LIABILITY FOR DAMAGE CAUSED BY THINGS

From the Common Law Point of View

BRUCE DUNLOP*

I

The concept of "Liability for Damage Caused by Things" is distinctly a concept of the civil law of delicts. It serves a purpose, or purposes, which the common law of torts fulfills in other ways, but it has no parallel. In at least one of its aspects, if I may say so with respect, this is happily the case. I refer to the interpretation of the first paragraph of article 1054 of the Civil Code by the Quebec courts. The common law mind, trained to think of liability as attributable only to human activity of one sort or another, is apt to be completely baffled by the idea of an autonomous act of a thing, independent of human intervention. I do not, of course, mean to imply that the law of torts is made up solely of salutary concepts, easy to understand and apply, which the civilian should envy and to which he should aspire. The law of torts has been beset by its share of unfortunate thinking, but the difficulties created are of a different nature. However, I am getting ahead of myself. Before coming to grips with specifics, I should begin as my colleague has begun, with some observations on general theories of liability in the law of torts.

II

The law of torts and the law of delicts are both, presumably, concerned with determining which of the parties to a lawsuit should ultimately bear the loss that has been inflicted by the activities of one, or more, upon the other, or others: the kind of loss that inevitably occurs where people own and use property, travel from place to place, carry on business and generally engage in modern social living.

To some extent, the decision may be affected by the fact that one or other of the parties may be in a better position to absorb the loss. Thus, for example, in all provinces of Canada vicarious

*Bruce Dunlop, of the Faculty of Law, University of Toronto.

liability is imposed on the motor car owner when he consents to the operation of the vehicle by someone else and harm results from the driver's negligence or fault.[1] Insurance is most readily available to the owner. Thus, too, business enterprises are vicariously liable for the negligence of their servants acting in the course of their employment.[2] Insurance is most readily available to the business enterprise and in any event it can "socialize" the loss in setting the price of its goods or services, as it does with the other costs of doing business.

This consideration is becoming increasingly apparent in the law of torts. In most situations, however, it is safe to say that the concern of the law of torts is to adjust the losses between the parties primarily on the basis of their conduct and its objectives. This is the touchstone of the law of torts: the classification of conduct or activity.

Conduct that will give rise to liability is of three types: conduct intentionally causing harm which is not justified as the inevitable result of some socially acceptable objective; "negligence", or conduct unintentionally falling below a standard of care imposed on all members of the community in conducting their day-to-day activities; and conduct, no matter how careful, with respect to activity of an "unusual" nature creating risks not treated as part of the give-and-take of "normal" social living. Most problems dealt with by the law of torts fall to be decided under the negligence doctrine.

I hasten to say that all problems of the law of torts are not solved by the unconfused and logical application of these principles. For example, with problems of intentional conduct one can, or could, find the courts purporting to classify the conduct as lawful or unlawful without reference to objective or motive. In the celebrated English case of *Mayor of Bradford* v. *Pickles*,[3] Lord Halsbury stated that if an act were lawful, "however ill the motive

---

[1] The Vehicles and Highway Traffic Act, R.S.A., 1955, c. 356, s. 130; the Motor-vehicle Act, R.S.B.C., 1960, c. 253, s. 70(1); The Highway Traffic Act, R.S.M., 1954, c. 112, s. 94; The Highway Traffic Act, R.S.N., 1952, c. 94, s. 79; the Motor Vehicle Act, R.S.N.B., 1955, c. 13, s. 241; the Motor Vehicle Act, R.S.N.S., 1954, c. 184, s. 201(3); the Highway Traffic Act, R.S.O., 1960, c. 172, s. 105(1); the Highway Traffic Act, R.S.P.E.I., 1951, c. 73, s. 68(2); the Motor Vehicles Act, R.S.Q., 1941, c. 142, s. 53(2), now the Highway Code, S.Q., 1959-60, c. 67 (s. 53(2) is replaced by s. 3 of the Highway Victims Indemnity Act, S.Q., 1960-61, c. 65.); the Vehicles Act, R.S.S., 1953, c. 344, s. 151(1).

[2] The cases are legion, but see *e.g.*, *Century Ins. Co.* v. *Northern Ireland Road Transport Board*, [1942] A.C. 505, [1942] 1 All E.R. 491, 111 L.J.P.C. 138.

[3] [1895] A.C. 587.

might be" the defendant would have a right to do it. On the other hand, "If it was an unlawful act, however good his motive might be, he would have no right to do it."[4] How the act was to be characterized, if not by reference to motive, was not made explicit. The case was decided, however, in 1895 and may have involved a contemporary value too obvious to warrant stating: the unfettered use of land for profit-making activity. Defendant was attempting to force plaintiff to buy water from him by the simple expedient of cutting off plaintiff's natural supply which happened to run under defendant's land. In cases both before and since one finds the process of weighing the purpose of the harmful activity more consciously performed and explicitly described.[5]

Nor is the negligence theory always clear in its application. It is usually expressed in the form of a duty owed, which has not been observed. The duty arises when a person's conduct creates an unreasonable risk of harm, foreseeable to the reasonable man. It is owed to those within the "ambit" of the risk: those whom the reasonable man would foresee as being affected by his conduct. It requires the person to take reasonable care to prevent the risk from culminating in harm. This expression of the concept can be supported by the case law[6] but there are cases that proceed on different footings. One type of case holds the person liable even though the particular risk that culminated in harm was not foreseeable.[7] Liability apparently arises from the fact that *some* risk is foreseeable. It should be safe to say that this line has come to an end, at least insofar as damage to person or property resulting from negligent conduct is concerned.[8] Another line refuses to hold the person liable even though he created a foreseeable risk that did culminate in harm.[9] It would appear that this line is to be confined to the "negligent" use of words which result in financial harm.[10]

In the doctrine of strict liability attaching to "unusual" activ-

---

[4] *Ibid.*, at p. 594.

[5] *Hollywood Silver Fox Farm* v. *Emmett*, [1936] 2 K.B. 468, [1936] 1 All E.R. 825.

[6] *Glasgow Corporation* v. *Muir*, [1943] A.C. 449, [1943] 2 All E.R. 44 (H. of L.); *Nova Mink Ltd.* v. *T.C.A.*, [1951] 2 D.L.R. 241, 26 M.P.R. 389 (N.S.S.C.).

[7] *In re Polemis*, [1921] 3 K.B. 560 (Eng. C.A.); *Thorogood* v. *Van den Berghs and Jurgens Ltd.*, [1951] 2 K.B. 537, [1951] 1 All E.R. 682 (C.A.).

[8] *Overseas Tankship (U.K.) Ltd.* v. *Mort's Dock & Engineering Co. Ltd.*, [1961] 2 W.L.R. 126, [1961] 1 All E.R. 404 (J.C.P.C.).

[9] *Candler* v. *Crane, Christmas & Co.*, [1951] 2 K.B. 164, [1951] 1 All E.R. 426 (C.A.).

[10] *Hedley, Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*, [1961] 3 All E.R. 891 (C.A.).

ities there is considerable confusion, as well. The doctrine began with the English case of *Rylands* v. *Fletcher*,[11] and perhaps most particularly stems from what was said by Blackburn J. at the intermediate stage of appeal:[12]

> We think the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape . . . . But for his act in bringing it there, no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences.[13]

The examples Blackburn J. used to illustrate his point made it clear that he had only one type of complainant in mind: another landowner who suffered damage to his property or the enjoyment of it. What has been done with this decision since 1868 is a long story that must here be made short. The rule in *Rylands* v. *Fletcher* was subsequently interpreted to mean that where an "unusual" use was made of land, by something being brought onto it, and that unusual something escaped and caused damage to other land, then the person making the unusual use of land was liable for the damage unless he could show the intervention of an act of God, the Queen's enemies, a stranger, or the complainant.[14]

The reasons for the exceptions remain something of a mystery. It is interesting to note that they parallel the defences to strict liability under article 1055 of the Quebec Civil Code, with respect to animals and tumbledown buildings. The alleged justification from the common law point of view is that under the circumstances the user of the land cannot be said to have "caused" the harm;[15] but of course he can. Except for his activity, no harm would have been done, just as Blackburn J. pointed out.[16] What may really be meant is that the user does not, under these circumstances, seem blameworthy. He is not at fault. Yet if fault is not a factor in determining liability, then this is a contradiction in terms. The rule in *Rylands* v. *Fletcher* would seem to fall between negligence and strict liability in an inconsistent way. It might be suggested that the rule of article 1055 of the Quebec Civil Code falls between the fault of article 1053 and strict liability in the same inconsistent way.

---

[11] (1868), L.R. 3 H.L. 330, 37 L.J. Ex. 161.
[12] (1866), L.R. 1 Ex. 265, *sub nom*, *Fletcher* v. *Rylands*.
[13] *Ibid.*, at pp. 279-80.
[14] *Rickards* v. *Lothian*, [1913] A.C. 263 (J.C.P.C.).
[15] *Ibid.* See also *Nichols* v. *Marsden* (1876), 2 Ex. D. 1 (C.A.).
[16] *Supra*, footnote 13.

From time to time there has crept into interpretations of the rule in *Rylands* v. *Fletcher* the idea that the activities of the defendant in such a case must be classified as "ultra-hazardous",[17] or the thing brought on the land as "dangerous in itself".[18] "Ultra-hazardous" activities are those which continue to present a risk of harm even though the utmost care is taken in conducting them. But may it not be argued that they are also "unusual" and that therefore the term "ultra-hazardous" is unnecessary? It is perhaps of value to note that the *Restatement of Torts* includes in its definition of "ultra-hazardous" activity the element of uncommon usage. The idea of something dangerous in itself, it will be argued later, is one that adds nothing but confusion to the law.

There remains the question of whether the doctrine of *Rylands* v. *Fletcher* has been, or should be, extended to activities that involve neither use of land nor injury to land. There seems no reason why it should not be. Assuming "normal" activities fall within the ambit of a sort of law of give-and-take, with no liability for damage done in the absence of intentional or negligent conduct, then with respect to "unusual" activities there seems no reason for placing landowners in a special category either as plaintiff or defendant. Some courts have indicated a willingness to extend *Rylands* v. *Fletcher*. For example, in *Dokuchia* v. *Domansch*[19] in the Ontario Court of Appeal, Laidlaw J. A. used *Rylands* v. *Fletcher* to justify a judgment in favour of a plaintiff who had been injured by an exploding truck on a highway. The truck had stalled and plaintiff, on defendant's instructions, had been lying on the fender pouring gasoline into the carburetter to make it go. His Lordship held the only requirement of *Rylands* v. *Fletcher* to be that the damage be caused by a "dangerous *thing*". However, two things about this judgment are disturbing. One wonders why it was necessary to go beyond the rules of negligence in order to solve this case. Furthermore, the judgment upheld involved an apportionment of "fault or negligence".[20] One wonders how such an apportionment can take place under a rule of strict liability.

III

Aside from the fact that difficulties arise in the interpretation of these general rules of tortious liability, certain areas of human con-

[17] The American Law Institute, Restatement of the Law, Torts (1939), s. 519, adopts this as a ground of strict liability.

[18] See, for instance, *Hale* v. *Jennings Brothers*, [1938] 1 All E.R. 579 (C.A.).

[19] [1945] O.R. 141, [1945] 1 D.L.R. 757 (C.A.).

[20] The Negligence Act, R.S.O., 1960, c. 261.

duct have not submitted to any of the generalizations. Specific reference is made to the keeping of animals, and the ownership or occupation of defective premises.

As has already been noted, the civil law of delicts imposes strict liability in these areas. I would not venture to guess the underlying policy. By contrast, the common-law rules are rather elaborate and more than a bit troublesome.

The special rules of the common law relating to liability for damage arising out of activity on land or the condition of premises are divided into two sub-areas: liability to adjacent owners and people off the premises, and liability to persons coming on the premises. The first of these sub-areas invokes the concept of "nuisance", the second brings into play what one might call the "status of visitors" rules.

Much could be said, and has been said, about the term "nuisance". Not much can be said, however, that is clear and certain. Nowhere can one find the word used in such a way as to describe a distinctive theory of liability. Everywhere one can find uses of the word which merely blur the focus of attention on other common-law theories of liability. Yet one finds judicial insistence that the word has a special meaning.[21] At least one such statement is coupled with an admission that the special meaning overlaps, for the most part, the other common-law theories of liability.[22] The bulk of nuisance decisions seem to turn on negligence.[23] Others turn on intentional conduct[24] or seem to involve strict liability[25] similar to that of *Rylands* v. *Fletcher*.

There is a class of cases that might justify the use of the term were it to be confined thereto. That is the class in which damage is a continuing thing and the remedy of injunction is available. The term is not, however, so restricted. Hence, one can only say of "nuisance" that it loosely describes liability of landowners and occupiers to those off the premises but that it is really of no assistance in determining the basis of liability.

As to people coming onto premises, the occupier owes the ordinary duty of care in respect of activity he engages in, after he

[21] *Longhurst* v. *Metropolitan Water Board*, [1948] 2 All E.R. 834 (H. of L.).

[22] *Ibid.*, *per* Lord Porter, at p. 839.

[23] See, for instance, *Cowan* v. *Harrington*, [1938] 3 D.L.R. 271, 13 M.P.R. 5 (N.B.); *Mint* v. *Good*, [1951] K.B. 517, [1950] 2 All E.R. 1159 (C.A.); *Smeaton* v. *Ilford Corporation*, [1954] Ch. 450.

[24] See, for instance, *Hollywood Silver Fox Farm Ltd.* v. *Emmett*, *supra*, footnote 5.

[25] See, for instance, *Barrette* v. *Franki Compressed Pile Co.*, [1955] O.R. 413, [1955] 2 D.L.R. 665.

knows or ought to know of someone's presence on his property.[26] His liability for existing conditions is a more complicated question. One must determine the basis upon which the injured person came to be on the premises. Only if he has a common business interest with the occupier is he owed the ordinary duty of care.[27] That is to say, only the business visitor or "invitee", as he is called, is entitled to recover if the occupier has failed to take reasonable care to see that the premises are safe. If the visitor to the premises is merely a "licensee", present with the consent of the occupier but with no common business interest, the duty is merely to warn of hidden dangers of which the occupier is, or ought to be as a reasonable man, aware.[28] The trespasser, or unlawful visitor, takes the premises as he finds them, with the exception of deliberate traps.[29]

As a generalization, this theory eventually appeared so faulty to the English courts that they were proceeding rapidly to replace it with the ordinary negligence approach, at least with respect to lawful visitors,[30] when they were beaten to the mark by the legislature.[31]

A few Canadian judges have attempted to take similar steps but have so far been unsuccessful,[32] and the classifications apparently remain to plague us for a time yet.

That they are a plague seems clear. In the first place, to try to shove all potential claimants into a bare trio of categories is unrealistic. The courts themselves have proved this by sometimes appearing to create intermediate categories such as "permitees"[33] and "licensees with an interest"[34] though close scrutiny leads one to wonder whether these be devices for boosting trespassers and licensees respectively into the categories immediately above them.

---

[26] *Excelsior Wire Rope Co. Ltd.* v. *Callan*, [1930] A.C. 404 (H. of L.); *Mourton* v. *Poulter*, [1930] 2 K.B. 183, *per* Scrutton L.J. (Eng. C.A.).

[27] *Jacobs* v. *London County Council*, [1950] A.C. 361, [1950] 1 All E.R. 737 (H. of L.).

[28] *White* v. *Imperial Optical Co.* (1957), 7 D.L.R. (2d) 471 (Ont. C.A.).

[29] *Robert Addie & Sons* v. *Dumbreck*, [1929] A.C. 358 (H. of L.).

[30] See the progression in *Pearson* v. *Lambeth Borough Council*, [1950] 2 K.B. 353, [1950] 1 All E.R. 682 (C.A.); *Hawkins* v. *Coulsdon and Purley U.D.C.*, [1954] 1 Q.B. 319, [1954] 1 All E.R. 97 (C.A.); *Davis* v. *St. Mary's Demolition Co.*, [1954] 1. W.L.R. 592, [1954] 1 All E.R. 578 (Q.B.); *Slater* v. *Clay Cross Co. Ltd.*, [1956] 2 Q.B. 264, [1956] 2 All E.R. 625 (C.A.).

[31] The Occupiers Liability Act, 1957, 5 & 6 Eliz. 2, c. 31.

[32] Barlow J. in *White* v. *Imperial Optical Co.* (1957), 6 D.L.R. (2d) 496 (Ont.); O'Halloran J.A. in *Kennedy* v. *Union Estates Ltd.*, [1940] 1 D.L.R. 662, 55 B.C.R. 1 (C.A.). Barlow J. was overruled on appeal, *supra*, footnote 28. O'Halloran J.A., while in the majority in awarding judgment, was alone in rejecting the "categories" approach.

[33] *Excelsior Wire Rope Co. Ltd.* v. *Callan*, *supra*, footnote 26.

[34] *Greisman* v. *Gillingham*, [1934] S.C.R. 375, [1934] 3 D.L.R. 472 (S.C.C.).

In the second place, the classification process raises really insuperable problems as is illustrated by an attempt to classify the following:[35]

(1) A person who enters a drugstore to use a public telephone;
(2) The driver of a motor car who stops at a gas station to use the toilet only;
(3) A pedestrian who uses the toilet of a gasoline station;
(4) Small children, such as babies in arms, accompanying their parents on a trip through a department store;
(5) A newsboy who goes into a bank to obtain change for a five dollar bill;
(6) Persons who enter a department store in order (a) to get out of the rain; (b) to invite salesgirls to dinner; (c) to use the store as a short cut to an adjoining street.

In the third place, the requirement of a *quid pro quo* as the basis for a duty of reasonable care is one that should have gone out of the law of torts with *Donoghue* v. *Stevenson*,[36] if not sooner. Finally, there is no apparent reason why this particular branch of the law of torts should not submit to the negligence generalization.

It will have been observed that, whatever else may be said about the respective merits of the civil-law and common-law approaches to the problems of "dangerous premises", the civil-law approach seems to involve less difficulty of application. The same can be said of the civil-law approach to the problems of damage cause by animals.

At common law we have a number of ways of approaching the question of liability of the owner or keeper of an animal that has inflicted harm.

First, we have the type of liability mentioned by Blackburn J. in *Rylands* v. *Fletcher*; an historical strict liability for damage done by domestic farm animals escaping from their owner's land and trampling or eating crops. As to the rest, there are two basic rules governing liability. All animals are divided into two classes: *ferae naturae* and *mansuetae naturae*.[37] Those considered wild by nature are said to be kept at the owner's peril. Those that are domesticated subject the owner to liability only in the event of negligence, except where a particular animal has demonstrated a vicious propensity of which the owner is, or ought to be, aware. In the exception, liability is strict.[38]

---

[35] Wright, Cases on the Law of Torts (2nd ed., 1958), p. 604.
[36] [1932] A.C. 562 (H. of L.).
[37] See, for instance, *Behrens* v. *Bertram Mills Circus Ltd.*, [1957] 2 Q.B. 1, [1957] 1 All E.R. 583 (Q.B.).
[38] *Ibid.* Also, legislation such as the Dog Tax and Cattle, Sheep and

Stated thus generally, the law relating to liability for animals may have a sensible rationale. The keeping of wild or vicious animals is no doubt an unusual activity and not of high social utility. Hence the rest of society ought not to have to accept the inevitable risks with compensation only in the event of negligence. On the other hand, domestic animals were and are a social necessity and common usage, so that the inevitable harm they cause should perhaps be a matter of give-and-take unless there has been a failure to observe a reasonable standard of care.

Things do not work out quite that simply, however, as a handful of cases will show.

It is said that the basis for the distinction between the two classes of animals is that those that fall into the one class are harmless, if not by nature by training, while those that fall into the other class are harmful by nature and remain so even though trained by man. This is patently untrue. One can think of a score of non-domestic animals one would as soon meet as, say, a domestic bull. But when it comes to being gored, pick the privately-owned bull-moose over the domestic bull every time, because the latter is by nature harmless and the chances of recovery are slimmer.

This little fiction may be harmless enough in the case imagined since there is presumably more social utility involved in keeping a bull than in keeping a bull-moose, but sometimes the fiction results in unjustifiable results. In *McQuaker* v. *Goddard*,[39] the court held that since camels did not exist anywhere in the world as wild animals they must therefore be domestic in England. It followed from this that the camel is harmless by nature and no liability attaches to his biting without a showing of owner's negligence or owner's knowledge of a vicious propensity on the part of the particular camel. Rejected was evidence offered by experts that camels were by nature vicious. Surely this amounts to a failure to appreciate the underlying problem of liability for animals. It is arguable that the presumptions of harmfulness and harmlessness actually obscured consideration of whether this was an every-day risk in England.

Nonsensically consistent with *McQuaker* v. *Goddard*, is *Behrens* v. *Bertram Mills Circus Ltd.*[40] The animal in the case was an elephant, one Bullu, as nice and docile a creature, according to

---

Poultry Protection Act, R.S.O., 1960, c. 111, is common, and imposes strict liability on the owners of dogs that do damage to such domestic livestock, regardless of any knowledge of propensity.

[39] [1940] 1 K.B. 687, [1940] 1 All E.R. 471 (C.A.).

[40] *Supra*, footnote 37.

the evidence, as one would ever hope to meet; a bit on the large size of course. The reason Bullu caused harm was that the plaintiff's dog Simba, harmless by nature, ran at Bullu, yapping and snapping. Bullu went after Simba with attendant destruction and injury. Because Bullu was *ferae naturae*, this was enough to involve her owner in liability for the resulting damage.

To me it does not make sense that in England, or Canada, camel owners should stand on a different footing from elephant owners simply because in other parts of the world all camels are domestic, albeit vicious, while some elephants are not. Perhaps both should stand on a different footing from owners of "usual" animals, but the type of distinction that has come to be drawn seems unrelated to the problem of compensation for particular risks.

It is small wonder that a judge[41] and a noted writer on the subject[42] have advocated placing liability for animals on the all-inclusive footing of negligence. The Civil Code's alternative of all-inclusive strict liability has much to be said for it as well. Apart from its simplicity of application, the rule might represent sound policy to remove the risks created by keeping animals from the realm of everyday give-and-take.

IV

The idea that "things" can have a quality attributed to them that can result in liability without reference to human conduct is most closely approached in the law of torts by a number of cases branding certain things as "dangerous *per se*" or "inherently dangerous". The idea is perhaps best summed up by Lord Dunedin in *Dominion Natural Gas Co. Ltd.* v. *Collins*[43] where he said:

> It has, however, again and again been held that in the case of articles dangerous in themselves, such as loaded fire-arms, poisons, explosives, and other things *ejusdem generis*, there is a peculiar duty to take precautions imposed upon those who send forth or install such articles when it is necessarily the case that other parties will come within their proximity.

It is submitted, however, that this theory is at best one of two things: an application of the "risk-duty" concept of negligence, or an application of the "unusual activities" theory of strict liability. At worst it is a generalization that injects confusion rather than logic into the law.

[41] Devlin J. in *Behrens* v. *Bertram Mills Circus Ltd.*, *ibid.*
[42] Williams, Liability for Animals (1939), p. 364.
[43] [1909] A.C. 640, at p. 646.

To take last things first, the confusion arises in determining when something is *ejusdem generis* with the nominate "dangerous things" in Lord Dunedin's statement, and hence in determining the real basis for liability. Gas meters,[44] electric space heaters,[45] noxious hair dyes,[46] and earthenware jars containing sulphuric acid[47] have been held to be dangerous *per se*. A naked sword and a hatchet,[48] a savage animal and a performance on a flying trapeze[49] have been used *obiter* as judicial examples of the category. On the other hand, an airgun,[50] a slingshot or catapult,[51] and a steam boiler without a safety valve[52] have been denied the honour, as indeed has the automobile.[53] It is impossible to say where the dividing line falls and some judges have said so.[54]

It is tautological to say that "things" are dangerous because they create risks of harm. It follows that they cannot be classified as dangerous or not, unless one envisions contexts in which they do or do not create risks of harm. This is admitted by judges who have performed the classifying operation, including Lord Dunedin who said that certain things were dangerous "when it is necessarily the case that other parties will come within their proximity".[55] One of two ideas seems to be implicit in all the cases on "dangerous things": a belief on the part of the court that the risk was so obvious that no one could possibly fail to foresee it; or that the activity being engaged in was in itself unreasonable or unusual and should result in liability no matter how much care be taken. It is arguable that these ideas account for the use of the term. If this be true, then the term "dangerous thing" performs no service except to confuse. The "risk-duty" and "unusual activities" theories suffice to solve the problems.

---

[44] *Ibid.*
[45] *Robinson* v. *Technico Ltd.*, (1953) unreported, see (1954), 70 L.Q. Rev. 170.
[46] *Watson* v. *Buckley*, [1940] 1 All E.R. 174 (K.B.).
[47] *Adelaide Chemical Co. Ltd.* v. *Carlyle* (1940), 64 C.L.R. 514 (Australia H.C.).
[48] *Glasgow Corporation* v. *Muir*, *supra*, footnote 6.
[49] *Wray* v. *Essex County Council*, [1936] 3 All E.R. 97 (C.A.).
[50] *Donaldson* v. *McNiven*, [1952] 2 All E.R. 691 (C.A.).
[51] *Smith* v. *Leurs* (1945), 70 C.L.R. 256 (Australia H.C.).
[52] *Ball* v. *London County Council*, [1949] 2 K.B. 159, [1949] 1 All E.R. 1056 (C.A.).
[53] Except, oddly enough, when it is in the garage and catches fire. See *Musgrove* v. *Pandelis*, [1919] 2 K.B. 43 (Eng. C.A.).
[54] *Hodge & Sons* v. *Anglo-American Oil Co.* (1922), 12 Lloyds L. Reo. 183, *per* Scrutton L.J., at p. 187 (Eng. C.A.).
[55] *Supra*, footnote 43.

V

As I have indicated, the aspect of the theory of liability for damage caused by things which seems most difficult for the common-law lawyer to understand is that which arises out of article 1054 of the Quebec Civil Code. While article 1055 imposes liability for things, its terms can be analyzed with reference to human activity: the keeping of animals and the ownership of buildings. But article 1054, as interpreted by the Quebec courts, suggests that liability can be based on autonomous acts of things, as opposed to the fault-bearing acts of persons.

In the example of Professor Crépeau, the distinction is drawn between a car that follows the direction of a careless driver and a car that refuses to follow the direction of a careful driver, perhaps because of a blow-out. To the common-law lawyer this latter situation would merely suggest that while the driver may not have driven negligently, he or his garageman may have been negligent in the maintenance of the vehicle; or perhaps the manufacturer of the tire was negligent; or again, perhaps the accident was inevitable in the sense that no one was to blame. At all events, it would not suggest that the vehicle had acted autonomously.

On the other hand, the root of a tree growing out of the ground might seem to present a perfect example of an "autonomous act", and yet apparently one would err in so assuming. The question then is, how is the distinction made? Perhaps a more meaningful question is, why is the distinction made? For one thing, it would seem to serve some of the purposes of the common-law doctrine of *res ipsa loquitur*.

This doctrine was born in an exchange between counsel and bench in a case involving a barrel of flour that fell out a window and hit plaintiff on the head.[56] Counsel argued on behalf of the defendant that, as there was no evidence as to how the barrel came to fall out of the window, there was no evidence of negligence. Said Pollock C.B.: "There are certain cases of which it may be said *res ipsa loquitur* and this seems one of them." The statement seems an innocent enough description of a process of inference as to what was the most likely explantion in the circumstances of the case. Since the building was in the defendant's control, it seemed more likely than not that the barrel fell as the result of the negligence of defendant or one of his servants.

Up to this point, if one could call *res ipsa loquitur* a doctrine, it might be said to parallel the civil law "presumption of fact" as

[56] *Byrne* v. *Boadle* (1863), 2 H. & C. 722, 159 E.R. 299 (Ex.).

Professor Crépeau has pointed out. Had the judge said merely "the thing speaks for itself", this might have been as far as the doctrine could have gone.

Two years after this case, however, Erle C. J. supplied the contents of what was to become the doctrine or at least *a* doctrine, when he said:

> There must be reasonable evidence of negligence; but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.[57]

He, too, may have been innocent of any motive other than the description of his drawing of inferences from known facts. However, once a judge expresses his reasoning process in words, he is often taken to have laid down a rule of law by those who follow. Eventually it became settled that where the conditions mentioned by Erle C.J. were met, an inference of negligence had to be drawn in the absence of any explantion by defendant, but where the conditions were not exactly met then an inference of negligence could not be drawn.[58] Much confusion developed as to the burden imposed by *res ipsa loquitur* on the defendant. As a matter of logic, since the burden of proof is normally on plaintiff, one would think the defendant would have to produce evidence which would render negligence no more likely than the opposite inference. To use the time honoured terminology, he should have to bring the scales back into balance. Some cases have so held.[59] Others, however, have said he must disprove negligence; actually convince the jury that negligence was the less likely explanation for the accident.[60] What is the answer? What is the burden? It now seems clear that this depends entirely on the type of case. Some courts quite frankly treat *res ipsa loquitur* as a device for reversing the burden of proof in cases where plaintiff cannot know what happened to him, as for example, when he is under anaesthetic on an operating table. As such, the fact that the defendant has peculiar

[57] *Scott* v. *London & St. Katherine Docks Co.* (1865), 3 H. & C. 596, 159 E.R. 665 (Ex. Ch.).

[58] See, for instance, *Wing* v. *London General Omnibus Co.*, [1909] 2 K.B. 652, *per* Fletcher Moulton L.J., at pp. 663-64; *Bloom* v. *Creed and Consumers Gas Co.*, [1937] 3 D.L.R. 709 (C.A.).

[59] See *Malone* v. *T.C.A.*, [1942] O.R. 453, [1942] 3 D.L.R. 369 (C.A.); *United Motors Service Inc.* v. *Hutson*, [1937] S.C.R. 294, [1937] 1 D.L.R. 737, *per* Duff C.J.C.

[60] *Zeppa* v. *Coca Cola Ltd.*, [1955] O.R. 855, [1955] 5 D.L.R. 187 (C.A.); *Barkway* v. *South Wales Transport Ltd.*, [1949] 1 K.B. 54, [1948] 2 All E.R. 460, *per* Asquith L.J.

knowledge seems of more importance that than the accident be one that does not normally occur in the absence of negligence.[61] There also remain cases in which the doctrine is used merely to permit inferences of negligence to be drawn from circumstantial evidence.[62]

In some situations, the doctrine takes on the role of imposing virtual strict liability on manufacturers and others with a product to sell to the public. The doctrine apparently applies automatically to all cases of defective manufactured articles: bottled beverages containing bits of glass or chlorine; underwear containing skin irritants; and so on.[63]

The effect of its application is to require the manufacturer to show that the defect did not occur as the result of negligence in the manufacturing process.[64] This, it has been held, cannot be done merely by showing a safe system of manufacture.[65] The manufacturer's evidence must therefore be directed to the life history of the particular article that has caused harm. In almost every case the article's history is unavailable. Identical to its fellows, it remains anonymous. Hence mere proof of injury due to a defect in the article entitles the injured person to recovery, for the manufacturer is caught on the negligence hook and cannot wiggle off.

Carriers by air have come in for this sort of treatment as well. In *Malone* v. *T.C.A.*,[66] the Ontario Court of Appeal held *res ipsa loquitur* to apply to airplane crashes because "with experienced and careful pilots and proper equipment, a passenger has the right to expect that he will be carried safely to his destination".

Courts in the United States have gone the next step, at least with respect to manufacturers, and imposed liability on the basis of implied warranty.[67] At least one Ontario judge has been prepared to take the same approach.[68] In Canada, however, we remain

---

[61] *Roe* v. *Ministry of Health*, [1954] 2 Q.B. 66, [1954] 2 All E.R. 131, especially *per* Denning L.J.; *Mahon* v. *Osborne*, [1939] 2 K.B. 14, [1939] 1 All E.R. 535, where it is interesting to contrast the views of the majority and minority in the Court of Appeal.

[62] See, for instance, *Leaman* v. *Rea*, [1954] 4 D.L.R. 423 (N.B. App. Div.) and comments thereon in *Wotta* v. *Haliburton Oil Well Cementing Co. Ltd.*, [1955] S.C.R. 377, [1955] 2 D.L.R. 785, *per* Taschereau and Locke J.J.

[63] *Zeppa* v. *Coca Cola Ltd.*, *supra*, footnote 60; *Varga* v. *John Labatt Ltd.*, [1956] O.R. 1007; *Grant* v. *Australian Knitting Mills, Ltd.*, [1936] A.C. 85 (J.C.P.C.).

[64] *Zeppa* v. *Coca Cola Ltd.*, *ibid.*

[65] *Grant* v. *Australian Knitting Mills, Ltd.*, *supra*, footnote 63.

[66] [1942] O.R. 453, [1942] 3 D.L.R. 369 (C.A.).

[67] *Escola* v. *Coca Cola Bottling Co.* (1944), 150 Pac. (2d) 436 (Cal. S. C.).

[68] See Riddell J.A. in *Shandloff* v. *City Dairy*, [1936] O.R. 597 and *Arendale* v. *Canada Bread Co. Ltd.*, [1941] 2 D.L.R. 41 (Ont. C.A.).

in the position of relying on *res ipsa loquitur* "as a straddle between 'fault' and 'strict liability'".[69]

Thus, the doctrine has developed two aspects that may parallel, at least roughly, the application of article 1054 of the Quebec Civil Code. In one aspect, it reverses the burden of proof, normally on the plaintiff in a negligence case, simply because he cannot possibly explain how he came to be injured but defendant can. In the other, it imposes a form of strict liability on certain profit-making activities, forcing the seller to stand behind his product.

One could see the former policy as a motive for the interpretation the Quebec courts have put on the first paragraph of article 1054 of the Civil Code. Where an injured party cannot readily single out the individual whose conduct is responsible for the injury, the injury could be attributed to the "thing" and the "gardien" made to explain the manner in which it came about. Perhaps the latter policy could operate through the first paragraph of article 1054 as well. If a defective manufactured article, or an airplane, could be said to "act autonomously" in causing harm, the reversed burden of proof would have the same effect in creating a sort of strict liability as has the doctrine of *res ipsa loquitur*. The question remains in the mind of the common-law lawyer, however, is it this kind of policy that guides the courts in making the distinction between the act of a person and the autonomous act of a thing? If the answer is "no", then the common-law lawyer is left wondering, not only how the distinction is made, but why. It is difficult to see any purpose in reversing a burden of proof indiscriminately. If such reversal is not indiscriminate, how does one make the decision to do it?

---

[69] Wright, The Law of Torts (1948), 26 Can. Bar Rev. 46, at p. 69.