1092, Prosser says that in all the negligence cases the insane person was held liable.

[133] (1922), 52 O.L.R. 95.

[134] See Shulman, The Standard of Care Required by Children (1928), 37 Yale L. J. 618; Seavey, Negligence — Subjective or Objective (1927), 41 Harv. L. Rev. 1.

isolated rules to a broader social purpose. "Dangerous things" have given way to the rationalization of *Donoghue* v. *Stevenson* and its notion of "risk" creating "duty". "Proximate cause" and its confusing conglomeration of metaphors will eventually yield, if more stubbornly. It has been suggested that nuisance, negligence, and the strict liability of *Rylands* v. *Fletcher*[135] are converging into a broader pattern based on recognized social responsibilities arising from control of animate or inanimate property or enterprises. It is at least significant that emphasis in loss shifting has turned from "right" to "duty".

Whereas even the primitive mind can see liability for positive acts creating active risks of harm, it is much more difficult to see such liability imposed as a result of merely owning or being in control of land or other objects of property. If I throw rocks on your land and ruin your garden anyone can see liability. If slates fall from my roof on your garden am I liable — and if so in what circumstances? And, if instead of falling on your garden they fall on your milkman, am I liable to him? Or if a tree on my land is blown on the highway and kills a pedestrian should I make compensation? Simple questions, deserving simple answers. Yet even today talk of nuisance, negligence, *Rylands* v. *Fletcher*, renders the clarification of such problems unduly difficult.

The decision of the English Court of Appeal and House of Lords in *Read* v. *J Lyons & Co. Ltd.*[136] has not made the task any easier. That decision — as a decision — need not particularly disturb us. It decided only that a plaintiff on the premises of a defendant as an inspector of munitions could not recover for damages caused by an explosion on the premises under the rule of *Rylands* v. *Fletcher*. Such a person's rights must be determined on the basis of an occupier's duties to those who are on his premises with or without his consent. Had the various members of the two courts confined themselves to this simple fact — as, in the main, did Lord Uthwatt — the case would have caused not a ripple of surprise, chagrin or dismay.[137] It is the dicta which have aroused all three.

The dicta, if taken seriously, raise the following points: (a) that the principle of *Rylands* v. *Fletcher* has no connection with

[135] (1868), L. R. 3 H.L. 330; (1866), L.R. 1 Ex. 265.

[136] [1946] 2 All E.R. 471; on appeal from [1945] K.B. 217.

[137] While Scott L. J. devoted much space in the Court of Appeal to proving that the American Law Institute's Restatement of the Law of Torts with regard to "extrahazardous activities" did not represent the English law, one may, respectfully, doubt his conclusions. Further, the Restatement would seem to indicate that the same result would follow under its statement as was reached in the Court of Appeal and the House of Lords.

strict liability for animals; (b) that it is confined to things on one person's land (one learned law lord uses "close") injuring another's land; (c) that only "proprietary rights" are entitled to the protection of strict liability; (d) personal injuries require proof of negligence. While one member of the House of Lords sententiously stated that "your Lordships are not called on to rationalize the law of England", it might with equal seriousness, and we hope without disrespect, be said that it was the function of the House neither to reduce to chaos the work of a century nor to speak in generalizations good, if at all, one hundred years ago, and to ignore the work of countless judges in that interval.

It is impossible in an article of this nature to enter upon a critical analysis of a decision like *Read* v. *Lyons*. Suffice it to say here that the English courts had already decided that the "escape" did not have to be from lands occupied by a defendant,[138] nor was liability limited to damage to lands occupied by a plaintiff.[139] Certainly physical damages were allowed by the Court of Appeal in *Hale* v. *Jennings Brothers*.[140] Canadian cases had even gone further in that some courts imposed liability without an "escape".[141] We are willing to recognize the "escape" notion — a barren method of reasoning for the highest court in England — but we are unwilling to believe that the House of Lords intended to elevate "proprietary rights" above the interest in the physical person and, if they did, then it is the writer's belief that Canadian courts should refuse to follow.

Of much more importance are the unifying elements which the House of Lords ignores. In "nuisance" cases the principle of "live and let live", of "give and take"[142] is well known. Each occupier must put up with those common, ordinary interferences with enjoyment of his property which are necessary for the general welfare and which the person who suffers today will inflict on his neighbour tomorrow. If the interference is caused negligently, or if it is the result of some extraordinary activity beyond the ordinary user of property, liability will follow.[143]

[138] *Midwood* v. *Mayor of Manchester*, [1905] 2 K.B. 597.

[139] *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Company*, [1914] 3 K.B. 772; *Northwestern Utilities Ltd.* v. *London Guarantee and Accident Co. Ltd.*, [1936] A.C. 108.

[140] [1938] 1 All E.R. 579. And see *Shiffman* v. *Order of St. John*, [1936] 1 All E.R. 557.

[141] See, e.g., *Peitrzak* v. *Rocheleau*, [1928] 2 D.L.R. 46 (Alta. C.A.); *Brady's Ltd.* v. *C.N.R.*, [1929] 2 D.L.R. 549, affirmed on other grounds in [1929] 4 D.L.R. 397 (Alta.); *Chamberlin* v. *Speny*, [1934] 1 D.L.R. 189 (Man.).

[142] *Bamford* v. *Turnley* (1862), 3 B. & S. 66.

[143] See, as applied to building operations, *Andreae* v. *Selfridge*, [1938] Ch. 1.

Even in the ordinary highway traffic case we are told that every user of the highway "consents" to the normal risks involved in such traffic.[144] Hence, as case supplanted trespass and the plaintiff had to show the "wrongfulness" of the conduct of which he was complaining, rather than leave the question of justification or privilege to the defendant, he had to show either intent or negligence. It is sometimes said that these are the only bases of liability.

At the same time there is, however, a liability to persons using the highway which is commonly referred to in the English cases as "nuisance". What is the form of conduct involving liability there? While the English books and English case law have professed to keep liability in nuisance separate from liability in negligence it is the writer's opinion that much confusion would be saved if a larger percentage of the cases talked the language of negligence. The smaller percentage could be justified on the ground that, although the defendant was not negligent, *i.e.,* although the utility in his conduct out-weighed the risk created (and there is risk in everything), nevertheless he was pursuing a course of conduct which involved something other than the normal risk in that community and which could, in the language of Fletcher Moulton in *Wing* v. *L.G.O. Co.*,[145] be styled an "excessive use of a private right".

On this ground the defendant, who in any community pursues his own advantage by activities which are "extraordinary" in that community, is liable for the damage caused to the interests of others who are held to consent only to normal risks.[146] In nuisance cases between individual occupiers of land this is elementary. The man who injects into a community more than the community standard of noise, smells, vapour, etc., no matter how carefully done and no matter how "lawful" the business, must bear the costs of his activities. It was, and despite *Read* v. *Lyons* still is, our belief that *Rylands* v. *Fletcher* was an attempted generalization of this theory of liability which subse-

[144] See Lord Blackburn in *River Wear Comsrs.* v. *Adamson* (1877), 2 App. Cas. 743, at p. 767; *Gaylor and Pope* v. *Davies*, [1924] 2 K.B. 75.

[145] [1909] 2 K.B. 652. It is to be noted that the learned judge also spoke of exposing, in this manner, "his neighbour's property *or person* to danger" (italics added).

[146] The notion of "common benefit" or "consent" running in those cases where the plaintiff, usually a tenant, is barred from recovering against a defendant who would, to others, have been liable on the *Rylands* v. *Fletcher* doctrine, bears out the general argument. See *Hess* v. *Greenway* (1919), 45 O.L.R. 650; *Peters* v. *Prince of Wales Theatre (Birmingham) Ltd.*, [1943] K.B. 73. Of course, everyone assumes, or consents to, the risks inherent in "ordinary domestic" user of such things as electricity. See *Collingwood* v. *Home and Colonial Stores, Ltd.*, [1936] 3 All E.R. 200.

quent courts held capable of expansion beyond the limits of a land-owning or occupying class. On this basis, negligence, nuisance and the so-called rule of *Rylands* v. *Fletcher* can be fitted to serve as a plan for modern social living. As we are here discussing broad generalities rather than specific issues, we believe it is possible to say that any person in the exercise of an independent right is entitled to expect that other persons in the exercise of like rights will not cause injury to interests deemed worthy of protection either by failure to exercise care in the conduct of rights which are deemed "standard", "normal" or "natural" in the community, or by failure, whether careless or not, so to control conduct that is not "natural", "normal" or "standard" that it results in harm to such interests.

Several important advances have been made in this direction. For example in 1914 a British Columbia Court held there was no liability on an owner-occupier of land from whose property a tree, known to the defendant to be in a dangerous condition, was blown on the plaintiff's house with resulting damage.[147] The court said, firstly, "This is not a case of nuisance". No reasons are given, but apparently the thought is that the tree, until it fell, was not interfering with the plaintiff's interest in land.[148] The court then said that *Rylands* v. *Fletcher* did not apply because the defendant did no act of bringing or even planting the tree on his premises. With this, there can be no argument. Even had he brought the tree on, surely ornamental trees are a common or ordinary user. The court then said it could find no duty with regard to what is growing on the land. A similar confusion of thought with regard to things "naturally" on the land has been noted in England.[149] In 1929 a British Columbia court,[150] not without a vigorous dissent, held similarly with regard to a decaying tree which fell on a user of a public highway.

In 1926, *Noble* v. *Harrison*[151] in England indicated that, if an occupier of land allows a "nuisance" to arise or continue by his neglect, after he became or ought to have become aware of it, he might be liable. This was said of trees with regard to a highway. The tree, of course, would only be a "nuisance" when it

[147] *Reed* v. *Smith*, 19 B.C.R. 139; 17 D.L.R. 92

[148] Compare Bramwell B. in the *Rylands* case (3 H. & C. 774): "The nuisance is not in the reservoir, but in the water escaping."

[149] See Goodhart, Liability for Things Naturally on the Land (1930), 4 Camb. L. J. 13; Noel, Nuisances from Land in its Natural Condition (1943), 56 Harv. L. Rev. 772.

[150] *Patterson* v. *Can. Robert Dollar Co. Ltd.*, [1929] 3 D.L.R. 33.

[151] [1926] 2 K.B. 332.

fell. Does this not mean that before it fell it was a risk of harm which culminated in falling? And if so, why talk nuisance?

In *Sedleigh-Denfield* v. *O'Callaghan*,[152] the House of Lords was faced with a claim against an occupier of land on whose premises a third party, a trespasser, had placed a pipe, which, not being properly installed, caused a flooding of the plaintiff's land when it became clogged in a heavy storm. Although Lord Atkin had trouble with talk of "nuisance", and realized again that it was only when the water escaped that the "nuisance was caused", he held that the defendants were liable if they knew or ought to have known of the danger, were able to prevent it and failed to do so. This case clearly recognized the social duty to use care to see that your property did not create, either by act of third person, or presumably by act of nature, an undue risk of harm to third persons. In light of that case, it is submitted that the British Columbia decisions are wrong, and it is interesting to note that in 1947 an English court[153] imposed liability on an owner whose tree fell into a highway when reasonable inspection would have disclosed the risk.[154]

Such cases as these, and others dealing with snow falling from a roof,[155] slates,[156] buildings,[157] walls,[158] shutters,[159] are, in the writer's opinion, a recognition of a broad principle of social responsibility not only to land occupiers and users of a highway but to any person lawfully on adjoining land. It would be exceedingly strange for a court, which has reached a principle of liability by talking of a duty to prevent a risk culminating, to exclude persons obviously within the risk. By talking "nuisance" the English courts are in danger of doing just that. The interests of an adjoining owner in his land may be obvious. So are the interests of any person in the physical integrity of his body, whether occupier or an occupier's visitor. The English courts have not made this generalization as yet and therefore stand in peril of

[152] [1940] A.C. 880.

[153] *Brown* v. *Harrison*, [1947] W.N. 191.

[154] A similar liability to persons on adjoining land was recognized in *Shirvell* v. *Hackwood Estates Co. Ltd.*, [1938] 2 K.B. 577, although, since the defendant owned the land on which the injuries occurred, the Court of Appeal exonerated the defendant, by what appears to be an unreasonable extension of the landlord's unnecessarily wide immunity with regard to premises he leases to a tenant. See Goodhart in 54 L.Q.R. 459 and the present writer in 16 Can. Bar Rev. 738.

[155] *Meredith* v. *Peer* (1917), 39 O.L.R. 271; *Slater* v. *Worthington's Cash Stores*, [1941] 1 All E.R. 245.

[156] *Cushing* v. *Walter & Son*, [1941] 2 All E.R. 693.

[157] *Wringe* v. *Cohen*, [1940] 1 K.B. 229.

[158] *St. Anne's Well Brewery Co.* v. *Roberts* (1928), 44 T.L.R. 703; *Cowan* v. *Harrington*, [1938] 3 D.L.R. 271 (N.B.C.A.).

[159] *Wilchik* v. *Marks*, [1934] 2 K.B. 56.

allowing a claim in "nuisance" for the death of an occupier and either denying recovery for the death of an occupier's wife, or insisting on a distinct claim for negligence. It is significant to note that most of the recent cases[160] involving physical harm or property damage justify a holding on the alternative grounds of nuisance and negligence.

If the user of land causing the harm be something other than an "ordinary" user, *e.g.*, the escape of large quantities of water, gas, explosives, etc., there is liability without fault. This is the connecting link with *Rylands* v. *Fletcher*. On the basis of that wider generalization it has been argued that an airplane which falls and injures either property or person renders the owner-operator liable without proof of negligence.[161] This result has been reached by statute in England.[162] In the absence, of statute, strict liability has been imposed in at least one American decision,[163] and, although the concept of trespass was used, granted the fact that the pilot in a given case might be unconscious or have no control, it seems difficult to find any modern theory that would support the concept unless it be absence of "consent".[164] If, however, this notion can be generalized to mean consent to all normal hazards, which would exclude intentional and negligent acts, if the act is neither, it must be because the act is an "extraordinary" as opposed to an "ordinary" or "natural" one. This at least makes sense and accords with our sense of social and economic justice. We believe that the case law contains sufficient from which to make the generalization, notwithstanding *Read* v. *Lyons*. The dangerous animal cases may have had a different origin but the continued existence of a strict liability for a tiger can, we think, only be accounted for by reason of its coincidence with a more deep-seated principle of general liability.[165]

In contrast to the main currents of tortious liability in which broad generalizations with a view to purpose are at least capable

[160] See the cases in footnotes 154-159, and see also *Dollman* v. *Hillman, Ltd.*, [1941] 1 All E.R. 355. See *Taylor* v. *Robinson*, [1933] O.R. 535, where an Ontario court supported a claim of a plaintiff who was injured as a result of a fall on ice formed by water escaping from the defendant's house on the grounds of "creation of nuisance", "negligence", "*Rylands* v. *Fletcher*".

[161] Bohlen, Aviation under Common Law (1934), 48 Harv. L. Rev. 216. But compare McNair, Law of the Air, c. 3.

[162] The Air Navigation Act, 1920: 10 & 11 Geo. V, c. 80, s. 9.

[163] *Rochester Gas & Elec. Corp.* v. *Dunlop* (1933), 266 N.Y.S. 469.

[164] See footnotes 144 and 146. Under *Stanley* v. *Powell*, [1891] 1 Q.B. 86, ordinarily there would be no liability for "trespass" — to the person at least — unless negligence or intent was proved. This must be subject to the "extraordinary" activity not "consented" to.

[165] Romer L. J. in *Collingwood* v. *Home & Colonial Stores Ltd.*, [1936] 3 All E.R. 200, and Bowen L. J. in *Filburn* v. *People's Palace and Aquarium Co. Ltd.* (1890), 25 Q.B.D. 258, are two of many modern judges who saw the dangerous animal cases as but one species of a common genus.

of discernment, if not in actual use, stands the welter of case law on the liability of an occupier of premises to those injured *on* the premises. We have seen that to those *off* the premises, while varying concepts are used, the general notion that they are entitled to expect care for their safety, and perhaps more, is clear. When a person is *on* an occupier's premises, the law has stubbornly refused to make any generalization and, instead of subsuming various situations under the all-embracive negligence concept, has proceeded by a series of self-imposed categories to classify varying duties. No other one subject in torts has received so much treatment in the pages of this Review.[166] This alone is indicative of the unsatisfactory nature of the state of the law. While some little progress has been made in the last twenty-five years in minor matters, by and large no great improvement has been or will be made until the categories of "trespasser", "licensee" and "invitee" have been either replaced by broader principles or else further categorized to take care of countless variations in the type of visitor who is now squeezed, with little regard to the realities of the situation, into one or another of the three legal pigeonholes. Here, truly, we have departed little from the methods of the Middle Ages.

That some underlying theory is available beyond mere categories should be apparent from the fact that sometimes, when a person is actually *on* an occupier's land, he is treated as though he were *off*. The *Barnes* v. *Ward*[167] line of cases, which imposes liability for excavations near a highway which render the highway unsafe, is an excellent illustration. Because persons on the highway can be expected to step off, the law recognizes a duty to use care for their protection. Many a harsh decision against child trespassers can be, and has been,[168] avoided by invoking this "nuisance" concept, particularly when a child's tendency to meddle with attractive things near a highway are involved. Where to draw the line is, here as elsewhere in the law, the difficult job in that connection.[169]

[166] For a partial list of leading articles only, see A. L. MacDonald's articles on Liability of Possessors of Premises in (1929), 7 Can. Bar Rev. 665; 8 Can. Bar Rev. 8, 184, 334; Friedmann, Liability to Visitors of Premises (1943), 21 Can. Bar Rev. 79; Paton, Liability to Visitors of Premises, 21 Can. Bar Rev. 440; Paton, Responsibility of an Occupier to Those Who Enter as of Right (1941), 19 Can. Bar Rev. 1; Prosser, Business Visitors and Invitees (1942), 20 Can. Bar Rev. 357.

[167] (1850), 9 C.B. 392.

[168] See *Harrold* v. *Watney*, [1898] 2 Q.B. 320, and the cases cited *supra*, footnote 18.

[169] The problem is realistically dealt with by Cardozo J. in *Hynes* v. *New York Cent. R. Co.* (1921), 231 N.Y. 229, 131 N.E. 898. A boy was standing, without permission, on the end of a springboard attached to the defendant's land but extending out some seven feet above a public water-

Once recognize that some "trespassers" are for purpose of liability highway travellers, it might seem obvious that there are different kinds of trespassers, known and unknown, for example. Likewise, it might seem obvious that there is a difference between the "static" condition of premises and the "dynamic" condition. In 1929, however, in *Addie* v. *Dumbreck*,[170] the House of Lords quite dogmatically laid down three categories only and, with regard to trespassers, whether children or adults, one rule only, namely, a duty to refrain from wilfully inflicting harm. No duty of care is owed to a trespasser. In the following year, in *Excelsior Wire Rope Co.* v. *Callan*,[171] the House of Lords imposed liability in circumstances very similar to those in which it had refused to impose liability to a child trespasser in the preceding year. Subsequent courts in England and Canada, in attempting to reconcile two "infallible" decisions have, seemingly, distinguished between trespassers of whose presence you are, or ought to be aware, and between a static condition of premises and "changing the condition of the land" so as to create an unreasonable risk of harm to the expected trespasser with regard to the latter risk.[172] A duty to refrain from actively creating unreasonable risks of harm is thus recognized as regards those whom you might expect to be present. You are under no obligation to make your premises safe for any trespasser who injures himself by coming on against your will. This view is a complete departure from the "wilful" harm notion in *Addie* v. *Dumbreck*. It has yet to be approved by the House of Lords. The Supreme Court of Canada in 1944, however, in *C.P.R.* v. *Kizlyk*,[173] quoted with approval section 334 of the American Law Institute's Restatement of Torts as representing English law. That section reads as follows:

> A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area thereof, is subject to liability for bodily harm there caused to them by his failure to carry on an activity involving a risk of death or serious bodily harm with reasonable care for their safety.

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way. Some high tension wires on the defendant's land fell on him as he stood there and killed him. Was the boy a trespasser because he was on a fixture? Or did the defendant owe him the same duty of care that would be owed if he were in the water beneath the board, in the air above it, or below? Conceptualism argues the trespass notion. A majority of the court, speaking through Cardozo J., held liability. In Cardozo, Growth of Law (1924), pp. 99-103, the author discusses the philosophy which dictated his conclusion.

[170] [1929] A.C. 358.

[171] [1930] A.C. 404.

[172] *Mourton* v. *Poulter*, [1930] 2 K.B. 183; *C.P.R.* v. *Kizlyk*, [1944] S.C.R. 98. And see Macdonald J. A. in *Hiatt* v. *Zien & Acme Towel and Linen Supply Ltd.*, [1940] 1 D.L.R. 736, at p. 738 (B.C.C.A.). See also the present writer in (1939), 17 Can. Bar Rev. 445.

[173] See footnote 172.

To the extent that subsequent courts give effect to this doctrine will the law regarding trespassers regain its normal relations with general principles of tortious liability.

While the English and Canadian case law has, in this period, retained its Draconian attitude with regard to child trespassers generally, there are indications that some judges at least are willing to recognize that carrying on hazardous undertakings in vicinities where children are likely to trespass should demand protection of the child as an expense of the undertaking. Noteworthy in this connection is the powerful dissent of Scott L. J. in *Adams* v. *Naylor*,[174] where actions were brought for the death of two young boys who were killed when they wandered over sand dunes on a mine field set by the army. Sand had covered up any warning sign. Realizing that he was departing from the cases as they stood, Scott L. J. stated that

> if an occupier has to keep artificial water in at his peril, I do not see why on principle he should not be called on to take all reasonable precautions to keep children out of a place where he knows they will be blown up. Our common law rules were evolved before the age of high explosives, and I cannot think that the flat denial to the child trespasser in the present case of all rights of recovery is consonant with the principles which underlie those rules.

The link with *Rylands* v. *Fletcher* is obvious. The House of Lords, to whom the appeal invited by Scott L. J. was taken, was able to evade the point completely by an interpretation of the Personal Injuries (Emergency Provisions) Act, 1939.[175] In light of *Read* v. *Lyons* it is perhaps fortunate that it is left for a future House to decide the issue whether the law will move forward into the atomic age.

With regard to "licensees" and "invitees" it is more difficult to find any real gleam of hope. The first difficulty — if we must categorize — is how to distinguish an "invitee" and a "licensee". Since *Indermaur* v. *Dames*,[176] it has been customary to require some common economic or business interest between the occupier and visitor. Prosser, in an article in this Review,[177] has shown that the early English cases did not require this so much as an actual public invitation. Certainly a return to this view, in the sense of imposing a duty of care with respect to persons coming on premises "thrown open to the public", would reduce the demands of other writers, such as Paton,[178] for another

[174] [1945] K.B. 750.
[175] [1946] A.C. 543.
[176] (1866), L.R. 1 C.P. 274.
[177] Business Visitors and Invitees (1942), 20 Can. Bar Rev. 357.
[178] The Responsibility of an Occupier to Those Who Enter as of Right (1941), 19 Can. Bar Rev. 1.

category such as "those who enter as of right". It would further make the law consistent by extending the "public place" concept, which lies behind the doctrine of liability to those on a highway, into the occupier's lands. The big difference, of course, would lie in the occupier's ability to terminate the privilege. On this basis a court would have no difficulty with public playgrounds, public lavatories, elevators in business buildings or apartment houses used by a lessee's visitors, railway platforms used by persons mailing a letter and so on. At the present time, with English courts following the business-benefit notion, English courts have held persons using a public playground to be licensees only,[179] although at times, having done so, they have proceeded to impose what looks startlingly like the liability to an invitee.[180] On the other hand, persons using public lavatories have been classified in Canada as invitees and entitled to find the premises "in good order and free from danger".[181] A visitor to a court house has, however, been held in one decision to be only a licensee in the absence of a material business interest that concerns the municipality.[182]

In *Haseldine* v. *Daw*[183] Scott L. J. considered that a visitor of a lessee of a flat who was injured due to a defect of an elevator in the control of the landlord could be, notwithstanding *dicta* of the House of Lords to the contrary in *Fairman* v. *Perpetual Investment Building Society*,[184] treated as an invitee of the landlord. The other members of the court felt that the *Fairman* case compelled them to classify such visitor as an invitee of the tenant but a mere licensee of the landlord. Personally, the writer does not believe the *Fairman* case to be compelling, since the decision depended solely on the ground that there was no trap and because on the law as it then stood, and probably stands today, that would have relieved from liability in any case. Most English writers, however, feel that Scott L.J. was wrong to question dicta that had stood (in text books) for twenty years. In Canada, decisions have imposed a duty of care on a landlord in such cases, sometimes by injecting a class midway between "licensee"

[179] *Sutton* v. *Bootle Corporation*, [1947] 1 K.B. 359, noted in (1947), 25 Can. Bar Rev. 1140.

[180] See *Ellis* v. *Fulham Borough Council*, [1938] 1 K.B. 212.

[181] *Arder* v. *Winnipeg* (1914), 24 Man. R. 727; *Blair* v. *Toronto* (1927), 32 O.W.N. 167. See the suggestion that visitors to a public air-raid shelter might be different from visitors to parks in *Baker* v. *Bethnal Green B.C.*, [1945] 1 All E.R. 135, commented on in Salmond (10th ed.), p. 487.

[182] *Black* v. *City of St. John* (1883), 23 N.B.R. 249. So a person on a railway platform to mail a letter in a postal car was classified as a licensee in *Spencer* v. *G.T.R.* (1896), 27 O.R. 303.

[183] [1941] 2 K.B. 343.

[184] [1923] A.C. 74.

and "invitee" and calling him a "licensee with an interest",[185] and sometimes by calling him a "licensee" and then imposing a duty of care to have the premises free of danger.[186] This chaotic condition of the authorities will doubtless remain until some wider principle, such as Prosser suggests, becomes a necessity as a guide through the wilderness. At the present time the English cases appear much too narrow. The Canadian cases seem to sprawl in every direction with nothing to guide them. The outlook is a melancholy one.

Even if we do succeed in categorizing, what is the duty or standard of care owed? *Indermaur* v. *Dames* spoke of "damage from unusual danger, of which the occupier knows or ought to know". This is usually spoken of as a duty with regard to traps. In *Fairman* v. *Perpetual*,[187] in speaking of a duty to a licensee, members of the House of Lords referred to a duty not to expose to a "hidden peril. . . of which the owner has knowledge, or ought to have knowledge". The same language was used by Lord Hailsham in *Addie* v. *Dumbreck*[188] with regard to a licensee. It is obvious, of course, that the liability to a licensee and invitee is, in such statements, identical. Perhaps perceiving this, Lord Hailsham further said that the duty to an invitee was "the duty of taking reasonable care that the premises are safe". Out of this confusion — a confusion which, without comment, was accepted at face value in some Canadian courts, including the Supreme Court of Canada[189]— has come the general recognition that the remarks of the learned Law Lords with regard to licensees were made *per incuriam*,[190] and it is now settled that to a licensee there is only a duty with regard to "known dangers".[191] There is no duty to inspect or to repair for those who come by private invitation on matters involving no common business interest.

This still leaves the question of the invitee. Is it a duty regarding "unusual danger" only or is it a duty to use care to make the premises safe? The obvious distinction is that, if the former, an invitee who knows, or who by the exercise of reasonable

[185] See, *e.g.*, *Lewis* v. *Toronto General Trust Corp.*, [1941] 2 W.W.R. 65 (Sask.)

[186] *Wilson* v. *Institute of Applied Art Ltd.*, [1941] 4 D.L.R. 788 (Alta.).

[187] [1923] A.C. 74.

[188] [1929] A.C. 358.

[189] In *Hambourg* v. *T. Eaton Co.*, [1935] S.C.R. 430, Crockett J., after speaking of the duty to a licensee as one with regard to traps known to the licensor, said, at p. 438, "(or, if one is disposed to add the alternative phrase above discussed) or which ought to have been known to the licensor".

[190] See *Haseldine* v. *Daw*, [1941] 2 K.B. 343.

[191] *Sutton* v. *Bootle Corporation*, [1947] 1 K.B. 359.

care ought to have known of the danger, fails.[192] If there is a duty of care to make the premises safe, mere knowledge is not necessarily a bar although it may go to the issue of contributory negligence.[193] Further, a warning of danger will always exclude liability if the rule of "unusual" danger is the test. Practically, at common law, a warning might exclude liability even if there was a duty to make safe since, if unheeded, it ordinarily would go to establish contributory negligence. As the latest edition of Salmond says, it is "impossible to answer the question . . . with confidence" on the authorities.[194] Since at common law the plaintiff would usually be defeated either by knowledge or contributory negligence, perhaps the problem in most cases was academic. With the introduction of Acts permitting apportionment of damages in accordance with degrees of fault the issue is important. If no duty, no apportionment: if a duty plus contributory negligence, then apportionment, subject to whatever strength may be left in the "last wrongdoer rule", is possible.

In Canada, decisions of the Supreme Court of Canada,[195] in allowing damages to a plaintiff against whom a finding of contributory negligence was made on the basis of a lack of care in failing to look and see the danger, and whose damages were merely reduced by the percentage of fault found against him, have clearly indicated that a duty to use care to make the premises safe was the basis of an invitor's liability. Since other Canadian cases had indicated that knowledge or means of knowledge barred a plaintiff,[196] this may be a case where the Contributory Negligence Acts have worked a substantial change in the nature of a defendant's liability. Further, the latest decision of the Supreme Court of Canada,[197] in allowing an invitee to recover despite the fact that the Ontario Court of Appeal had found the invitee's negligence the *causa causans* of the injury, supports the view earlier suggested, that "ultimate negligence" is usually unnecessary and inapplicable when apportionment applies.

Both English and Canadian cases provide for a fourth category of liability in the occupier cases, namely, the person

[192] See *Reid* v. *Mimico* (1926), 59 O.L.R. 579.

[193] Compare the judgment of the Privy Council in *Letang* v. *Ottawa Elec. Ry. Co.*, [1926] A.C. 725, with the judgment of the Supreme Court of Canada, which it reversed, in [1924] S.C.R. 470.

[194] Salmond (10th ed.), p. 480.

[195] *Greisman* v. *Gillingham*, [1934] S.C.R. 375; *Brown* v. *B. & F. Theatres Ltd.*, [1947] 3 D.L.R. 593, reversing [1946] O.R. 454, 3 D.L.R. 194. See also *Whitehead* v. *North Vancouver*, [1939] 1 W.W.R. 369 (B.C.C.A.).

[196] See, *e.g.*, *Reid* v. *Mimico* (1926), 59 O.L.R. 579.

[197] *Brown* v. *B. & F. Theatres Ltd.*, *supra*, footnote 195.

who comes on in pursuance of a contract. It is hard to understand why this should be thought of as a contractual obligation, since if liability is not agreed upon, it is imposed by law, which is the criterion of tort. With liability to an invitee established as a duty to use care to make premises safe it is a little more difficult to see the value of this category unless, as recent English authority suggests,[198] it is designed to include liability for independent contractors and perhaps liability for lack of care on the part of anyone.[199] So far as invitees are concerned the English Court of Appeal has recently excluded liability for the negligence of an independent contractor.[200] Canadian courts, however, had earlier indicated that an invitor cannot escape liability by delegating repairs to an independent contractor.[201] To that extent we do not see the value in the contract concept. A case has not yet arisen where, say, a Sunday school teacher buys tickets to take his class to a theatre performance. English law indicates the possibility of liability of one kind to the teacher and another to members of the class. Insistence on "privity" of contract here seems as much out of line with modern tort liability as it has proved to be elsewhere.

Before leaving this unsatisfactory part of the law, reference should be made to the rather unique decision of an Ontario court in *Danluk* v. *Birkner*.[202] In that case the plaintiff was a patron of the defendant's illegal gambling establishment. Hence, both were probably guilty of a criminal offence. In a police raid the plaintiff was injured due to the defective condition of the premises. The Ontario Court of Appeal held that because of his participation in a crime the plaintiff was deprived of his status as an invitee, since such a status arose by consent and the occupier could not "consent" to a crime. His position was, therefore, likened to a trespasser and the defendant was said to owe a duty only to refrain from wilful injury. Participation in a crime is ordinarily irrelevant to tortious liability, as the cases where an operator of a car is on the highway without a licence

[198] See Goddard L. J. in *Haseldine* v. *Daw*, [1941] 2 K.B. 343. And see Salmond (10th ed.), p. 477.

[199] *Maclenan* v. *Segar*, [1917] 2 K.B. 325; *Hall* v. *Brooklands Auto Racing Club*, [1933] 1 K.B. 205.

[200] *Haseldine* v. *Daw*, *op. cit.*

[201] *Valiquette* v. *Fraser* (1907), 39 S.C.R. 1, at p. 3. See an Alberta court following this, rather than the *Haseldine* decision, in *Smith* v. *Conklin*, [1943] 1 W.W.R. 332.

[202] [1946] O.R. 427, 3 D.L.R. 172; affirmed on another point, [1947] 3 D.L.R. 337.

[203] *City of Vancouver* v. *Burchill*, [1932] S.C.R. 620, which overruled many earlier cases where the absence of a licence barred in an action for non-repair of a public highway.

prove.[203] If it be said that the *in pari delicto* doctrine should apply, it is open to argument that the guilt was far from equal in such a case. While the court suggested that a decision refusing to impose liability on the operator of a gaming house might cause him to discontinue his business through loss of patronage, it can be argued with as great plausibility that the decision is really a subsidy to such an operator which the honest business man does not receive. The Supreme Court of Canada[204] did not deal with the point on appeal since it was able to support the judgment on the area of invitation doctrine. The decision shows the essentially legislative nature of adjudication in tort issues to which we have already made reference.

It is difficult to understand why this department of the law has defied any attempt at generalization. Mr. Justice O'Halloran has made a Canadian judicial attempt without success.[205] Several writers have tried on innumerable occasions, with the same result. Apparently the seeming certainty of legal categories has appealed to the legal mind. Continued exposure of the fictions and intellectual dishonesties involved seems the only possible remedy in the hope that an English or Canadian court with courage will some day clear the air, as was done, in another connection, in *Donoghue* v. *Stevenson.*

V

During the lifetime of this Review the advance of physical science has called for reconsideration of several branches of the law. The airplane, for example, has outmoded, almost overnight, our ideas with regard to trespass to land and rights in air space. England, by legislation in 1920,[206] anticipated the trespass claim as well as the problem of liability of aircraft for physical and property damage already referred to. It is surprising that, in Canada, neither situation has received attention from legislature or court. We are, therefore, in the position where the courts must struggle to fit the airplane into conceptions which were designed without any suspicion of the possibilities of modern aircraft. In that connection we may well draw on American experience. In the past twenty-five years various theories have been advanced in the United States.[207] Nowhere has the maxim

[204] [1947] 3 D.L.R. 337.

[205] See his judgment in *Kennedy* v. *Union Estates Ltd.*, [1940] 1 D.L.R. 662 (B.C.C.A.).

[206] The Air Navigation Act, 1920, 10 & 11 Geo. V, c. 80, s. 9.

[207] For a résumé, see Hackley, Trespassers in the Sky (1937), 21 Minn. L. Rev. 733.

cujus est solum ejus est ad coelum et ad inferos been literally applied, in the sense that flight of a plane at any level would constitute a trespass to the owner of land. The American Law Institute attempted a solution,[208] adopted in some states by legislation,[209] which continued to recognize ownership in space as belonging to the landowner subject to a privilege of flight similar to the use of navigable waters. Some courts have attempted to fix "zones" of possible enjoyment, while others have limited an owner's rights to actual use and have denied trespass unless it actually interfered with present enjoyment.[210] This last view is essentially one which places the aircraft in the air with an equal right to that of the landowner and, in effect, shifts from a trespass notion to one of nuisance. The difference, of course, is fundamental. Trespass is ordinarily actionable without proof of damage. "Nuisance" requires interference with actual enjoyment.

It is apparent that whichever theory is adopted will have a profound influence on the acquisition of flying rights by prescription. If time begins to run when flights could have been prevented or enjoined, suppose planes have passed, on a take-off, at a height of one hundred feet, over a vacant farm for some years. A house is then built and such flights interfere with enjoyment. Does time for the acquisition of a prescriptive right begin only with the building of a house, or when the "trespass" — if it be such — occurred? [211] These are questions on which legislation rather than a process of judicial trial and error might well be expected. The fact that some American courts, having recognized the privilegeof flight over another's lands, gave that privilege the dignity of a legal right by enjoining the landowner from planting trees to interfere with the right,[212] shows the seriousness of the problem. It also shows the difficulty of applying *Bradford* v. *Pickles*[213] to novel social facts. It is doubtful whether a Canadian, or English, court would so encourage the aviation industry at the expense of private landowners. Perhaps there is something to be said in favour of waiting until we have some judicial experience on the problem of attempting to reconcile the conflicting interests involved before taking parliamentary legislative action. It is more likely that the absence of Canadian

[208] Restatement of Torts, s. 194.
[209] See Prosser, Torts, p. 87.
[210] *Hinman* v. *Pacific Air Transport* (1936), 84 Fed. (2d) 755.
[211] Compare *Sturges* v. *Bridgman* (1879), 11 Ch. D. 852.
[212] See the decision of a District Court of Iowa in *Tucker* v. *United Air Lines Inc.* (1935), U.S. Av. R. 1, noted in 36 Col. L. Rev. 484; and compare *Capital Airways* v. *Indianapolis Power and Light Co.* (1939), 18 N.E. (2d) 776, noted in 38 Mich. L. Rev. 275.
[213] [1895] A.C. 587.

legislation is due to uncertainty whether legislative power is provincial or federal.

The advent of the radio into the already troubled waters of defamation has also raised problems whose only satisfactory solution would seem to lie in legislation. The artificial distinction between slander and libel, which arose entirely because of an accident of history and which courts have felt bound to justify by specious rationalizations,[214] has given rise to differences of opinion where courts have been forced to apply "existing" law to an instrumentality, such as the radio, which the law never contemplated. If one looks only to the method of publication, it is difficult not to agree with the Australian court in *Meldrum* v. *Australian Broadcasting Co. Ltd.*,[215] that defamation by radio is slander. Courts have attempted to justify the fact that libel, originally the printed word, was actionable without proof of damage because of its wider dissemination.[216] It seems absurd, however, to grant an action *per se* to printed defamatory words circulated to half a dozen and refuse it to defamatory words published to millions. For this reason it is not surprising that some American courts have held, realistically, that radio defamation is libel.[217] The fact that most radio programmes are broadcast from a written manuscript, while considered immaterial in the *Meldrum* case, has support in early English cases where written material was read.

The only solution to this problem is the long overdue one of abolishing the distinction between libel and slander. While this has been mooted for years, the difficulty of choosing between the requirement of proof of damage for all defamatory remarks and making all defamation actionable *per se* has prevented anything constructive being done. In Canada, the Conference of Commissioners on Uniformity of Legislation prepared a Defamation Act in 1944 in which the distinction between libel and slander was wiped out and all defamatory publications were made actionable without proof of damage or, as the Act rather unscientifically provides, "damage shall be presumed". The Uniform Act has, to date, been adopted in two Provinces only, namely, Manitoba in 1946 [218] and Alberta in 1947.[219] While there may be parts of

[214] *Thorley* v. *Lord Kerry* (1812), 4 Taunt. 355.
[215] [1932] Vict. L. R. 425.
[216] *Thorley* v. *Lord Kerry*, footnote 214.
[217] See, *e.g.*, *Sorenson* v. *Wood and KFAB Broadcasting Co.* (1932), 243 N.W. 82 (Neb.); *Hartmann* v. *Winchell* (1947), 73 N.E. (2d) 30 (N.Y.). In both of the latter cases the defamatory matter was read from a script. Compare *Locke* v. *Gibbons* (1937), 299 N.Y.S. 188, where it was not.
[218] 1946, Man. c. 11.
[219] 1947, Alta. c. 14.

the Act open to criticism as, for example, the attempt to apply to radio the same privileges, and right of apology, as now apply by statute to newspapers, there can be no question as to the importance of the Act. The time is long overdue for acting on the almost universally expressed belief that the artificial distinction between libel and slander should be abolished. The Uniform Act is a concrete attempt to give practical effect to that belief.

The further question, whether a radio broadcasting corporation is liable as an original publisher for remarks which it has had no opportunity of preventing, for example, the ad-libbed remark and material coming through on a chain programme, has received different treatment in the American courts.[220] It seems likely, however, that the policy which produced the strict liability of *Hulton* v. *Jones*,[221] and which was shorn of any lingering suspicion of negligence in *Cassidy* v. *Daily Mirror Newspapers Ltd.*[222] and *Newstead* v. *London Express Newspaper Ltd.*,[223] will result in the imposition of a strict liability on the operators of broadcasting corporations as an expense incidental to their business of disseminating anything from news to gossip. The arguments *pro* and *con* have been fully stated in an article by J. F. Finlay, Defamation by Radio, in this Review.[224]

A few years ago, radio broadcasting brought into bold relief the apparent inability of courts in the British Commonwealth to find some remedy for an intentional violation of the "right of privacy". In *Victoria Park Racing and Recreation Grounds* v. *Taylor*[225] the defendants, having purchased land overlooking the plaintiff's race track, installed an observer equipped with a radio transmitter. As a result of broadcasts of the events of big race meets the plaintiff lost considerable patronage and money. The Australian High Court was unable to find any rubric of English law under which it could classify the action, and the plaintiff failed. Professor Paton has discussed the case fully in this Review[226] and blames the court's inability to find a remedy on a

[220] See *Coffey* v. *Midland Broadcasting Co.* (1934), 8 Fed. Supp. 889, and compare *Summit Hotel Co.* v. *National Broadcasting Co.* (1939), 8 Atl. (2d) 302 (Penn.) commented on in 53 Harv. L. Rev. 143 and 38 Mich. L. Rev. 415.

[221] [1910] A.C. 20.

[222] [1929] 2 K.B. 331.

[223] [1940] 1 K.B. 377. See Holdsworth, A Chapter of Accidents in the Law of Libel (1941), 57 L.Q.R. 74.

[224] (1941), 19 Can. Bar Rev. 353.

[225] [1937] Argus L. R. 597.

[226] Broadcasting and Privacy (1938), 16 Can. Bar Rev. 425. See also Winfield, The Right to Privacy (1931), 47 L.Q.R. 23.

too narrow concept of "property". In the United States a considerable body of law, designed to prevent "shabby conduct" and "dirty tricks" [227] in the world of business, has developed under the heading of "unfair competition". On the *prima facie* tort theory there is no reason why an interest of substance of this kind should not be protected against predatory conduct like that in issue. It is believed that the unfortunate result of the Australian case — which seems a denial of the general theory of torts and of the possibility of expansion of the action on the "case" — is due to talk of "rights" in land rather than placing the emphasis on social "duties".

It has been shown elsewhere that English law prevents the theft of ideas and of literary "property".[228] Why should an interest of the nature and kind asserted in the *Victoria Park* case go without redress? While similar to a "right in privacy", there was even more in that case than a claim to have one's life, or face, or past, kept private. *Tolley* v. *Fry*[229] indicated that interests of the latter kind were only protected against defamatory publications. The recent litigation in England arising from the actions of a press photographer in taking pictures for a tabloid of a bride and bridegroom, which involved assaults on the photographer and libel suits against a paper commenting on the whole affair, has again emphasized this fact.[230]

One is reminded that in *Winsmore* v. *Greenbank*,[231] an English court, allowing for the first time a claim by a husband against a third person for enticing away his wife, said "the law will never suffer an injury and a damage without a remedy". In 1946 a successful appeal to this vital principle of the common law was made to an Ontario court to allow an action by a wife against a third person for enticing away her husband, although in allowing the action the court had to "explain" away some six previous

[227] See Chafee, Unfair Competition (1940), 53 Harv. L. Rev. 1289.

[228] See the classic article, Warren and Brandeis, The Right to Privacy (1890), 4 Harv. L. Rev. 193. And see Nizer, The Right to Privacy, A Half Century of Development (1941), 39 Mich. L. Rev. 526.

[229] [1931] A.C. 333.

[230] See Hyde, Privacy and the Press: The Daily Mirror Press Photographer Libel Action (London, 1947,) and a review in (1947), 25 Can. Bar Rev. 937 by Alexander Stark. The latter states that the public have "no sacred right" to prevent publicity attaching to their names, faces or actions, and seems to imply that reporters should be encouraged to invade privacy. It is true that courts have not recognized a right, sacred or profane, but we believe that if reporters continue to take their "candid" shots for publicity purposes, cameras will continue to be broken and photographers assaulted. If so, the very basis for any tort liability — preservation of peace and order — requires some action. Surely "public benefit" can be used to test a newspaper's baring of a person's private life.

[231] (1745), Willes 577.

decisions.[232] Such judgments restore one's faith in the ability of the common law to recognize new interests and cloak them with the dignity of a legal right. The fact that in our opinion the particular action allowed, as well as the husband's similar action and actions for breach of promise of marriage, should be abolished by legislation — as has been done in several of the United States[233] — is another matter.

* * *

The past twenty-five years have been fruitful ones in the law of torts. Specific and unrelated instances have yielded to coherent organizing principles, based on social policies which are becoming much easier to discern. It is possible that the next twenty-five years may see automobile compensation cases removed from the field of litigation to that of administration. There will still be the press of new interests struggling for recognition and of old interests seeking protection against subtler forms of invasion. The task of the lawyer and of the judge is to approach those problems with an appreciation that there are no set answers, but only methods of exposing the basic social and economic realities involved. The extent to which the profession is willing to admit that the impact of physical forces, of ideas, of social ordering, of "use and wont", is as important as the concepts which create order and continuity in the living law, will mark the extent to which the law of torts will be responsive to the rapidly changing aims of individuals and groups of individuals in the atomic age.

[232] *Applebaum* v. *Gilchrist*, [1946] O.R. 695, 4 D.L.R. 383.
[233] See Prosser, Torts, p. 937.