COMMENTS
COMMENTAIRES

CARRIAGE BY AIR ACT, 1952—LIMITATION OF AIR CARRIER'S LIABILITY—WHETHER SERVANTS OF CARRIER ALSO PROTECTED.—

> It must be accepted as settled law that: "No statute operates to repeal or modify the existing law whether common or statutory or to take away any rights which existed before the statute was passed, unless the intention is clearly expressed or necessarily implied."[1]

The Warsaw Convention, made applicable to Canada by the Carriage by Air Act, 1952,[2] limits the liability of an air carrier for damage sustained in the event of the death or injury of a passenger during an international flight. The question whether this limitation extends by necessary implication to the servants of an air carrier was raised but not decided in the recent case of *Stratton* v. *Trans-Canada Airlines, et al.*[3] The plaintiff's husband was killed when the defendant's aircraft crashed on Mount Slesse in British Columbia killing all on board. The plaintiff brought an action under the Families Compensation Act[4] and the Administration Act[5] of British Columbia against Trans-Canada Airlines and the executors of the deceased pilots. Defendants argued that since the deceased was travelling on a contract of international carriage, the case was governed by the Carriage by Air Act and that, therefore, the liability of both Trans-Canada Airlines and the pilots was limited. Manson J., at first instance, held that the deceased was not travelling under a contract of international carriage when he was killed and that the Carriage by Air Act did not apply. The Court of Appeal unanimously upheld his decision on this aspect of the case. It was, therefore, unnecessary for either the Court of Appeal or Manson J. to consider whether the pilot's liability was limited by this Act. In fact, Sheppard J., in the Court of Appeal, said:

[1] Halsbury's Laws of England (1st ed., 1913), Vol. 27, p. 167 quoted in *Lamontagne* v. *Quebec Railway, Light, Heat and Power Co.* (1914), 22 D.L.R. 222, 50 S.C.R. 423, at p. 427, *per* Sir Charles Fitzpatrick C.J.

[2] R.S.C., 1952, c. 45. The Convention for the Unification of Certain Rules Relating to International Carriage by Air was signed at Warsaw on October 12th, 1929.

[3] (1961), 27 D.L.R. (2d) 670, 34 W.W.R. 183 (B.C.S.C.), aff'd in part (1962), 37 W.W.R. 577, (1962), 32 D.L.R. (2d) 736 (B.C.C.A.).

[4] R.S.B.C., 1948, c. 116.

[5] R.S.B.C., 1948, c. 6.

> As the Warsaw Convention does not apply, it is not necessary to consider whether the pilots would have been entitled to its benefits had it been applicable to the flight in question.

Manson J., on the other hand, made the following statement:

> There is nothing in the Act that even remotely suggests that the word "carrier" is to be interpreted as including employees of carriers.[6]

It is this terse *dictum* which has prompted the present comment. While the learned judge is probably correct, it is hoped to show by reference to conflicting opinions and decisions that the problem is not quite so clear and straightforward as his statement seems to indicate.

The problem is considered important for the reason that unless the carrier's servants are protected by the limitation provisions in the Warsaw Convention, their purpose will be clearly defeated. In his letter to the President of the United States sending the Convention to him, the former Secretary of State Hull wrote:

> It is believed that the principle of limitation of liability will not only be beneficial to passengers and shippers as affording a more definite basis of recovery and as tending to lessen litigation but that it will prove to be an aid in the development of international air transportation as such limitation will afford a more definite and equitable basis on which to obtain insurance rates with the probable result that there would eventually be a reduction of operating expenses for the carrier and advantages to travellers and shippers in the way of reduced transportation charges.[7]

Because of the possibility that the carrier's servants will be sued for an unlimited amount, an occurrence that will have grave financial consequences for them, since they are invariably in a far weaker position than the carrier economically, their representatives and, in some instances, governments have urged or required the carrier to sign hold harmless agreements[8] and to insure the liability of the servants.[9] Even if they are not bound by hold harm-

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[6] *Supra*, footnote 3, at p. 674 (D.L.R.).

[7] Senate Doc., exec. G, 73rd Cong., 2nd sess., p. 3, quoted in *Ross* v. *Pan-American Airways, Inc.* (1949), 85 N.E. 2d 880, at p. 885, [1949] U.S.Av.R. 168, at p. 177, *per* Desmond J. (N.Y. Ct. App.). For an extensive discussion of the rationales of limitation of liability, see Drion, Limitation of Liabilities in International Air Law (1954), nos 14-42, pp. 12-44. *Cf.* Report on the Warsaw Convention as amended by the Hague Protocol (1959), 26 J. Air L. & Com. 255, prepared by the Association of the Bar of the City of New York. See also, Reyntens J. in the Belgian case of *Pauwels* v. *Sabena*, [1950] U.S.Av.R. 367, at p. 380, 4 Rev. fr. de dr. aérien 411, at p. 425, Pas. 1950, III, 96.

[8] *Cf.* attitude of the International Federation of Airline Pilots Associations, I.C.A.O. Doc. A4-WP/154.

[9] See, *e.g.*, Swiss Federal Air Navigation Act, 1948, art. 70(2) which provides that the carrier must cover by insurance the liability of persons charged with any service on board it for damage, caused in the course

less agreements or statutory provisions, many carriers feel morally obliged to indemnify their servants and, in any event, the possibility of unlimited claims against anyone engaged in aviation, must eventually affect aviation costs in general.[10]

The result is that the carrier himself is burdened with the unlimited claims against his servants. He will have to insure against this risk of unlimited liability and the costs of operation of aircraft will be affected. Thus, litigation will tend to increase since the majority of complaints concerns damage caused by servants,[11] insurance rates will go up and this will most likely result in an increase, not a reduction in transportation charges, an effect completely contrary to that anticipated by Secretary of State Hull and other protagonists of limitation of liability in favour of the carrier. It is, therefore, not surprising that attempts have been made to find a legal basis for the proposition that the servants of a carrier are protected by the limitation provisions in the Warsaw Convention.[12]

The French jurist, Lemoine, finds it in the principle of identification of the carrier with his servants.[13] He argues in this way. Throughout the Convention, the acts of the servants and of the carrier are assimilated. They have the same effect, liability is limited or excluded. There is, therefore, a distinction between the Warsaw Convention and the French law of May 31st, 1924 which does not allow the carrier to exclude liability for his own faults but does allow him to exclude his vicarious liability in certain circumstances. If there is no distinction drawn between his acts and those of his servants as there is in the French Act, how can it be argued that, in his case, liability is limited, but in the case of his servants, liability is unlimited? He goes on to emphasize the

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of their employment, to third parties. See also, resolution of I.F.A.L.P.A., 5th conf., Brussels, 1950.

[10] *Cf.* Drion, *op. cit.*, footnote 7, no. 134, p. 154; Selvig, Unit Limitation of Carrier's Liability (1960), § 6. 23, p. 145.

[11] *Cf.* as to carriage by sea, remarks of Owen J. in the Australian case, *Gilbert Stokes & Kerr Prop. Ltd.* v. *Dalgety & Co. Ltd.* (1948), 81 Ll.L.R. 337, at p. 338 (Sup. Ct. of N.S.W.).

[12] For an excellent discussion of the social and economic implications of the problem, see The Protection of Transport Workers Against Civil Law Claims Arising out of their Employment (1959), 26 J. Air L. & Com. 90, reprinted from the International Labour Review, vol. LXXVIII, no. 2, a publication of the International Labour Organization. See also, Minutes of the ninth session of the I.C.A.O. Legal Committee at Rio de Janeiro, 1953, Doc. 7450-LC/136, p. 143 *et seq. Cf.* as to carriage by sea, the dissenting judgment of Lord Denning in *Scruttons, Ltd.* v. *Midland Silicones, Ltd.*, [1962] 1 All E.R. 1, at p. 22 (H.L.).

[13] Lemoine, Traité de droit aérien (1947), nos 840-841, p. 558. To the same effect, Litvine, Précis élémentaire de droit aérien (1953), nos 234-235, p. 158.

point by reference to article 20(2) which declares the carrier not liable where damage to goods and baggage is concerned, if he proves that the damage was occasioned by negligent pilotage. This applies even if the carrier himself is the pilot. Can it really be maintained that faulty pilotage does not engage the liability of the carrier if he is the pilot at fault, but does engage the liability of the servant if the latter is pilot?

With respect, there seems to be a *non sequitur* involved here which may be demonstrated by putting his argument in the form of a syllogism. Major premiss: the acts of the carrier and the acts of his servants have the same effect. Minor premiss: the effect in the case of the carrier's acts is limitation of the carrier's liability. Therefore, the effect in the case of his servant's acts is limitation of the servant's liability. This is inaccurate, since the effect of the servant's acts, as stated in the conclusion, is not the same as the effect of the carrier's acts as stated in the minor premiss. Since the major premiss requires the same effect in both cases, the conclusion should be: therefore, the effect in the case of his servant's acts is limitation of the carrier's liability and no one would quarrel with that!

A more convincing argument suggested by Lemoine and fully developed by Drion[14] lays stress on article 24 which reads:

> . . . any action for damages, however founded can only be brought subject to the conditions and limits set out in this Convention.

Drion believes that a sound interpretation based on the spirit of article 24, which was to prevent the provisions of the Convention from being avoided by claiming outside the Convention, leads to the conclusion that any action brought against the carrier's enterprise or against the members of it, is to be brought subject to the limits of article 22. The difficulties with this argument are twofold. First, articles 17, 18 and 19 to which article 24 expressly refers, only state that the "carrier is liable"[15] and secondly, it would appear that article 24 only deals with the nature of the action and not with the parties to it. Two other jurists have expressed the

[14] Drion, *op. cit.*, footnote 7, nos 133-140, p. 152 *et seq.* See also, Shawcross and Beaumont on Air Law (2nd ed., 1951), s. 362, note a, p. 343 and Jara, Spanish delegate at the Hague Conference on Private Air Law, 1955, I.C.A.O. Doc. 7686-LC/140, p. 219.

[15] See, however, Drion's remark *op. cit., ibid.*, no. 64, p. 71, that the logic of the convention should not be overestimated. In illustration, he refers to article 22(3) which limits the carrier's liability for damage caused to handbaggage. This limit would have no significance if article 24 is construed to allow claims beyond the limits with respect to liability not mentioned in articles 17, 18 and 19, since liability for damage caused to handbaggage is not referred to in these articles.

opinion that the limitation of liability in favour of the carrier is extended to his servants. They give no additional reasons.[16]

The majority of authors hold a contrary opinion.[17] It is said that no attempt was made at the Warsaw Conference to cover the liability of servants for their individual tortious acts.[18] They can be sued separately and are not protected by the limitation of liability provided in the Convention.[19] The main arguments are as follows. There is nothing in the history or preamble of the Warsaw Convention to indicate that the rules were also intended to apply to the carrier's servants. This observation is fortified by the fact that articles 17, 18, 19 and 22 only speak of the carrier, whereas the carrier's servants are mentioned in articles 20 and 25. For example, article 25(1) deals with the effect of the carrier's wilful misconduct on his liability. Article 25(2) deals with the effect of the wilful misconduct of servants and agents on the carrier's liability. If the term "carrier" was intended to include servants and agents, why was article 25(2) thought to be necessary? Its existence contradicts the assertion that servants and agents are covered by the word "carrier" elsewhere in the Convention.[20]

It is now necessary to turn to a discussion of the few judicial decisions on the subject or analogous to it. It has been said that "the jurisprudence of Canada . . . is against those who contend that the provisions of the Carriage by Air Act apply to the servants and agents of an air carrier".[21] Three cases are cited: *Vancouver* v. *Rhodes*,[22] *Litwyn* v. *Vincent*[23] and the *Stratton* case.

In *Vancouver* v. *Rhodes*, the master of a ship was held liable when his ship struck and damaged a bridge. He argued that the

[16] Gay de Montella, Principios de Derecho Aeronautico (1950), p. 560; Ambrosini, Italian delegate at the Hague Conference, *supra*, footnote 14, p. 220.

[17] Maschino, La condition juridique du personnel aérien (1930), p. 125; Koffka-Bodenstein-Koffka, Luftverkehrsgesetz und Warschauer Abkommen (1937), p. 269; Riese, Luftrecht (1949), p. 440; Bucher, Le statut juridique du personnel navigant de l'aéronautique civile (1949), p. 36.

[18] Calkins, Grand Canyon, Warsaw and the Hague Protocol (1956), 23 J. Air L. & Com. 253, at p. 267 citing Henry de Vos, C.I.T.E.J.A. draft text, Minutes of the Warsaw Conference, I.C.A.O. Doc. 7838, p. 160.

[19] See Beaumont, Need for Revision and Amplification of the Warsaw Convention (1949), 16 J. Air L. & Com. 395, at p. 401 and authors cited in footnote 17, *supra*.

[20] Kamminga, The Aircraft Commander in Commercial Air Transportation (1953), p. 90. For an uncommitted discussion of these opinions, see Beaubois, Le statut juridique du commandant d'aéronef (1955), 9 Rev. fr. de dr. aérien 221, at p. 252 *et seq.*

[21] Rosevear, Federal Acts relating to Fatal Accidents in Canada, Papers Presented at the Annual Meeting of the Can. Bar Assoc., Winnipeg, (1961), p. 182.

[22] [1955] 1 D.L.R. 139, aff'd [1955] 3 D.L.R. 550 (B.C.C.A.).

[23] [1945] 3 D.L.R. 104 (Man. C.A.).

limitation provisions in the Canada Shipping Act[24] applied to him as the servant of the shipowner. Clyne J., at first instance, rejected this contention and said:

> . . . the limitation legislation . . . was designed to limit the owner's vicarious liability arising from the wrongdoing of the master and was never intended to protect the actual wrongdoer.[25]

This reasoning is not applicable to the Carriage by Air Act, since the carrier's liability is limited and sometimes excluded even if he is the actual wrongdoer and the limitation provisions of the Act are not confined to his vicarious liability.[26]

In *Litwyn* v. *Vincent*, it was held by the Manitoba Court of Appeal that a person injured by an employee within the scope of the Workmen's Compensation Act,[27] although deprived of his action against the employer by section 5 of the Act, is not, on that account, deprived of his cause of action against the negligent employee.[28] This case may be distinguished, since the Workmen's Compensation Acts define the term "employer" whereas the Carriage by Air Act contains no definition of the term "carrier". It does provide an analogy, however, if only because the court stressed the well-established principle of statutory interpretation cited at the beginning of this comment. It is thought that this principle will prove to be the chief stumbling block in the way of servants when attempting to rely on the limitation provisions in the Carriage by Air Act.

In an English maritime case, *Adler* v. *Dickson*,[29] Denning L.J., as he then was, referred to the British Carriage by Air Act, 1932[30] and stated:

> The provisions under that Act contain certain exemptions and limitations in favour of the "carrier". The pilot of the aircraft is not expressly given the benefit of them but Parliament must have intended that he should have the same protection as the carrier.[31]

This is only an *obiter* dictum and is of doubtful value, since the learned judge used it in support of his views on the privity of contract doctrine. These views have since been rejected by the English Court of Appeal[32] and very recently by the House of

[24] R.S.C., 1952, c. 29, s. 657. [25] *Supra*, footnote 22, at p. 140.

[26] The Act to amend the Canada Shipping Act, S.C., 1961, c. 32 amends s. 659 of the Canada Shipping Act to include servants and agents among those whose liability is limited by s. 657.

[27] R.S M., 1940, c. 239.

[28] Subsequently, all employees of employers covered by the Act were included in the prohibition: S.M., 1945 (1st Sess.), c. 70, s. 3.

[29] [1955] 1 Q.B. 158. [30] 22 & 23 Geo. 5, c. 36.

[31] *Supra*, footnote 29, at p. 183.

[32] *Green* v. *Russell*, [1959] 2 Q.B. 226.

Lords itself in *Scruttons, Ltd.* v. *Midland Silicones, Ltd.*[33] where the court held, *inter alia*, that a stevedore's liability was not limited by article 4(5) of the United States Carriage of Goods by Sea Act,[34] since stevedores do not come within the term "carrier" as used in that Act.[35]

There are several reported decisions in the United States that have a close bearing on the problem. In *Wanderer* v. *Sabena* and *Pan-American Airways, Inc.*,[36] the plaintiff was injured at Gander while on a flight from Brussels to New York. More than two years after the accident, an amended complaint was served on Pan-American Airways naming the airline an additional defendant in the action. Pan-American Airways moved to dismiss the complaint against itself on the ground that the cause of action did not accrue within the time for commencement of suit as provided in article 29 of the Warsaw Convention. The plaintiff contended that the two year time limit was inapplicable as, *inter alia*, the defendant was not the carrier under the contract of carriage. The court held that the Warsaw Convention applies not only to the carrier but to the agencies employed to perform the carriage and dismissed the action. This case has been severely criticized but mainly on the ground that, in the particular circumstances, Pan-American Airways should not have been considered as the agent of Sabena.[37]

The case was cited with approval in *Chutter* v. *K.L.M. and Allied Aviation Service Corporation*,[38] where, more than two years after the date of the accident, the plaintiff brought an action against the two defendants for injuries sustained when she stepped out of

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[33] *Supra*, footnote 12, at p. 7, *per* Viscount Simonds.

[34] 46 U.S.C. 1300-1310. The Act gives effect to the Convention for the Unification of Certain Rules Relating to Bills of Lading signed at Brussels on August 25th, 1924.

[35] *Cf.* the decision of the High Court of Australia in *Wilson* v. *Darling Island Stevedoring Co.* (1955), 95 C.L.R. 43, [1956] 1 Ll. L.R. 346. Although only concerned with the scope of a negligence clause in a bill of lading, the court, by a majority of three to two, expressly rejected the reasoning in *Gilbert Stokes & Kerr Prop.* v. *Dalgety & Co. Ltd.*, *supra*, footnote 11, where article 4(5) of the Australian Carriage of Goods by Sea Act was extended in favour of stevedores. See also *Krawill Machinery Corp.* v. *Herd* (1959), 359 U.S. 297, 3 L. Ed. 2d 820, [1959] 1 Ll. L.R. 305, discussed *infra*.

[36] [1949] U.S.Av.R. 25 (N.Y. Sup.).

[37] See Shawcross and Beaumont, *op. cit.*, footnote 14; Lacombe, (1949), 12 Rev. gen. de l'air 821; Abraham, (1953), 2 Zeitschrift für Luftrecht 90; Le Goff, La jurisprudence des Etats-Unis sur l'application de la Convention de Varsovie (1957), 20 Rev. gen. de l'air 352, at p. 354. But see Calkins, *op. cit.*, footnote 18, p. 267, note 7, where he criticizes the *Wanderer* and *Chutter* decisions on the ground that they require an interpretation of the Convention which was not intended by its framers.

[38] (1955), 132 F. Supp. 611, [1955] U.S.&C.Av.R. 250 (D.C. N.Y.).

an aircraft into thin air. The ramp had been removed by the second defendants in preparation for the aircraft's take-off. The court held that the flight was governed by the Warsaw Convention whose conditions and limitations inured to the benefit of the second defendants who were acting as agents for K.L.M. at the time of the accident. Thus, suit was barred. In support of his views, the judge cited two maritime cases which had held that the limitation provisions in article 4(5) of the United States Carriage of Goods by Sea Act, 1936, applied to stevedores independently contracted for by the carrier.[39]

> . . . the stevedore is engaged by the carrier to perform a part of the contract of carriage and it is impractical to distinguish the carrier from the community of persons whose joint activity is the carrier's activity.[40]

He thought the analogy of the Carriage of Goods by Sea Act quite persuasive "because C.O.G.S.A. merely refers to the liability of the carrier while the Warsaw Convention in article 24 refers to an action for damages . . . 'however founded' ".[41]

The authority of the *Wanderer* and *Chutter* cases has since been considerably weakened by the decision of the United States Supreme Court in *Krawill Machinery Corp.* v. *Herd*,[42] where it was held in part that the limitation provisions in the Carriage of Goods by Sea Act do not extend to stevedores or agents. The court expressly overruled *Collins* v. *Panama R. Co.*,[43] one of the decisions relied upon in the *Chutter* case, and said:

> We can only conclude that if Congress had intended to make such an inroad on the rights of claimants (against negligent agents) it would have said so in unambiguous terms, and in the absence of a clear Congressional policy to that end, we cannot go so far.[44]

In *International Milling Co.* v. *Perseus*,[45] the District Court of Michigan held that the limitation provisions of the Carriage of Goods by Sea Act do not apply to servants of the shipowner either. It is difficult to see, therefore, how the Supreme Court could come to a different conclusion in the case of the Warsaw Convention which most certainly does not limit the liability of servants and

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[39] *Collins* v. *Panama R. Co.* (1952), 197 F. 2d 893 (C.A. 5th); *U.S.* v. *South Star* (1954), 210 F. 2d 44 (C.A. 2nd).

[40] *Supra*, footnote 38, at p. 613 (F. Supp.).

[41] *Ibid.* For comments approving the decision, see de Juglart (1955), 18 Rev. gen. de l'air 429, at p. 430; Le Goff, La jurisprudence des Etats-Unis sur l'application de la Convention de Varsovie (1956) 19 Rev. gen. de l'air 336, at p. 346.

[42] *Supra*, footnote 35.

[43] *Supra*, footnote 39.

[44] *Ibid.*, at p. 308 (L1. L.R.) citing *Brady* v. *Roosevelt S.S. Co.* (1943), 317 U.S. 575, at pp. 581, 584, 87 L. Ed. 471.

[45] [1958] 2 L1. L.R. 272 (D.C. Mich.).

agents in unambiguous terms. In fact, the District Court of New Jersey in *Pierre* v. *Eastern Airlines, Inc.* and *Foxworth*,[46] a personal injury case, expressly held that the limitation of liability provisions of the Convention do not extend to nor protect the servants of the carrier. No reasons were given.[47]

There is one decision in France where an air carrier was held to be partly exonerated from liability, whereas his servant, a pilot, was held liable without any limit.[48] The carrier relied on article 42 of the French law of May 31st, 1924 which allowed carriers to exclude their liability, in certain circumstances, for faults committed by persons employed on board aircraft. The law added, however, that all clauses purporting to exclude the carrier's personal liability are void. There was no doubt, therefore, that the pilot who was

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[46] (1957), 152 F. Supp. 486, [1957] U.S.&C.Av.R. 431 (D.C. N.J.) *Cf. Scarf* v. *T.W.A.* and *Allied Aviation Service Corporation*, [1956] U.S. & C.Av.R. 28 (D.C. N.Y.), where the second defendants, agents of T.W.A. were not allowed the benefits of the convention which applied in the case of T.W.A. The case is distinguishable, however, on the ground that it was not alleged that T.W.A. were liable for the negligence of the Service Corporation. "The tort of the Service Corporation was not the tort of the air carrier." Therefore, the Warsaw Convention did not apply to them. See Gazdik (1956), 23 J. Air L. & Com. 232.

[47] In a note on Transporting Goods by Air (1960), 69 Yale L.J. 993, at p. 1006, the air law cases mentioned are discussed and it is said that the *Chutter* result seems the correct one in the context of carriage of goods, since the tariff on file with the Civil Aeronautics Board extends the carrier's defences to its servants and agents. *Pierre* and *Scarf* are considered inapposite, as they dealt with personal injuries to which the tariff system has not applied since 1954. See Fed. Reg. 509 (1954), 14 C.F.R. 221. 38 (h) (1956). It is only necessary to point out here that *Chutter*, also a personal injury case, was not decided on the ground that a tariff expressly extended the carrier's defences to his servants and agents, a different point entirely. It was founded on the ground that the Warsaw Convention, by necessary implication, extended the conditions and limitations therein to servants and agents. See now *Coultas & Polak* v. *K.L.M. Airlines et al.*, [1961] U.S.&C.Av.R. 199 (D.C. N.Y.), where the judge in his charge to the jury stated that any liability on the part of Sabena, an agent of K.L.M., was governed by the Warsaw Convention and was limited to $8,300.00 unless the jury found them guilty of wilful misconduct. He gave no indication as to why he regarded this as the law. See also, Evaluation of Aviation Cases for Settlement or Trial (1961), 28 Tenn. L. Rev. 230, at p. 231 where a District Court judge is reported to have said in *Tuller* v. *K.L.M.* (1959), 172 F. Supp. 709, aff'd on another point *sub nom. K.L.M. et al.* v. *Tuller* (1961), 292 F.2d 775, 7 Avi. 17,544, [1961] U.S. & C. Av.R. 181, cert. denied (1961), 368 U.S. 921: "To permit the principal to have the advantage, if such it be, of the Convention, and to deny the same to the agent . . . does violence not only to logic but to common sense." An examination of the report cited (172 F. Supp.) reveals no such remark. However, it is clear from the appeal that Sabena, K.L.M.'s agent at the time of the accident, is regarded as subject to the provisions of the Convention. The Circuit Court of Appeals upheld the jury's findings of wilful misconduct on the part of both K.L.M. and Sabena.

[48] *Brutschy et Soc. Caudrion-Renault c Mourier, Mathon et Nigay*, Cour de cassation (Ch. Crim.), 12 Jan. 1938 (1938), 7 Rev. gen. de dr. aérien 91.

personally responsible for the accident, could not rely on the exclusion clause in favour of the carrier and was subject to unlimited liability as a consequence.[49] There are a few pertinent decisions in French maritime law concerning the applicability to "acconiers"[50] of the limitation provisions contained in the law of April 2nd, 1936 and in the Hague rules. The courts have uniformly held that the provisions do not apply to them, mainly because their services precede the maritime transport and hence fall outside the Act. At the same time, it has been emphasized that the privileges of the Hague rules are granted exclusively to the "transporteur maritime" and this would indicate that in France, any liability on the part of the servants or agents is not subject to limitation according to the Hague rules, article 4(5).

> . . . que la loi de 1936, comme la convention de Bruxelles ne concernent que les rapports entre les transporteurs maritimes et les chargeurs ou réceptionnaires. . . .[51]

From the foregoing discussion, it is clear that the weight of judicial authority and juristic opinion is in favour of Manson J.'s dictum in the *Stratton* case. Although there is only one reported case, the American one of *Pierre* v. *Eastern Airlines*, which expressly holds that servants are not protected by the limitation provisions of the Warsaw Convention, the most recent decisions construing article 4(5) of the Hague rules, indicate that this case will be preferred in the future. Judicial dicta which have urged a reasonable construction of the Warsaw Convention so "as to accomplish its obvious purposes"[52] will no doubt be ignored in favour of the view that statutes should be strictly construed so as not to alter the existing law further than their words import.[53]

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[49] This is the same situation as that in *Vancouver* v. *Rhodes, supra,* footnote 22.

[50] Roughly translated "acconiers" means "stevedores".

[51] *Cie Francaise de Consignation, etc. c Sté Marseille, etc.*, Trib. de Comm. de Marseille, 1 Feb. 1957, (1958), 10 D.M.F. 100; See also *Chambre de Commerce de Marseille, etc. c Cie Générale Transatlantique*, Cour d'appel d'Aix, 18 Mars 1958, (1959), 11 D.M.F. 587, at p. 588. *Cf.* Fraikin, Traité de la responsabilité du transporteur maritime (1957), p. 96: "Ces textes sont de droit étroit et ne peuvent être étendus à d'autres bénéficiaires que ceux qu'ils désignent expressment."

[52] For instance, *Ross* v. *Pan-American Airways, Inc., supra,* footnote 7; *American Smelting & Refining Co.* v. *Philippine Airlines,* [1954] U.S.&C. Av.R. 221, at p. 223 (N.Y. Sup.); *Grein* v. *Imperial Airways,* [1937] 1 K.B. 50, at p. 74. *Chutter* and *Wanderer, supra,* footnotes 36 and 38 may have been influenced by this consideration. *Collins* and *Gilbert, supra,* footnotes 35 and 39 were most certainly influenced by it when considering a maritime statute.

[53] *E.g., Litwyn* and *Krawill, supra,* footnotes 23 and 42. See also *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.* (1907), 204 U.S. 426, at p. 437, 51 L. Ed. 553. But see *Coultas & Polak* v. *K.L.M. Airlines et al* and *K.L.M. et al.* v. *Tuller, supra,* footnote 47.

Moreover, this view can derive support from the Protocol to amend the Warsaw Convention signed at the Hague on September 28th, 1955 which contains an article expressly allowing the servants and agents to avail themselves of the limitation of liability of the carrier.[54] Although the argument might be advanced that this article was inserted *ex abundante cautela*, it is a very weak one, since the majority of delegates were clearly under the impression that they were filling a gap in the Warsaw Convention.[55] A citation of this Protocol alone, therefore, may suffice to persuade a court that the Convention does not protect the carrier's servants and agents.[56]

In conclusion, it may be said, perhaps irrelevantly and certainly irreverently, that when considering the interpretation of a statute or of a convention, the words of Humpty Dumpty are always present in the mind!

> "When I use a word", Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean, neither more nor less". "The question is", said Alice, "whether you can make words mean so many different things". "The question is", said Humpty Dumpty, "which is to be master, that's all".[57]

If such an important word as "carrier" is to be left undefined, no one should complain if its meaning gives rise to conflicting opinions according to which judge in which State is the master.

GEOFFREY N. PRATT*

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[54] Article XIV. The Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person other than the Contracting Carrier, signed at Guadalajara on September 18th, 1961, contains a similar provision: article V. So do many of the most recent maritime conventions. See, *e.g.*, International Convention Relating to the Limitation of Liability of Owners of Sea-Going Ships signed at Brussels on October 10th, 1954; International Convention for the Unification of Certain Rules Relating to the Carriage of Passengers by Sea signed at Brussels on March 29th, 1961, art. 12. See (1961), 13 D.M.F. 387.

[55] See, *e.g.*, Minutes of the 9th session of ICAO Legal Committee at Rio de Janeiro, 1953, I.C.A.O. Doc. 7450-LC/136, p. 143 *et seq;* Minutes of the International Conference on Private Air Law, The Hague, 1955, I.C.A.O. Doc. 7686-LC/140, p. 214 *et seq.*

[56] The protocol will come into force when thirty signatory states have deposited instruments of ratification (art. XXII). Up to Jan., 1963 twenty-seven states had ratified the protocol. Canada and the United States have not yet done so.

[57] L. Carroll, Through the Looking Glass, quoted by Lord Atkin in *Liveridge* v. *Anderson*, [1942] A.C. 206, at p. 245.

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INCOME TAX—CAPITAL GAIN—ISOLATED TRANSACTION.—One of the most significant income tax cases of recent years is the decision of the Supreme Court of Canada in *Irrigation Industries Limited* v. *M.N.R.*[1] The decision represents a return to fundamental principles and reverses a long and virtually uninterrupted trend of judicial decisions in Canada toward narrowing the scope of capital gain in the course of widening the concept of adventure or concern in the nature of trade.[2] In particular, the decision has disinterred the long-buried doctrine of isolated transaction according to which the singleness or isolation of a transaction is of itself a consideration tending toward a conclusion that a transaction gave rise to a capital and not an income gain.

The facts of the case disclose a set of circumstances that would have discouraged all but the most determined taxpayer, when measured against the background of existing Canadian decisions. Indeed, the decision of the Supreme Court of Canada reverses the Exchequer Court, which found taxability for the familiar reasons involved in the conclusion that the taxpayer had engaged in a concern in the nature of trade.[3] Irrigation Industries Limited had been formed in 1947 to erect a mill to dehydrate alfalfa, but that purpose had never been carried out. The company had been largely inactive until early 1953, when it purchased 4,000 treasury shares of Brunswick Mining and Smelting Corporation Limited for $40,000.00. The funds for the purchase were borrowed from the company's bank, and the shares purchased were at the time "speculative" in the ordinary usage of the term, the Brunswick company being then engaged in the "outline and test" stage of development of its mining claims in New Brunswick. The prospect of dividend return on the shares was found by the learned trial judge to be remote, if it existed at all.

The taxpayer then sold more than half of the Brunswick shares five weeks later, and the balance four months later, realizing an overall net gain of $26,897.50. The reason given in evidence at the trial for the early sale was pressure from the taxpayer's bank for repayment of a loan and the subsequent sale of the balance of the shares was prompted by the fact that their market price had

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[1] [1962] C.T.C. 215.

[2] Section 139(1)(e) of the Income Tax Act, R.S.C., 1952, c. 148 as am. defines "business", the income from which is taxed by section 3(a), as including "an adventure or concern in the nature of trade". It is this definition that is invoked by the Minister in most tax appeals concerning questions of income or capital gain.

[3] [1960] C.T.C. 329.

risen to a point where they were "no longer attractive as an investment".[4]

The motivation for the purchase of the Brunswick shares was stated in evidence at the trial to be that "this was an excellent opportunity to invest money in a company which appeared to have an excellent chance for growth and development into a large mining operation".[5] Apart from the purchase of certain debentures in 1955, the taxpayer had no other dealings in securities, and the purchase and sale of shares of other companies was not among the objects for which the company was incorporated as recorded in its Memorandum of Association.

On these facts the taxpayer contended it had made a capital gain on the realization of an investment in Brunswick shares, and the Minister contended that the gain was taxable as income from an adventure or concern in the nature of trade. The Tax Appeal Board[6] and the Exchequer Court of Canada[7] agreed with the Minister, whereupon the taxpayer appealed to the Supreme Court of Canada.

The Exchequer Court decision adverse to the taxpayer followed the pattern of recent Canadian jurisprudence on the question of concern in the nature of trade and applied some of the now familiar tests that were set forth at length by the President of the Exchequer Court of Canada in *M.N.R.* v. *Taylor*.[8]

The inherently speculative nature of the subject-matter of the transaction, the short time of holding, and the fact that borrowed money and not the taxpayer's own capital was used to make the purchase led Cameron J. to find adventure or concern in the nature of trade. The learned trial judge held that those elements in the transaction outweighed the investment intention of the company as stated by its president in evidence, the fact that the transaction was outside the formal objects of the company, and that it was in fact the only instance of such a transaction in the company's history.

By a majority of three (Martland, Taschereau and Locke J.J.) to two (Cartwright and Judson J.J.) the Supreme Court of Canada reversed the Exchequer Court decision and found that the transaction in question had resulted in a capital gain to the taxpayer. The significance of the contrary view of two members of the Court may be lessened by reason of the hesitation with

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[4] *Ibid.*, at p. 332.
[5] *Supra*, footnote 1, at p. 225.
[6] (1960), 22 Tax A.B.C. 335.
[7] *Supra*, footnote 3.
[8] [1956] C.T.C. 189.

which Cartwright J., writing the judgment of himself and Judson J., says he reached his dissenting conclusion.

Martland J., writing for the majority, states a number of propositions that must now be read in partial modification of the guidelines established by earlier decisions of the Exchequer Court, and in particular those enunciated by the President of the Exchequer Court in *M.N.R.* v. *Taylor*,[9] which previously was the definitive statement of the principles applicable to questions of adventure or concern in the nature of trade.

It had been suggested in some earlier cases that the fact that a purchase and resale transaction was financed in whole or in part by borrowed funds rather than the employment of the taxpayer's own otherwise idle capital was a badge of trading rather than investing. Baldly stated, this proposition bespeaks a certain judicial naiveté concerning the nature of investment. In the field of real estate, for example, rare indeed is the long term "investor" who will purchase a revenue property for cash in full even if he has the funds available. He will normally purchase a fractional equity interest for cash and borrow on mortgage for the balance of the price, so that he can then spread his risk and make his investment more secure by using the balance of his own cash thus conserved to repeat the transaction with other properties. Clearly he is none the less an investor for prudently choosing not to place all his eggs in the one basket. Martland J. in a single sentence puts the point into perspective:

> With respect, I would not think that the question of whether securities are purchased with the purchaser's own funds, or with money borrowed by him, is a significant factor in determining whether their purchase and subsequent sale is or is not an investment.[10]

The inherently "speculative" nature of the Brunswick shares is then dealt with as shortly in the following sentence in the majority reasons for judgment:

> Similarly, the fact that there was no immediate likelihood of dividends being paid on the shares should not have much significance, for there are many corporate ventures, financed by the sale of shares to the public, in which immediate payment of dividends may not be anticipated, and yet the purchase of the treasury shares of a company embarking on a new enterprise is a well recognized method of making an investment.[11]

What will likely prove to be the most significant point in the judgment, however, is the treatment of the argument that since

[9] *Ibid.*
[10] *Supra*, footnote 1, at p. 218.
[11] *Ibid.*

the shares were purchased to be held not indefinitely but only until they could be disposed of at a profit, their purchase and rapid resale constituted an adventure in the nature of trade. Martland J. first points out the obvious fact that virtually every purchaser of securities, be he investor or trader, has at least some intention of disposing of them if it becomes to him financially desirable to do so. But, His Lordship continues, where the transaction of purchase and sale is an isolated one, there must, in order to subject any gain to tax, be some clearer indications of "trade" than only an apparent intention to make a sale as soon as a profit might reasonably be obtained. The something more that is required is probably what Fournier J. in the Exchequer Court described as "commercial *animus*".[12]

The isolation of the transaction appears from the opinion of the majority to be the principal reason for the capital gain conclusion reached. Martland J. quotes English authority for the statement that "Unless *ex facie* the single transaction is obviously commercial, the profit from it is more likely to be an accretion of capital and not a yield of income,"[13] and continues with the following statement:

> The nature of the property in question here is shares issued from the treasury of a corporation and we have not been referred to any reported case in which profit from one isolated purchase and sale of shares, by a person not engaged in the business of trading in securities, had been claimed to be taxable.[14]

The isolation of the transaction was one of two causes of the hesitation with which Cartwright J. said he reached his opposite conclusion. Writing the dissenting judgment for himself and Judson J. he said:

> The other cause of my hesitation is that while the expression "adventure or concern in the nature of trade" has been in the Acts in the United Kingdom for a century and a half and in the Act in this country for 13 years counsel have not referred to any reported case in which the profit arising from one isolated purchase and sale of shares by a taxpayer not engaged in the business of trading in securities had been claimed to be taxable.[15]

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[12] *Sterling Paper Mills Inc.* v. *M.N.R.*, [1960] C.T.C. 215, at p. 227.

[13] Scott, L.J., in *Barry* v. *Cordy*, [1946] 2 All E.R. 396, at p. 400, quoted by Martland J., *supra*, footnote 1, at p. 219.

[14] *Ibid.*, at p. 220. For examples of taxation by association, where the taxpayer normally deals in the subject matter of the transaction in dispute, see *Fogel* v. *M.N.R.*, [1959] C.T.C. 227; *Osler, Hammond & Nanton Limited* v. *M.N.R.*, [1961] C.T.C. 462; *Gairdner Securities Ltd.* v. *M.N.R.*, [1954] C.T.C. 24; and *McMahon and Burns Limited* v. *M.N.R.*, [1956] C.T.C. 153.

[15] *Ibid.*, at p. 230. The other stated cause of His Lordship's hesitation

The Supreme Court of Canada has thus given renewed emphasis to the singleness of a transaction—its isolation as measured against the general commercial history of the taxpayer—as an important consideration in determining questions of adventure or concern in the nature of trade. This marks a contrast from the statement of Thorson P. in *M.N.R.* v. *Taylor* where he said:

> In my opinion, it may now be taken as established that the fact that a person has entered into only one transaction of the kind under consideration has no bearing on the question whether it was an adventure in the nature of trade.[16]

How far the resurrected doctrine that an isolated transaction is at least *prima facie* not taxable will apply in the future cannot, of course, be foretold.[17] The decision of the highest court in *Irrigation Industries Limited* v. *M.N.R.* does lay down a proposition that may fairly be said to be of general application. At the same time, the reasons for judgment of the majority three times make reference to the fact that the Brunswick shares in question were treasury shares, purchased apparently by subscription directly from the Brunswick company. This meant that the price paid by the taxpayer was "invested" in the business of the Brunswick company in the direct sense. Does the repeated mention of that fact indicate that the matter might have been viewed differently if the Brunswick shares had been purchased not from treasury but on the open market? There is also repeated mention of the fact that corporate shares are not of themselves "articles of commerce" but represent a recognized vehicle for "investing capital in a business enterprise".[18] Whereas the decision of the Supreme Court of Canada puts the quietus to the idea that had been developing in some circles that only blue chip stocks or other income-producing securities could be the subject of *bona fide* investment, at the same time it will not apply indiscriminately to all other kinds of purchase

in reaching a conclusion of taxability had to do with the difficulty of basing decisions in cases of this kind upon the difficult and subjective test of the intention of the taxpayer at the time the transaction was entered into.

[16] *Supra*, footnote 8, at p. 211.

[17] *Irrigation Industries Limited* v. *M.N.R.* has already been cited in a subsequent Exchequer Court case involving the question of adventure or concern in the nature of trade, but it was distinguished as a precedent on the ground that the facts in the subsequent case did not concern an isolated instance, such as was the case in *Irrigation Industries Limited* v. *M.N.R.*; *The Sterling Trusts Corporation and Kathleen Dignan* (*Executors of Alan Dignan, Deceased*) v. *M.N.R.*, [1962] C.T.C. 297. The principles of the *Irrigation Industries* decision have been applied again by the Supreme Court of Canada in *Montreal Trust Company* v. *M.N.R.*, [1962] C.T.C. 418, also reversing a decision of the Exchequer Court reported at [1961] C.T.C. 228.

[18] *Supra*, footnote 1, at p. 221.

and sale. Future cases will, of course, be determined as questions of fact in the context of their own circumstances, but the decision in *Irrigation Industries Limited* v. *M.N.R.* seems at this point in time clearly to represent the end of the swing of the pendulum toward extinction of the concept of tax-free capital gain.

P. N. THORSTEINSSON.*

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TORTS—DOCTRINE OF PROFESSIONAL NEGLIGENCE—STANDARD OF PROFESSIONAL CARE.—It is well settled in English law that whenever the safe performance of an act depends on the professional knowledge and skill of the actor, he is required to possess such knowledge and to exercise such skill. He must possess a reasonable degree of skill and ability which a member of his profession, trade or calling would reasonably be expected to display in the particular circumstances of the case.

The doctrine is of a very ancient and respectable ancestry. Its foundations reach deep into the Roman era where it was first formulated.[1] With the systematization of Roman law, it found its way into the *Digest* and the *Institutes*. There, the matter was put rather laconically in the form of a maxim—*Imperitia culpae adnumeratur*.[2] Inexperience was thus equated with negligence. Although the *Digest* mentions medical practitioners,[3] midwives,[4] artificers,[5] assessors,[6] building inspectors,[7] and drivers,[8] who would be bound to act with professional skill, it provides in quite general terms that lack of skill of one who holds himself out as possessing professional skill amounts to negligence.[9] By negligence, in these circumstances, Roman law understood any failure in duty.[10] Ordinarily, however, Roman law distinguished between intent[11] and negligence[12] which in the time of the *Digest* was again subdivided

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[1] Its origin may be traced to the *Lex Aquilia* of about 287 B.C. Digest 9. 2. 1.

[2] Digest 50. 17. 132; Institutes 4. 3. 7.

[3] Digest 1. 18. 6. 7; 9. 2. 7. 6; 8; 9. 2. 8; 9. 2. 9. 1.

[4] *Ibid.*, 9. 2. 9. pr.; 1.

[5] *Ibid.*, 9. 2. 27. 29; 19. 2. 9. 5; 19. 2. 51. 1.

[6] *Ibid.*, 2. 2. 2.

[7] *Ibid.*, 1. 18. 7.

[8] *Ibid.*, 9. 2. 8.

[9] *Ibid.*, 19. 2. 9. 5.

[10] It is a wider sense of *culpa* of the type of the Lex Aquilia. Digest 9. 2. 44. pr.

[11] *Dolus.*

[12] *Culpa.*

in slight[13] and gross negligence.[14] But the Roman doctrine of degrees of negligence has not been carried over to the English law. English law developed its own concept, that of duty of care, the breach of which would amount to negligence. There are no degrees of negligence but a proper—higher or lower—standard of care is required of the actor according to the particular circumstances of the case.

The different method of approach used in English law does not, however, detract from the basic proposition that inexperience or lack of skill amounts to negligence. On the contrary, the validity of the doctrine has never been doubted and it is firmly established in the law.

Like in Roman law, it holds good in English law that any one who engages in the performance of an act which can only safely be done by an experienced or skilled man must possess the necessary experience or skill. This principle covers all imaginable transactions and activities. It is elaborated to more detail in the case of professional men exercising professions currently exercised in the Roman era with the necessary addition of all the other professions, trades and callings that are carried on in the modern time. So the standard of care displayed by medical practitioners, dentists, nurses, barbers and hairdressers, lawyers, accountants, valuers, bankers, and so on in the exercise of their profession attracted special attention of the law.

The standard of care is objective, that of the hypothetical reasonable man.[15] And it is a question of fact in every case whether the actor did or did not exercise the measure of care that a reasonable man would have exercised in the particular circumstances.[16]

One of the earliest recorded instances of the problem occurs in Fitz-Herbert.[17] The reference is to the duty of artificers to exercise their callings properly,[18] and it sums up the law as it then

[13] *Culpa levis:* failure to act as, in the circumstances, a *bonus pater familias* would act. Digest 13. 6. 18. pr.

[14] *Culpa lata:* failure to understand what everybody understands. *Ibid.*, 50. 16. 213. 2.

[15] This view prevails both in England and the Commonwealth as well as in America. Restatement of Torts (1939), s. 299.

[16] T. Ellis Lewis, the learned editor of Winfield on Tort (6th ed., 1954), pp. 494-496, gives four factors which tend to help to maintain an objective standard. 1. The magnitude of the risk which can be foreseen to which the defendant exposes others and the likelihood of injury occurring. 2. The importance of the object to be attained. 3. Practicability in the sense of expense and effort involved in safety measures. 4. General and approved practice.

[17] *Natura Brevium* (1534), 94 D.

[18] "If a smith prick my horse with a nail . . . , I shall have my action upon the case against him, without any warranty by the smith to do it

stood.[19] In *Best* v. *Yates*,[20] the standard of care required of a tailor was discussed, in *Coggs* v. *Bernard*,[21] that of a carrier,[22] and in *Slater* v. *Baker and Stapleton*,[23] in *Seare* v. *Prentice*,[24] and in *Pippin and wife* v. *Sheppard*,[25] that required of surgeons was considered. The problem was also adverted to in Blackstone[26] and in Buller.[27]

As the standard of care required of a professional man is not simply to exercise reasonable care, but to display such care and skill that is possessed by a man of average competence exercising a particular calling, the standard may vary from calling to calling depending on the degree of knowledge and perfection attained in the particular calling. The fundamental requirement, however, is common to all professions, trades and callings. Professional men are expected and bound to exercise that degree of care and skill which is displayed by the average practitioner in that particular profession. A fair and reasonable standard of care and competence is thus required.[28] The practitioner possessing the average skill and competence in the exercise of his profession is looked upon by the law as the standard giving entity.

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well . . . for it is the duty of every artificer to exercise his art rightly and truly as he ought." *Ibid.*

[19] See also Y.B. 43 Edw. 3, Mich. no. 38 (1369); *Skyrne* v. *Butolf* (1388), De Banco Roll, Easter 11 R. 2. (no. 509), rot. 230; and Y.B. 14 Hen. VI, no. 58 (1436) which are based on assumpsit.

[20] (1676), 1 Vent. 268.

[21] (1703), 2 Ld. Raym. 909.

[22] *Ibid.* Gould J. said at p. 909: "Any man, that undertakes to carry goods, is liable to an action, be he a common carrier, or whatever he is, if through his neglect they are lost, or come to any damage."

[23] (1767), 2 Wils. K.B. 359.

[24] (1807), 8 East. 348.

[25] (1822), 11 Price. 400.

[26] Commentaries (1768), Vol. 3, Ch. 9, p. 163. He says: "Every one who undertakes any office, employment, trust, or duty, contracts with those who employ or entrust him, to perform it with integrity, diligence, and skill. And, if by his want of either of those qualities any injury accrues to individuals, they have therefore their remedy in damages by a special action on the case."

[27] An Introduction to the Law Relative to Trials at Nisi Prius (Dublin, 1768), p. 73, lays down a general rule, that in all cases where a damage accrues to another by the negligence, ignorance, or misbehaviour of a person in the duty of his trade or calling, an action on the case will lie: (as if a farrier kill my horse by bad medicines, or refuse to shoe, or prick him in the shoeing).

[28] Lord Hewart C.J. said in *R.* v. *Bateman* (1925), 41 T.L.R. 557, at p. 559: "If a person holds himself out as possessing special skill and knowledge and he is consulted, as possessing such skill and knowledge, by or on behalf of a patient, he owes a duty to the patient to use due caution in undertaking the treatment. If he accepts the responsibility and undertakes the treatment and the patient submits to his direction and treatment accordingly, he owes a duty to the patient to use diligence, care, knowledge, skill and caution in administering the treatment. No contractual relation is necessary, nor is it necessary that the service be rendered for reward. It is for the judge to direct the jury what standard to apply and for the

The care and attention due to patients by medical practitioners being of utmost importance to the public, it is not surprising that the degree of competence required of medical men is well settled. In *Lanphier* v. *Phipos*,[29] Tindal C.J. said: "Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest possible degree of skill. There may be persons who have higher education and greater advantages than he has, but he undertakes to bring a fair, reasonable, and competent degree of skill."[30] Again in *Everett* v. *Griffiths*,[31] Scrutton L.J. held that a medical man practising his profession undertakes that he has the ordinary skill and knowledge necessary to perform his duty towards those resorting to him in that character.

The duty imposed on medical men in English law is thus to bring to the exercise of their profession a fair and reasonable degree of care and skill. The standard of care required of American practitioners is identical.[32] In *Sinz* v. *Owens*,[33] Edmonds J., in the California Supreme Court, held that the standard of care required of a physician was not the highest skill medical science knows, but only that degree of skill, knowledge and care ordinarily possessed

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jury to say whether that standard has been reached. The jury should not exact the highest, or very high standard, nor should they be content with a very low standard. The law requires a fair and reasonable standard of care and competence." See also *Gent* v. *Wilson* (1956), 2 D.L.R. (2d) 160 (Ont. C.A.).

[29] (1838), 8 Car. & P. 475, at p. 479.

[30] Erle C.J. said in *Rich* v. *Pierpont* (1862), 3 F. & F. 35, at p. 40: "A medical man is not answerable merely because some other practitioner might possibly have shown greater skill and knowledge; but he is bound to have that degree of skill which could not be defined, but which, in the opinion of the jury, is a competent degree of skill and knowledge. It is not enough to make the defendant liable that some medical men, of far greater experience or ability, might have used a greater degree of skill, nor that even he might possibly have used some greater degree of care. The question is whether there had been a want of competent care and skill to such an extent as to lead to the bad result." See also Falconbridge C.J. in *Town* v. *Archer* (1902), 4 O.L.R. 383, at pp. 387-388; Lord Hewart C.J. in *R.* v. *Bateman*, *supra*, footnote 28; and Plaxton J. in *Crysler* v. *Pearse*, [1943] 4 D.L.R. 738, at p. 753 (Ont.).

[31] [1920] 3 K.B. 163, at p. 193.

[32] In the absence of a special contract, a physician or surgeon is not required to exercise extraordinary skill and care or the highest degree of skill and care possible, but as a general rule he is only required to possess and exercise the degree of skill and learning ordinarily possessed and exercised, under similar circumstances, by the members of his profession in good standing, and to use ordinary and reasonable care and diligence, and his best judgment, in the application of his skill to the case. 70 Corpus Juris Secundum (1951), Physicians and Surgeons, para 41.

[33] (1949), 8 A.L.R. 2d 757, at p. 762 (Cal.).

and exercised by members of his profession under similar circumstances.[34] It was the opinion of the court that in order to determine the standard of ordinary care and skill required of a medical practitioner, the court was not permitted to aggregate into a common class the quacks, the young men who have no practice, the old ones who have dropped out of the practice, the good, and the very best, and then strike an average between them. This method would place the standard too low.[35] A higher degree of skill is, however, required from a specialist than from a general medical practitioner.[36] Due regard must also be had for the advanced state of medical knowledge at the time of the treatment of any human malady, and refuge may not be found in the practices of the medical dark ages.[37]

A medical practitioner is free from liability on the ground of negligence if he can show that he acted in accordance with the recognized practice.[38] As McNair J. has put it, a medical man is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art, and this is so even if there is a body of opinion who would take a contrary view.[39] A physician is not liable for an error of judgment unless the course pursued is clearly against the course recognized as correct by his profession.[40] A medical man is bound to use reasonable skill and he fulfils his obligation if he uses methods approved by others of the profession

[34] In the treatment of the patient, the surgeon is under a duty to apply his skill and ability in a careful and prudent manner. *Kennedy* v. *Parrott* (1956), 56 A.L.R. 2d 686, at p. 692 (N.C.).

[35] *Scarano* v. *Schnoor* (1958), 68 A.L.R. 2d 416, at p. 423, (Cal. C.A., Dooling J.). See also *Hunter* v. *Hanley*, [1955] S.L.T. 213, at p. 217, *per* Lord President Clyde.

[36] *Wilson* v. *Swanson* (1956), 5 D.L.R. (2d) 113 (S.Ct.C.); *Challand* v. *Bell* (1959), 18 D.L.R. (2d) 150, at p. 154 (Alta.). The surgeon undertakes that he possesses the skill, knowledge and judgment of the average. In judging that average, regard must be had to the special group to which he belongs. A different standard is exacted from a specialist than from a general practitioner.

[37] *Kelly* v. *Carroll* (1950), 19 A.L.R. 2d 1174, at p. 1182, (Wash., Mallery J.).

[38] *Marshall* v. *Lindsey County Council*, [1935] 1 K.B. 516, at p. 540, *per* Maugham L.J.; *Vancouver General Hospital* v. *McDaniel* (1935), 152 L.T. 56, at pp. 57-58, *per* Lord Alness; *Whiteford* v. *Hunter*, [1950] W.N. 553, at p. 554, *per* Lord Porter.

[39] *Bolam* v. *Friend Hospital Management Committee*, [1957] 1 W.L.R 582, at p. 587 (Q.B.). See also *Chasney* v. *Anderson*, [1950] 4 D.L.R. 223 (S.Ct.C.).

[40] Admittedly, the science of medicine is not an exact science. Physicians are not to be held liable for honest errors of judgment. They are allowed a wide range in the exercise of their judgment and discretion. To hold one liable it must be shown that the course which he pursued was clearly against the course recognized as correct by his profession. *Bourgeois* v. *Dade County* (1957), 72 A.L.R. 2d 391, at p. 394, (Fla., Thornal J.).

who are reasonably skilled.[41] He will, however, be liable if he is proved guilty of such failure, as no medical practitioner of ordinary skill would be guilty of had he acted with ordinary care.[42]

Similarly to medical practitioners, dentists owe their patients the duty to exercise due care and skill.[43] They are not guarantors of good results but are obliged to exercise reasonable care and skill in the treatment of patients.[44] The same rule applies also to nurses.[45] They must meet the standard of learning, skill and care to which nurses practising the profession are held.[46]

The other profession, the careless exercise of which may have considerable injurious consequences to human health, is that of barbers and hairdressers and possibly jewellers. The standard of care required is that which a reasonably prudent and skillful person engaged in the exercise of the profession would take in the same or similar circumstances.[47] It is that degree of care normally possessed by persons of ordinary skill, ability and prudence engaged in the performance of the same transaction.[48] In the exercise of their profession, the duty of care does not extend only to the actual rendering of professional services but includes also a duty to keep all the necessary appliances in good and clean condition.[49]

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[41] *Baldor* v. *Rogers* (1954), 55 A.L.R. 2d 453, at p. 459, (Fla., Thomas, Acting C.J.).

[42] In *Hunter* v. *Hanley, supra,* footnote 35, Lord President Clyde said: "To establish liability by a doctor where deviation from normal practice is alleged, three facts require to be established. First of all it must be proved that there is a usual and normal practice. Secondly it must be proved that the defender has not adopted that practice, and thirdly (and this is of crucial importance) it must be established that the course the doctor adopted is one which no professional man of ordinary skill would have taken if he had been acting with ordinary care."

[43] *Warner* v. *Payne,* unrep. April 15th, 1935 (K.B., Goddard J.); *Fish* v. *Kapur,* [1948] 2 All E.R. 176 (K.B.); *Nesbitt* v. *Holt,* [1953] 1 D.L.R. 671 (S.Ct.C.).

[44] *Hotelling* v. *Walther* (1942), 144 A.L.R. 205, at p. 208, (Ore., Belt J.).

[45] *Strangways-Lesmere* v. *Clayton,* [1936] 2 K.B. 11; *Ingram* v. *Fitzgerald,* [1936] N.Z.L.R. 905; *Mahon* v. *Osborne,* [1939] 2 K.B. 14; *Gold* v. *Essex C.C.,* [1942] 2 K.B. 293; *Bugden* v. *Harbour View Hospital,* [1947] 2 D.L.R. 338 (N.S.).

[46] *Cooper* v. *National Motor Bearing Co., Inc.* (1955), 51 A.L.R. 2d 963, at p. 969, (Cal. C.A., Kaufman J.); *Griffin* v. *Colusa County* (1941), 44 Cal. App. 2d 915.

[47] *Blankenship* v. *Van Hooser* (1930), 221 Ala. 542.

[48] *Pratt* v. *Edwards & Son* (1929), 237 N.Y.S. 372; *Hogan* v. *Hornbeck* (1940), 282 Ky. 574; *Watson* v. *Buckley,* [1940] 1 All E.R. 174 (K.B.); *Holmes* v. *Ashford,* [1950] 2 All E.R. 76 (C.A.); *Ingram* v. *Emes,* [1955] 2 Q.B. 366.

[49] It is clearly evidence of negligence for a barber to use appliances, razors, towels, *etc.,* which have already been in use on other persons, without taking means to insure that they are thoroughly cleansed. *Hales* v. *Kerr,* [1908] 2 K.B. 601, at p. 604, *per* Channel J. The standard of care required of a jeweller in piercing ears for the purpose of wearing earrings

The degree of professional competence expected of lawyers is similar to that expected of medical practitioners.[50] It is the care and skill of a reasonably competent and careful solicitor.[51] He is not bound to know all the law, but he must be familiar with the well-settled principles of law and rules of practice which are of frequent application in the ordinary business of the profession.[52] He will, however, be liable on proof of "gross negligence"[53] which implies the absence of reasonable care and skill.[54] In case of difficulty or doubt, he should take counsel's opinion.[55] As to barristers, they cannot be sued for damages in negligence for historical reasons,[56] but they are subject to the rules of conduct of their Inns of Court.

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is that standard of cleanliness, skill and care which might be expected from a jeweller. *Phillips* v. *William Whiteley, Ltd.*, [1938] 1 All E.R. 566, at p. 569, *per* Goddard J.

[50] The rules of law governing liability for negligence of physicians and surgeons toward their patients also govern the liability of attorneys for negligence toward their clients, so that attorneys are required to exercise that degree of skill and diligence in their profession which physicians and surgeons are required to exercise in theirs. *Olson* v. *North* (1935), 276 Ill. App. 457.

[51] *Godefoy* v. *Dalton* (1830), 6 Bing, 460; *Hart* v. *Frame* (1838), 6 Cl. & F. 193, at p. 210; *Gronbach* v. *Petty*, [1951] 4 W.W.R. 49 (Man.); *Aaroe* v. *Seymour*, [1956] O.R. 736; *Good* v. *Walker* (1857), 30 Ala. 482; *Holmes* v. *Peck* (1849), 1 R.I. 242.

[52] No attorney is bound to know all the law; God forbid that it should be imagined that an attorney, or a counsel, or even a judge is bound to know all the law; or that an attorney is to lose his fair recompense on account of an error, being such an error as a cautious man might fall into. *Montriou* v. *Jefferys* (1825), 2 C. & P. 113, at p. 116, *per* Abbott C.J.; *Enterline* v. *Miller* (1904), 27 Pa. Sup. 463; *Davis* v. *Assoc. Indemnity Corp.* (1944), 56 F. Supp. 541 (D.C. Pa.).

[53] Lord Ellenborough in *Baikie* v. *Chandless* (1811), 3 Camp. 17, at p. 20; Tindal C.J. in *Godefoy* v. *Dalton*, *supra*, footnote 51, at p. 467; Macdonald J. in *Marriott* v. *Martin* (1915), 21 D.L.R. 463, at pp. 465-466 (B.C.); Scrutton L.J. in *Fletcher & Son* v. *Jubb, Booth & Helliwell*, [1920] 1 K.B. 275, at p. 280.

[54] While there can be no doubt that for any misfeasance or unreasonable neglect of an attorney whereby his client suffers a loss an action may be supported and damages recovered to the amount of that loss, yet it is equally well established that an attorney in the management of his professional business is not bound to extraordinary diligence, but only to use a reasonable degree of care and skill, reference being had to the character of the business he undertakes to do, and is not to be answerable for every error or mistake, but, on the contrary, will be protected if he acts in good faith, to the best of his skill and knowledge, and with an ordinary degree of attention. While some law writers and some adjudged cases state that an attorney is liable to his client for "gross negligence" only, yet it would appear that even when such term is used it merely means the want or absence of reasonable care and skill. *Glenn* v. *Haynes* (1951), 26 A.L.R. 2d 1334, at p. 1339, *per* Spratley J. (Va. C.A.).

[55] *Godefoy* v. *Dalton*, *supra*, footnote 51; *Potts* v. *Sparrow* (1834), 6 C. & P. 749; *Andrews* v. *Hanley* (1857), 26 L.J. Ex. 323; *Richard* v. *Cox*, [1943] K.B. 139.

[56] Blackstone, *op. cit.*, footnote 26, Ch. 3, pp. 26-29; *Swinfen* v. *Lord Chelmsford* (1860), 5 H. & N. 890.

The standard of care applicable to the conduct of auditors and public accountants is the same as that applied to lawyers, medical practitioners, architects and other professional men engaged in furnishing skilled services for compensation, and that standard requires reasonable care and competence.[57] They are liable in tort for a failure to perform such services in an accurate and skillful manner.[58] They are liable in damages to their clients if the performance of their work indicates lack of reasonable care,[59] but to third parties they are liable only for fraud.[60]

The position of valuers is similar to that of the other professional men. They are expected to possess the skill and care an ordinary competent valuer would show in the exercise of his profession.[61] They answer in negligence to their clients: but to third parties they are liable only for fraud.[62]

Also bankers are under the obligation to bring in the exercise of their profession a due degree of care and skill. The applicable

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[57] *Gammel* v. *Ernst & Ernst* (1955), 245 Minn. 249. It is the duty of an auditor to bring to bear on the work he has to perform that skill, care and caution which a reasonably competent, careful and cautious auditor would use. In *re Kingston Cotton Mill Co., (No. 2)*, [1896] 2 Ch. 279, at p. 288, *per* Lopes L.J.; *International Laboratories Ltd.* v. *Dewar*, [1933] 3 D.L.R. 665, at pp. 703-704, *per* Robson J.A. (Man. C.A.).

[58] *In re London and General Bank, (No. 2)*, [1895] 2 Ch. 673, at p. 683, *per* Lindley L.J.; *Re Owen Sound Lumber Co.* (1917), 33 D.L.R. 487, at p. 502, *per* Hodgins J.A.; *Dantzler Lumber & Export Co.* v. *Columbia Casualty Co.* (1934), 95 A.L.R. 258, (Fla. S. Ct.).

[59] *Gammel* v. *Ernst & Ernst, supra*, footnote 57; *Guardian Ins. Co.* v. *Sharp*, [1941] 2 D.L.R. 417, at pp. 423-426, *per* Davis J. (S.Ct. C.).

[60] *Ultramares Corp.* v. *Touche* (1931), 255 N.Y. 170; in *State Street Trust Co.* v. *Ernst* (1938), 278 N.Y. 104, 120 A.L.R. 1250 (C.A.), at p. 1253, Finch J. said: "Accountants may be liable to third parties even where there is lacking deliberate or active fraud. A representation certified as true to the knowledge of the accountants when knowledge there is none, a reckless misstatement, or an opinion based on grounds so flimsy as to lead to the conclusion that there was no genuine belief in its truth, are all sufficient upon which to base liability. A refusal to see the obvious, a failure to investigate the doubtful, if sufficiently gross, may furnish evidence leading to an inference of fraud so as to impose liability for losses suffered by those who rely on the balance sheet. In other words, heedlessness and reckless disregard of consequence may take the place of deliberate intention." And see Denning L.J. in *Candler* v. *Crane, Christmas & Co.*, [1951] 2 K.B. 164, [1951] 1 All E.R. 426, at pp. 434, 436: "Accountants owe the duty, of course, to their employer or client, and also, I think, to any third person to whom they themselves show the accounts, or to whom they know their employer is going to show the accounts so as to induce him to invest money or take some other action on them. They owe a duty of care not only to their own clients, but also to all those whom they know will rely on their accounts in the transaction for which those accounts are prepared."

[61] *Baxter* v. *Gapp (F.W.) and Co. Ltd., and Gapp*, [1939] 2 K.B. 271; *Bell Hotels (1935), Ltd.* v. *Motion*, [1952] C.P.L. 403.

[62] *Love* v. *Mack* (1905), 93 L.T. 352; *Old Gate Estates, Ltd.* v. *Toplis & Harding & Russell*, [1939] 3 All E.R. 209.

standard is derived from the ordinary practice of bankers.[63] It is ascertained by reference to the practice of reasonable men carrying on the business of bankers, and endeavouring to do so in such a manner as may be calculated to protect themselves and others against fraud.[64] Although it is not part of the ordinary business of a banker to give advice to customers as to investments generally, so that a banker would not be under a duty to advise his customer carefully, there may be occasions when advice may be given by a banker in the course of his business.[65] The nature of the banker's business is in each case a matter of fact and its limits cannot be laid down as a matter of law. But if a banker takes it upon himself to give professional advice, his only obligation is to advise with the care and skill which an ordinary banker in his position might reasonably be expected to possess.[66]

The standard of care and skill required of architects, surveyors or engineers is to use reasonable care and diligence in the exercise of their profession.[67] They must be skilled and must display at least an average ability in their work.[68] If they fail to exercise this

[63] *Commissioner of Taxation* v. *English, Scottish & Australian Bank, Ltd.*, [1920] A.C. 683, at p. 689, *per* Lord Dunedin.

[64] *Lloyds Bank* v. *E.B. Savory & Co.*, [1933] A.C. 201, at p. 221, *per* Lord Warrington. See also *Choinière* v. *Banque d'Epargne de Montréal*, [1957] Q.B. 467 (Que. C.A.).

[65] *Banbury* v. *Bank of Montreal* (1918), 34 T.L.R. 518, at p. 521, *per* Lord Finley L.C.; See also *Batts Combe Quarry Co.* v. *Barclays Bank Ltd.* (1931), 48 T.L.R. 4.

[66] *McConnell* v. *Ray* (1937), 180 Okla. 590; *Batts Combe Quarry Co.* v. *Barclays Bank Ltd., ibid.; McIntyre* v. *Bank of Montreal* (1957), 10 D.L.R. (2d) 288 (Man.); *Woods* v. *Martin's Bank Ltd.*, [1958] 1 W.L.R. 1018, at pp. 1030, 1032, *per* Salmon J.

[67] A person who holds himself out to the public in a professional capacity, holds himself to be possessed of average ability in such profession, and the law implies that he contracts with his employer: 1. that he possesses that requisite degree of learning, skill and experience which is ordinarily possessed by the profession in the same art or service, and which is ordinarily regarded by the community, and by those conversant with that employment, as necessary and sufficient to qualify him to engage in such business; 2. that he will use reasonable and ordinary care and diligence in the exercise of his skill, in the application of his knowledge, to accomplish the purpose for which he is employed; 3. in stipulating to exert his skill and apply his diligence and care, an architect, like other professional men, contracts to use his best judgment. *Johnson* v. *O'Neill* (1912), 137 N.W. 713, at p. 715 (Mich.). See also *Harries Hall and Kruse* v. *South Sarnia Properties Ltd.*, [1928] 4 D.L.R. 872, at p. 876, *per* Fisher J. (Ont.); and *Nelligan* v. *Brennan and Whale*, [1955] 5 D.L.R. 305 (Ont.).

[68] *Moneypenny* v. *Hartland* (1824), 1 C. & P. 351; *Philips* v. *Ward*, [1956] 1 All E.R. 874 (C.A.); *Straus* v. *Buchman* (1904), 89 N.Y.S. 226. The responsibility of an architect does not differ from that of a lawyer or physician. When he possesses the requisite skill and knowledge, and in the exercise thereof has used his best judgment, he has done all that the law requires. *Bayne* v. *Everham* (1917), 163 N.W. 1002 (Mich.); *Scott* v. *Potomac Ins. Co. of D.C.* (1959), 341 P. 2d 1083 (Ore.); *Russell* v. *McKerchar* (1905), 1 W.L.R. 138 (Man. C.A.); *Ramsay and Penno* v. *R.*, [1952] 2 D.L.R. 819 (Ex. Ct.).

degree of skill and competence, they will be liable in damages, and also, they will not be able to recover compensation for their services.[69]

Although the degree of professional standing in some of the aforementioned professions attracted, due to their importance, considerably more attention of the law than that used in the exercise of other professions, there is no doubt that the standard of average skill and competence must be shown in the exercise of any profession. It applies to medical men and lawyers as well as to brokers, auctioneers, surveyors and dispensing chemists. In fact, it applies to all men engaged in the exercise of a profession, trade or calling. The uniformity of approach is remarkable. The law takes the fact in consideration that a beginner will not be able to equal the skill of a man of experience; that professional men practising generally will not attain the degree of skill expected of a practitioner working exclusively within a narrow field of specialization; and also that no practitioner can always give a top performance irrespective of his above average competence. In this way, the doctrine which was first formulated in Roman law was carried in an appropriately developed form into the modern law. True, it has been adopted to suit the new conditions but its function in the legal system is the same today as it was many centuries ago. Being of utmost importance to the proper exercise of professional services in the community, there is no doubt that it will form a permanent part of the law in the years to come.

GEORGE E. GLOS*

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[69] *Moneypenny* v. *Hartland, ibid.*, at p. 354; *Cauchon* v. *MacCosham* (1914), 19 D.L.R. 708 (Alta.); *Brantford* v. *Kemp* (1960), 23 D.L.R. (2d) 640 (Ont. C.A.); *Kinney* v. *Manitowoc County, (Wis.)* (1905), 135 F. 491 (C.C.A.).

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