

CONTRIBUTORY NEGLIGENCE—SHOULD THE RULE IN ADMIRALTY AND THE CIVIL LAW BE ADOPTED?

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At the last sittings of the Ontario Legislature a Bill, No. 68, (1923) was introduced, dealing with this question in the following fashion:—

“ 2. In an action or counter-claim for damages hereafter brought, which is founded upon fault or negligence, if a plea of contributory fault or negligence shall be found to have been established, the Jury, or the Judge in actions tried without a Jury, shall nevertheless find the entire amount of the damages to which the plaintiff would have been entitled had there been no such contributory fault or negligence.

“ 3. (1) The Judge shall then determine the degree in which each party was in fault and shall so apportion the total amount of damages found that the plaintiff shall have judgment only for so much thereof as the Judge deems proportionate to the degree of fault imputable to the defendant.

“(2) Where upon the evidence it is not practicable to determine the respective degrees of fault, the defendant shall be liable for one-half the damages sustained.”

To understand properly the object and the probable effect of this bill if enacted, it is necessary to compare the present condition of the common law in this regard with the analogous doctrine under the civil law and in the English Admiralty jurisdiction, for the intent of this proposed legislation is undoubtedly to substitute for our common law rule, the principle which is now in force where the civil law prevails.

Common Law Doctrine of Contributory Negligence.

Contributory negligence must, in the light of recent decisions of the Courts, be interpreted in a much nar-

rower and more particular sense when applied to judicial matters than would ordinarily be attributed to it. The doctrine of contributory negligence in its present form is one of slow growth and a clear enunciation of the principle has been for many years a matter of considerable difficulty to Judges and its application a matter of perplexity and doubt to juries.

Definition of Contributory Negligence.

However, there seems little doubt to-day that the legal significance of contributory negligence may be clearly and definitely defined as "such an act or omission on the part of a plaintiff, amounting to a want of ordinary care, as concurring or co-operating with the negligent act of the defendant is a proximate cause or occasion of the injury complained of." Beach, *Contributory Negligence*, 3rd edition (1899), p. 7. Any negligence (though contributory to the injury) which falls short of the above definition, is not such contributory negligence as will be held by the Courts to prevent the recovery of damages. For example, slight negligence not amounting to want of ordinary care, however much it contributed to the accident, would not be contributory negligence as thus qualified, nor would negligence, though both amounting to want of ordinary care and also contributory, if it is remote from the accident. It must have concurred and co-operated with the negligent act of the defendant in such a way as to have become the proximate cause of the injury complained of. In other words, if with ordinary care exercised up to the moment of the happening of the injury, the plaintiff could have avoided it, he is then and only then guilty of contributory negligence in the legal significance of the term as a bar to recovery, even although the defendant, by the exercise of like care, might have avoided it. With such "contributory negligence" it may be assumed the proposed Act is intended to deal.

Object of Bill No. 68.

The object of the proposed statutory change in the law is obvious. It is intended to abate the rigour of

the rule of common law at present so well established that where from the concurring negligence of two parties, one party suffers all the injury, he must bear the whole loss, although the other party may have been equally or even more negligent.

Rule in Admiralty.

A different rule has been in force in the Admiralty jurisdiction; a rule for apportioning damages in all cases of contributory negligence, which unquestionably challenges any statement that the introduction of the same principle into the common law would be impracticable. The former rule in Admiralty was to apportion the loss at first equally and later, upon the Maritime Conventions Act of 1911 coming into force, in proportion to the degree of fault of both.

History of Admiralty Rule.

Marsden on Collisions gives the history of the Admiralty rule as to division of loss in cases of collision at sea. It is founded on the laws of Oleron and dates from the twelfth century. Various forms of the rule appear in the codes of Wisby, Hamburg, Netherlands and in Hanseatic, Danish and Swedish codes, in the Consolato del Mare and the Ordonnance of Louis XIV. The usual rule appears to have been that if the collision was accidental, the loss was equally divided. In England the Admiralty Court records begin in 1530. For a considerable time there appears to have been no consistent application of any rule of division of loss. However there seems no doubt that by 1690 the rule was to divide the loss equally where the cause was doubtful. In 1789 in *The Petersfield* and *Judith Randolph*, the rule of equal division of loss, *rusticum judicium*, was for the first time applied solely on the ground that both ships were at fault, with an express finding that the fault of one ship was greater than the other. As far as records show, the rule since 1789 has been applied only when both ships were in fault, never where

neither was in fault or in cases of insufficient proof. Marsden suggests that the development in the common law Courts of the doctrine of contributory negligence probably supplies a plausible reason for the application of the *rusticum judicium* rule in the case of "both to blame" and also for confining its application to that case alone. The rule as applied in the Admiralty Courts is definitely stated in the case of *DeVaux v. Salvador* (1836), 4 Ad. & El. 420, at page 431, by Lord Denman " . . . Both vessels being at fault, a positive rule of the Court of Admiralty requires the damage done to both ships to be added together and the combined amount to be equally divided between the owners of the two;" and in *Cayzer v. Carron Co.* (1884), 9 A. C. 873, at 881, by Lord Blackburn: "The rule of Admiralty is that if there is blame causing the accident on both sides, they are to divide the loss equally . . . the rule of law is that if there is blame causing the accident on both sides, however small the blame may be on one side, the loss lies where it falls."

By the Maritime Conventions Act of 1911, it was enacted that where by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was at fault; provided that if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault the liability shall be apportioned equally. Reference to the discussion in the British House of Commons at the time of the passing of the Act reveals the fact that the ship owners were apparently unanimous in support of the legislation which had been introduced as a result of two conventions held at Brussels in the previous year. In the first case following this legislation, *The Rosalie* (1912), P. D. 109, the rule was applied by dividing the damages according to the blame, 60 per cent. to one and 40 per cent. to the other. See also *The Bravo* (1912), 12 Asp.

311; *The Counsellor* (1913), P. D. 70; *The Ancona* (1915), P. D. 200; *The Llanelly* (1914), P. D. 40, and *The Umona* (1914), P. D. 141; *The Cairnbahn* (1913), 12 Asp. 455. In *The Peter Benoit* (1915), 13 Asp. 203, the loss was divided equally. "Fault" within the meaning of the Statute was held to mean fault causing or contributing to the collision. Lord Sumner observed: "The conclusion that it is possible to establish different degrees of fault must be a conclusion proved by evidence, judicially arrived at and sufficiently made out. Conjecture will not do. A general leaning in favour of one ship rather than the other will not do. The question is not answered by deciding who was the first wrong doer, nor even of necessity who was the last. The Act says 'having regard to all the circumstances of the case.' Attention must be paid not only to the actual time of the collision and the manœuvres of the ships when about to collide, but to their prior movements and opportunities, their acts and omissions. Matters which are only introductory even though they preceded the collision by but a short time are not really circumstances of the case, but only its antecedents and they should not directly affect the result." As Pickford, L.J. (in the Court of Appeal) observes: "The liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault." That must mean in fault as regards the collision. If she is in fault in other ways, which had no effect on the collision, that is not a matter to be taken into consideration."

The rule under the Maritime Conventions Act of 1911 appears to have been successfully applied in all cases since the passing of the Act. Its essential justice apparently has never been questioned. The Maritime Conventions Act was adopted in Canada in 1914. (Statutes of Canada Chap. 13, 1914), but does not apply to the Great Lakes or the St. Lawrence as far east as the lower exit of the Lachine Canal and the Victoria Bridge at Montreal.

As may have been noted in the historical sketch of

the Admiralty rule just outlined, the Maritime Laws of England had a common origin with those of the other maritime nations of the world. The original rule of the Admiralty Court appears to have been similar to that applied by the Court of Common Law, but the close connection of a maritime people with foreign nations, led to the gradual introduction of a procedure based on the Roman Law corresponding to that which was being introduced on the Continent of Europe.

The Quebec Rule.

The Admiralty rule as to division of loss undoubtedly partakes more of the nature of the Roman than the English Common Law, and particularly since the passing of the Maritime Conventions Act, the law of contributory negligence as administered in the Admiralty Courts is strikingly similar to that in force in Quebec. We need only cite a passage from the judgment of Sir Charles Fitzpatrick, Chief Justice of the Supreme Court of Canada, in the *Nichols' Chemical Company of Canada v. Le Febvre* (1909), 42 Can. S. C. R. at p. 404. "It may be necessary to call attention to the confusion which seems to exist with respect to the application of the rule now adopted in Quebec in actions of damages against employers where it is found that there is common fault (*faute commune*). The principle of the French Law which it is said has been recently adopted in *that Province*, is that where the party who claims compensation for an injury caused by the fault of another has been also guilty of fault, which contributed to the accident, he must share the responsibility, and in that case, the damages are not divided equally as is the rule in the English Admiralty Courts, *Cayzer v. Carron*, *supra*, and R. S. C. 1906, ch. 113, sec. 918, but the plaintiff is awarded only a proportion varying according to the degree in which the respective parties were to blame." A comment of Justice Girouard in his concurring judgment is also interesting; he says, "the rule of law with

regard to *faute commune* is not new in Quebec. I submit with due respect it is old, and simply ignored for a while as I have explained in the case of the *Shawinigan Carbide Co. v. Doucet*, 18 Que. K. B. (1909), 271." In *C. P. R. v. Frechette* (1915), A. C. 817, there is an interesting comparison between the French and English Law on this point. Lord Atkinson says at p. 878: "There is no doubt that the law of Quebec differs from the law of England on the question of contributory negligence properly so called, if one takes for example such a plea of contributory negligence as might be framed in conformity with the judgment by Wightman, J., in *Tuff v. Warman*, 5 C. B. N. S. 575, at p. 585, to this effect, that the plaintiff himself so far contributed to the misfortune by his own negligence that but for such negligence on his part the misfortune would not have happened and the defendants could not, by the exercise of ordinary care and caution upon their part have avoided the consequences of the plaintiff's negligence.' Now that plea, if proved, would be a perfectly good defence in England: *Radley v. London and North-western Railway Company*, 1 App. Cas. 754. It would be no defence in Quebec. The jury in Quebec, notwithstanding the proof of it, would be entitled to inflict a kind of penalty upon the plaintiff, on account of his own negligence, proportioned, presumably, in their opinion, to his culpability, deduct that sum from what they would have awarded to him, had he been blameless and give him a verdict for the balance: *Nichols Chemical Co. of Canada v. Le Febvre*, *supra*. That is in fact what the jury have done in the present case. But though this difference between the laws of the two countries on this subject does exist, it is equally certain in Quebec, as in England, that a plaintiff suing for damages in respect of an injury sustained by him cannot recover if his own negligence be the sole effective cause of the injury. (*George Matthews Co. v. Bouchard*, 28 Can. S. C. R., 580, at p. 584). The ground of this distinc-

tion between the two cases is this, the latter is not, in the true sense of the term, contributory negligence at all. That term can only be properly applied to a case where both the parties, plaintiff and defendant, are each guilty of negligence so connected with the injury as to be a cause materially contributing to it. If the negligence of either party falls short of this, it is an irrelevant matter." Thus it would appear that what constitutes contributory negligence in the Courts of the Province of Quebec is the same as at Common Law although it is not in Quebec a bar to recovery.

History of Common Law Rule.

The English Common Law, as it relates to negligence, including contributory negligence, according to Beach, has also come down to us from the Civil Law of Imperial Rome. "It is a part of that great debt which the Common Law owes to the classical and the scholastic jurisprudence Earlier English jurists in the seventeenth and eighteenth centuries began seriously to study the civil law with a view to adapting it in some definite way to the growing social and commercial necessities of Englishmen." Nevertheless, the English Common Law Courts perhaps by an extension of the application of the rule *volenti non fit injuria* or the rule against contribution amongst joint tortfeasors, early adopted the rule by which a plaintiff guilty of contributory negligence was not permitted to recover. *Butterfield v. Forrester*, 11 East 60, is believed to be the earliest reported case in the English Law Reports in which the rule as to contributory negligence is distinctly announced. It was decided by Lord Ellenborough in 1809, and has ever since been regarded a leading case. It may safely be said that it has been cited with approval as a controlling authority in every jurisdiction where the Common Law obtains. No case is more often referred to in oral argument and no case in any branch of the law is more generally received as unquestionably sound. Beach p. 8.

This was an action for obstructing a highway, by means of which obstruction the plaintiff who was riding along the road, was thrown from his horse and injured. The defendant while repairing his house, close by the roadside, had put up a pole partly across the road on his side, leaving however free passage through the street on the other side of the way, and the plaintiff riding rapidly through the street at nightfall, but before it was dark, not observing the obstruction, rode violently against it, fell from his horse and was much hurt. Bayley, J. directed the jury that if a person riding with reasonable and ordinary care could have seen and avoided the obstruction; and if they were satisfied that the plaintiff was riding along the street extremely hard, and without ordinary care, they should find a verdict for the defendant; which they accordingly did.

The judgment of Lord Ellenborough, is a model of judicial brevity—"A party is not to cast himself upon an obstruction which has been made by the fault of another and avail himself of it, if he do not himself use common and ordinary caution to be in the right. In cases of persons riding upon what is considered to be the wrong side of the road, that would not authorize another purposely to ride up against them. One person being at fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant and no want of ordinary care to avoid it on the part of the plaintiff."

Among earlier cases in the English Court of King's Bench some of the decisions go so far as to hold that if the negligence of the plaintiff or person killed or injured contributed in any degree, however slight, there is no recovery. But under the modern law it is not any degree of negligence that will prevent recovery, but such negligence, however slight, as amounts to want of ordinary care and prudence, if such negligence contributes directly to produce the injury. Pol-

lock on Torts, 11th ed., p. 471, quotes with approval an article in the *Law Quarterly Review*, vol. 5, p. 87, which is attributed to Mr. Justice Wills, in which distinction is made between the cases where the negligent acts were successive and where they were simultaneous, the rule where negligent acts were successive being "he who last has an opportunity of avoiding the accident, notwithstanding the negligence of the other is solely responsible" (*Davies v. Mann* (1846), 10 M. & W. 546, and *Radley v. London and North-western Railway, supra*), and where the negligent acts were simultaneous "If the plaintiff could, by the exercise of ordinary care have avoided the accident he cannot recover." (*Dublin Railway v. Slattery*, 3 App. Cas. 1155) "The ground of both rules is the same, but the law looks to proximate cause or in other words, will not measure out responsibility in halves or other fractions, but holds that person liable who was in the main the cause of the injury." The decision in *British Columbia Electric Railway v. Loach* (1916), 1 App. Cas. 719 (approving the judgment of Anglin, J. in *Brenner v. Toronto Railway Co.* (1907), 13 O. L. R. 423), particularly as defined in *Neenan v. Hosford* (1920), 2 Ir. Reps. 258, is an authority for the view that the defendant is liable in spite of the plaintiff's negligence, if the plaintiff's contributory negligence was spent in time to enable the defendant, by the exercise of reasonable care, to avoid the accident. In *Grayson v. Ellerman* (1920), A. C. at p. 472, Lord Birkenhead states the common law formula in this form:—

"1. Were the appellants (defendants) guilty of negligence?

"2. Were the respondents (plaintiffs) guilty of negligence?

"3. If both parties were guilty of negligence could the appellants (defendants) in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened?" In the same case Viscount Finlay says, at p. 475, "In collision cases, the question

which arises very frequently is whether although the defendant has been guilty of negligence, the plaintiff by the exercise of reasonable care might have prevented the consequences of that negligence." This appears, as pointed out by Lord Justice O'Connor of the Irish Court of Appeal in the *Law Quarterly Review* for January, 1922, to add another question:—

4. "If both parties were guilty of negligence, could the plaintiff, by the exercise of ordinary care and diligence, in the result have avoided the mischief?" Lord Justice O'Connor suggests that instead of formulæ confusing alike to Judge and jury, the liability be determined by putting the simple question, "Was the defendant's negligence the main or real cause of the accident?"

The latest authoritative statement on this branch of the law is given by Birkenhead, L.C., in *The Volute* (1922), A. C. 129.

Comparison of Admiralty and Common Law Rules.

Marsden, p. 137, points out that recent cases show that in Admiralty the loss is not divided in every case where there is want of due diligence or of skill on both sides, but that a ship is liable for such want of diligence or skill as has caused or contributed to the loss, that there has been an increasing disposition to disregard the negligence which though connected with the collision, is not itself a proximate cause. At page 31, he says, "It is clear that there is no difference between the rules of law and Admiralty as to what amounts to negligence causing collision and that before a vessel can be held to be in fault for a collision, the negligence causing or contributing to the collision must be proved." Thus in *Cayzer v. Carron Co.*, *supra*, a vessel infringed a statutory rule of navigation which required her to wait under a point in the river until the other ship passed and was in that respect guilty of negligence, and without that negligence, other circumstances being the same, the collision would not have

happened, yet it was held that this negligence was not a cause of the collision . . . One ship was held to be in fault because with ordinary care, she could have avoided a collision, notwithstanding the negligence of the other, and it was for this reason that the negligence of the latter was held not to be a cause of the collision." This is compared with the case at Common Law, *Davies v. Mann*, *supra*, the celebrated "donkey" case. The owner of a donkey which had been negligently left hobbled and unguarded on a highway sued the defendant by the negligence of whose servant, in driving along the highway at too rapid a speed, a donkey was run over and injured. It was held that the donkey owner could recover, his negligence notwithstanding.

Criticism of the Admiralty Rule Before the Maritime Conventions Act, 1911.

The original Admiralty rule of equal apportionment of loss before the recent amendment apportioning the damages is approved in *Stoomvart v. Peninsular & Oriental Steam Nav. Co.*, 7 A. C., 1882, at p. 819, by Lord Blackburn, who says: "This rule has been stigmatized as '*judicium rusticorum*' and is justified on the ground of general expediency avoiding interminable litigation at the cost of some inevitable injustice in particular cases." But on the other hand in the same case Lord Selborne speaks of it as "a rule of the Admiralty Jurisprudence which to myself has always seemed arbitrary," and Lord Denman in *De Vaux v. Salvador*, 4 Ad. & El. 420, in applying the rule for division of loss, says, "this is neither a necessary nor a proximate effect of the perils of the sea. It grows out of an arbitrary provision in the law of nations from a view of general expediency not as dictated by natural justice nor (possibly) quite consistent with it."

But the objections as regards the arbitrary working of the Admiralty rule are now set aside by the Mari-

time Conventions Act, 1911. As it was said during the debate in Committee at the time the bill was before the House of Commons by Mr. Robertson, the Parliamentary Secretary to the Board of Trade, "there is a rectification of the distinctly rough and ready procedure under which when two ships have been damaged in collision, they aggregate the loss and divide it equally between them, no matter what might have been the degree in which the ships singly contributed to the accident. It is universally admitted that this is very rough justice indeed. On this point our law is being usefully modified."

Criticism of Common Law Rule.

The Common Law rule, permitting no apportionment of the damages either equal or otherwise, is obviously open to criticism. As far back as 1888, Lord Lindley in *The Bernina*, 1888, 12 P. D., at p. 89, said in referring to Common Law cases: "Why in such cases (*i.e.* of contributory negligence), the damages should not be apportioned, I do not profess to understand. However as already stated, the law on this point is settled and not open to judicial discussion."

In his admirable and interesting address delivered at the annual meeting of the Canadian Bar Association held in Vancouver in 1922, Mr. Justice Anglin in commenting "on some differences between the Law of Quebec and the law as administered in the other Provinces of Canada" made the following statement: "The English law excluding all relief where the plaintiff has been guilty of contributory negligence, however slight, has always seemed to me much less equitable than the provision of the civil law that where there is *faute commune* there should be an apportionment of damages according to the degree of blame attributable to each party. This feature of the civil law has been adopted by the English Courts of Admiralty. The day may come when the Imperial Parliament may incorporate it in

the law of England and their respective legislatures in the laws of the Provinces of Canada, other than Quebec." CANADIAN BAR REVIEW, January, 1923, pp. 48-49.

Thompson in his Commentaries on Negligence, 2nd edition, pp. 174-5, states the general rule as follows: "Where the catastrophe is the result of the mutual and concurring negligence of the plaintiff and defendant, the plaintiff cannot recover damages . . . the reason 'in such cases,' why neither party can maintain an action against the other is not that the wrong of the one is set off against the wrong of the other, it is that the law cannot measure how much the damage suffered is attributable to the plaintiff's own fault." If he were allowed to recover it might be that he would obtain from the other party compensation for his own misconduct . . . If he has suffered in consequence of his own fault the law gives him no remedy." Thompson again, p. 169, in referring to those early English cases where any contributory fault of the plaintiff, however slight, was a bar to recovery, says: "But this doctrine which visits upon the plaintiff or person injured all the consequences of the defendant's negligence, although the plaintiff's negligence may have been slight and trivial and that of the defendant gross and wanton, is cruel and wicked and shocks the ordinary sense of justice of mankind. Such a rule finds no proper place in an enlightened system of jurisprudence." In the later cases, the negligence of the person injured, though slight, if it directly contributes to the accident and there has been a want of ordinary care, still bars his right to recover damages, and he must bear the whole loss, while the defendant, who may have been grossly negligent, but has suffered no injury, escapes all liability. Such is the law at present.

In an article in 29 Yale Law Review, 899, the following view is expressed:—

"The inherent weakness of the whole Doctrine of Contributory Negligence is that the Common Law makes no effort to apportion the blame or even to

divide the loss between the two parties who are guilty of concurrent negligence. Seemingly the now discredited doctrine of comparative negligence which once prevailed in Illinois (but is now no longer the law), as well as the many provisions to the same effect found in our recent Workmen's Compensation Acts, are attempts to mitigate the hardships of the Common Law doctrine. It is a matter of regret that the limitations of our system of trial by jury prohibit, or are considered to prohibit, an investigation into the relative harm suffered by each. The rule applied in the Courts of Admiralty and in the Civil Courts of France and Germany and some other European countries realize certainly a more satisfactory result than one generally does under our Common Law rules as to contributory negligence."

In a recent American text book, Clark's Law of Torts, 1922, the author suggests that what he calls "the unconscious last chance doctrine" probably represents English law: that is, recovery is allowed where the defendant was unconscious of the peril, but could by the exercise of due care have discovered the danger in time to have avoided the injury — the plaintiff whether conscious of the peril or not, being helpless to avoid it. His opinion of the present state of the law of contributory negligence may be gathered from the following: "Instead of allowing contributory negligence to defeat recovery altogether, it would be more just to allow it to go only in reduction of damages, thus compelling the negligent defendant to bear a part of the loss and the negligent plaintiff a part."

Analogous Legislation.

The Ontario Workmen's Compensation Act, Statutes of 1914, chap. 25, secs. 107 and 108, provides that contributory negligence on the part of a workman shall not be a bar to recovery of damages by him in an action in which the employer would otherwise have been liable, and such damages shall be awarded in proportion to the degree in which each party was in fault. There are similar provisions in the corresponding Acts

of the other Canadian Provinces and in the U. S. Federal Employers' Liability Act of 1908, sec. 3.

It may be noted also that legislation in this direction is now in force in the United States of America as regards claims for damages arising out of railroad injuries. By section 2871 of the Code of the State of Georgia and section 3149 of the Compiled Laws of Florida it is enacted: "No person shall recover damage from a railroad company for injury to himself or his property, where the same is done by his consent or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to him." In Nebraska, secs. 5411 and 8834, Compiled Laws, 1922, contain similar provisions, both with regard to railway employees and generally as to injuries to person or property caused by negligence—contributory negligence by the person injured is not to be a bar to recovery, but shall be considered by the jury in mitigation of damages in proportion to the amount of contributory negligence. There are similar provisions in Massachusetts General Laws, 1920, chap. 29, sec. 3.

Desirability of Change in the Law.

The importance of the proposed amendment to the law and the great benefit which will flow from proper legislation, should not be minimized. It concerns itself with a part of the law which is daily becoming of greater moment in its relation to the personal safety of every member of the community. The growth of the law in this direction has been a slow one, gradually evolving with the growing needs of society resulting from the steadily increasing commercial activities during the seventeenth and eighteenth centuries, receiving a great impetus on the introduction of canals and railways into England and this country during the last century, until finally, in our day of rapid transit by railways and motor vehicles the question assumes

an importance undreamt of even twenty years ago. Particular reference might be made to our rapidly growing law relating to motor vehicles in which the question of negligence and contributory negligence forms naturally so large a part. "Although we may not all know it we are in the thick of the locomotive revolution," as a writer in the *London Times* put it recently.

Widdifield, *Law of Motor Vehicles*, at p. 29: "Where motor vehicles are using the streets and highways, negligence at common law is the basis of all liability for damages arising from such use, except as otherwise provided by statute or by statutory regulation." Huddy on *Automobiles*, 1922, at p. 317: "The circumstance that new systems of locomotion, such as electricity, steam, etc., have been added to vehicles using the public highway has not wrought any legal change in the general principles of the law of the use of highways. In determining whether the driver of an automobile has exercised proper care, the size and speed of the machine, its capability of frightening horses or causing other injuries are to be considered. Considering the question from this point of view, it is clear that greater precautions and diligence are required of an automobile than is to be expected from the driver of a horse drawn conveyance." At p. 321: "The care to be exercised under given circumstances is commensurate to the danger involved . . . The addition of automobiles on account of their speed, size and other characteristics is attended with greater danger to pedestrians and other travellers than is the movement of a horse drawn carriage. Thus it may be said that the care required of the driver of a motor vehicle is commensurate with the danger of such a machine. This may require that the driver shall at all times use greater diligence than would be imposed on the driver of a horse and wagon or on other travellers."

There is an interesting article in the *Law Notes* for February, 1923, which reads in part: "The profession is familiar with the difficulty which Admiralty Judges

have experienced because of the fact that every seaman 'swears for his ship.' Moreover, a distinct hostility among different classes of vessels has often been commented upon. The officers of a steamer regard sailing vessels as an intolerable nuisance, while the 'wind jammer' considers all steamers as reckless bullies, regardless of the rights of others. A like feeling exists between pleasure craft and working boats. The result of this is that in navigation the conduct of vessels is largely influenced by this feeling and in the trials subsequent to collision the testimony is colored by it. A very similar situation is growing up as between the automobile and the pedestrian and in its development it will cause many avoidable accidents and much conflicting testimony. If it does, the situation will be more complicated than the maritime conflict referred to, for it will be impossible to secure a tribunal aloof from the *animus* which affects the parties."

Mr. Justice Walsh in the case of *Black v. City of Calgary* (1915), 24 D. L. R., p. 59, made the following remarks on the questions here discussed:—

"In dismissing the action I do so without costs. The law as it now stands in actions such as this is most unsatisfactory and unjust. No matter how great may have been the negligence of a defendant, if the plaintiff has by his own negligence contributed to the accident, he cannot recover except, of course, in cases where ultimate negligence is brought home to the defendant. The result is, that although the damage done is due to their concurrent negligence the plaintiff alone must bear the whole of the loss.

"In Quebec the much more equitable principle prevails of apportioning the damage between the parties. If a man is injured partly by his own fault and partly by that of another it is surely fairer to make each of them pay a part rather than one of them suffer all of the resulting loss, for they are both to blame, and without carelessness on the part of each the accident would not have happened. If, as often happens in collision cases, both parties suffer injury because of

fault on both sides, there surely can be nothing unfair in pooling the damages and apportioning the aggregate loss between them."

The case of *Grand Trunk Pacific Ry. Co. v. Earl*, (1923), Can. Law Reports 397; (1923), 2 D. L. R. 741, decided on 3rd April, contains striking statements by Duff, Anglin and Mignault, JJ., as to the harshness of the English doctrine of contributory negligence, and the more equitable doctrine of the civil law in force in the Province of Quebec, but "this is a matter for the consideration of the law-maker, for the Courts are obliged to apply the law, however harsh it may seem."

After being read a second time and referred to the Legal Committee of the Ontario Legislature, Bill No. 68 was withdrawn at the suggestion of Chief Justice Sir William Meredith to the Attorney-General that the Bill should be held over for another year to enable the Bench and Bar of Ontario to consider it carefully.

Prior to this the opinions of the Judges of the Supreme Court at Ottawa were obtained by the Attorney-General of Ontario. With the exception of Mr. Justice Idington—who expressed no opinion—all the Judges expressed themselves as being strongly in favour of the principle of the proposed measure. It must be generally conceded that the law relating to contributory negligence is not in a satisfactory condition. It is hoped, therefore, that those who are the most qualified to decide how it can be improved will give their earnest attention to the best means of improving the law in this respect. As an illustration of the confusion that has arisen in applying the principles of the common law, reference may be made to the recent case of *Clark v. Canadian National Railways*, 67 D. L. R. 674; 16 Sask. L. R. 31, which has been summarized as follows: "In a case of a collision between a railway train and an automobile on a level crossing at the intersection of the defendant company's line with a public highway, where primary negligence only had been established against the defendants, and no question of ultimate negligence on its part arose, the inquiry by the

jury should not have extended further than to ascertain whether or not there was any contributory negligence on the part of the plaintiff, and a further question as to whether the accident should be attributed to the negligence of the one rather than of the other, which may have altered the significance of the other questions in the minds of the jury, is ground for granting a new trial." See also (1923), 3 D. L. R. 387.

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