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Allen M. Linden

Osgoode Hall Law School of York University

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A CENTURY OF TORT LAW IN CANADA:
WHITHER UNUSUAL DANGERS, PRODUCTS LIABILITY AND AUTOMOBILE ACCIDENT COMPENSATION?

ALLEN M. LINDEN*

Toronto

Introduction

A century ago, in the twenty-first year of the reign of Her Majesty Queen Victoria, the Upper Canada Court of Queen's Bench, in the Michaelmas term, decided the case of Plant v. The Grand Trunk Railway Company.1 William Plant, an employee of the defendant, was helping to clear away the snow on a railway track near Georgetown, Ontario, when a freight train approached. The foreman instructed the workmen "to clear", but William Plant, taken by surprise, "lost his presence of mind" and ran along the track in front of the train instead. Because of the negligence of the train's crew in tending the brakes, the train was unable to stop promptly, overtook William Plant and killed him. His widow sued and won a jury verdict at trial, but, on appeal, the action was dismissed. Chief Justice Draper declared that: "Servants must be supposed to have the risk of the service in their contemplation when they voluntarily undertake it and agree to accept the stipulated remuneration. If therefore one of them suffers from the wrongful act or carelessness of another the master will not be responsible".2 Since the poor brakes were due to the "negligence, not of the defendants, . . . but of the persons employed by the defendants in the conduct and management of the train . . ."3 the doctrine of common employment applied to preclude recovery. Alternatively, Chief Justice Draper continued, "we can scarcely imagine a clearer case of contributory negligence".4 His Lordship concluded: "The loss and misfortune to the plaintiff and her children is doubtless very serious and sad, but we must not be

*Allen M. Linden, of Osgoode Hall Law School, Toronto.

1 (1867), 27 U.C.Q.B. 78.
2 Ibid., at pp. 82-83.
3 Ibid., at p. 84.
4 Ibid., at p. 86.
drawn out of our path of duty, even by our feelings for the widow and orphans".  

*Plant v. Grand Trunk Railway* is not a leading case at all; it was selected because it depicts the cruelty of the Canadian law of torts and the prevailing attitude of the Canadian judiciary toward their "path of duty" in 1867. There existed, of course, other similar horrors. In addition to contributory negligence and the doctrine of common employment, that reflected the rugged individualism and *laissez faire* philosophy of the power elite of the time. In the last hundred years, as our infant industries matured and as our social consciousness awakened, some of the most iniquitous of these rules have been buried. It is now virtually impossible for a workman's widow such as Mrs. Plant to go uncompensated, because legislation assures reparation in such cases, regardless of the defences of common employment, contributory negligence and voluntary assumption of risk, the third of the "unholy trinity" of defences. Moreover, the early harshness of contributory negligence theory has been mollified, first by the judicially created doctrine of "last clear chance", and, subsequently also, by the passage of the comparative negligence Acts. Numerous other reforms have been effectuated which have gone a long way toward humanizing the law of torts. More importantly, a more consistent approach to tort problems is evolving as the courts are slowly becoming aware of the abolition of the forms of action.

But many of the relics of pre-confederation Canada still flourish, despite a vastly changed world and despite the widening gap between the law of torts and the expectations of the Canadian people. The courts still insist upon placing everyone who enters another's premises into one of three immutable categories. They have not yet brought the law of products liability into harmony with the development in modern merchandizing. In utilizing penal legislation in tort suits, Canadian courts cling to the myth of legislative intention when numerous judges and authors have


8 *See S.O., 1924, c. 32: now The Negligence Act, R.S.O., 1960, c. 261.


10 *White v. Imperial Optical Co.* (1957), 7 D.L.R. (2d) 471 (Ont. C.A.) rev'ing (1957), 6 D.L.R. (2d) 496.

11 *See Prosser, The Fall of the Citadel: (Strict Liability to the Consumer)* (1966), 50 Minn. L. Rev. 791.
demonstrated the hypocrisy of this quest.\textsuperscript{12} The concept of no liability without fault remains the shibboleth in Canadian decisions although elsewhere doubt is being cast upon its effectiveness and validity as a loss-distribution technique in the modern world.\textsuperscript{13} There are on display in the Canadian reports such museum pieces as the doctrine of “last clear chance”, the marital immunity, insanity and infancy immunities, the Good Samaritan rule and a host of others.\textsuperscript{14}

To explain why Canadian tort law has developed so sluggishly is by no means easy. One reason is that our courts, rather than choosing the best solution boldly and openly from among the alternatives presented, have instead abdicated their responsibilities to the English courts. While this was understandable when the Privy Council was the final arbiter of Canadian disputes, it no longer is now that we have been freed from their supervisory powers.\textsuperscript{15} For some strange reason, the Supreme Court of Canada has not fully recognized the extent of its power to forge a Canadian law of torts. Indeed, as we enter our second century of nationhood, some tort teachers in this land doubt whether there exists such a thing as “Canadian” tort law. The underdeveloped character of Canadian tort law was illustrated by Dean Wright’s response to a criticism that his casebook contained insufficient Canadian decisions: “Unfortunately, there are few Canadian cases representing possibilities that are not better explored and better understood by the English cases”.\textsuperscript{16} There is no reason why this situation must endure. Canadian judges have, on occasion, manifested that they are capable of original and imaginative work. Justice Roach, for example, wrote a magnificent opinion restructuring the obsolete English law of animals on the highway to correspond with modern conditions. He declared:\textsuperscript{17}

It is now over 200 years since Thomas Gray wrote his famous lines descriptive of rural England at eventide, “The lowing herd winds slowly o’er the lea”. The lea no doubt included such highways as then trav-

\begin{itemize}
\item See generally, Fleming, \textit{op. cit.}, footnote 6.
\item Wright, \textit{op. cit.}, footnote 15, at p. 112.
\end{itemize}
ersed the landscape. As I read the modern English cases the herd may still wander along those same highways without the owner being subject to civil liability for the injuries they may cause. No longer in this Province does "the ploughman homeward plod his weary way". He goes now in his tractor, oft-times along the highway. The farmer whose lands adjoin the King's Highway can in this modern era scarcely know the meaning of "the solemn stillness" of which Gray wrote. No longer can he be conscious of the beetle wheeling his droning flight. What he hears, instead, is the whir of motor cars wheeling their way at legalized speed along the adjoining highway. The common law of England may have been adequate in Gray's day. The Courts in England have held that it is still adequate, but surely it must be apparent that to-day in this Province it is not.

The Canadian courts have turned their backs on other English authority as well; the Supreme Court of Canada has recently declared its independence from London Graving Dock v. Horton,19 British Transport v. Gourley,20 Jacob v. London County Council,21 the old control test of vicarious liability22 and others.23 In the years ahead we can expect, hopefully, even more evidence of maturity, but, all too often, Canadian judges still abide by English precedent blindly without balancing the conflicting policies in the light of Canadian conditions.24 This might be less unacceptable if the English courts were attuned to social developments and willing to reshape tort law to reflect these changes, but this not the case. In England, judges regard Parliament as the sole amender of the law and are reluctant to strike out on new paths themselves. The various English law reform commissions, have prodded Parliament to action on occasion,25 but, when Canadian courts imitate their English brethren by refusing to exorcise some anomaly or other, our legislatures do not react. Consequently, Canadian courts may adhere to lifeless English precedents,26 so that we end up as "more English than the English"!

24 As when the "Wagon Mound" was decided, see Gibson, The Wagon Mound in Canadian Courts (1963), 2 Osgoode Hall, L.J. 416. see also Smith, Requiem for Polemis (1965), 2 U.B.C.L. Rev. 159.
25 See the Occupiers' Liability Act, 1957, 5 & 6 Eliz 2, c. 31.
26 As with Indermuir v. Dames (1866), L.R. 1 C.P. 274, aff'd L.R. 2 C.P. 311 (Ex. Ch.).
But the quality of our judiciary can only reflect the calibre of the legal profession from whom they are drawn. The members of the negligence bar in Canada have been predominantly pragmatic men, not overly concerned with social needs or philosophical issues and they have not respected these qualities in other men. They have not challenged the courts, as have their American counterparts, with bold, new causes of actions, nor have they pressed actively for legislative reform, nor have they supported much research. It must be admitted, however, that the quality of Canadian lawyers is dependent upon the character of their law schools. In the field of torts, as in others, we in the law schools are in no position to cast the first stone. Without doubt, Dean Wright, ably assisted by such men as Dr. Malcolm MacIntyre, strove mightily to bring some order into the law of torts, but so far they have been largely unheeded by our courts and our bar. Burdened by large teaching loads and administrative duties, the early Canadian torts men were unable to fashion a Canadian law of torts by producing sufficient treatises, articles and commentary as did Professors Bohlen, Seavey, Smith, Prosser, Green, Harper, James, Morris, Keaton, Malone and Ehrenzweig. In fact there is still no Canadian textbook on tort law. To-day, however, there are over two dozen full-time professors teaching torts in Canada. Banded together in the new torts subsection of the Association of Canadian Law Teachers, such men as Professors Lang, Gray, Gibson, Smith, Alexander, Weiler, Dunlop and others are determined to remake our law of torts. With the help of Professor Fleming's excellent text book, The Law of Torts, an alert bar and a sympathetic judiciary, victory may soon be achieved.

Ironically, however, now that tort law is about to be streamlined to incorporate some of the new thinking about loss-distribution and some of the social facts of modern life, we are beset with doubts about its future. Tort law may soon be rendered superfluous by burgeoning social welfare legislation, changing insurance practices and other institutional alterations. If this is so, our battle to humanize the law of torts may have been in vain.

This article will attempt to explore in some detail three important areas of personal injury law in the light of this new challenge. It will not canvass the many detailed substantive changes in the Canadian law of torts for this has been done elsewhere.\(^{27}\) Nor will it explore the jurisprudential developments of the entire field, because Dean Wright has already done this in superb

\(^{27}\) Alexander, op. cit., footnote 23.
First, the concept of "unusual danger", that has survived in Canada for a century, despite an illegitimate birth, a propensity for spreading confusion and a complete absence of merit, will be discussed. Second, the area of products liability, once transformed and now due to undergo another metamorphosis will be considered. Third, automobile accident compensation will be examined, for it is dissatisfaction with the performance of tort law in resolving these problems that threatens the future existence of the entire field. Lastly, an attempt will be made to assess whether, in the light of these developments, the continued existence of tort law is justified.

I. Unusual Dangers.

It is pretty well agreed the the Canadian law of occupiers' liability is a mess. Indeed, nowhere else in the law of torts has confusion been as prevalent and injustice as rampant as it has been in disputes arising out of injuries sustained on the land of another. This is understandable, perhaps, for "the history of this subject is one of conflict between the general principles of the law of negligence and the traditional immunity of landowners". In this clash, Canadian landowners have emerged victorious. Despite significant advances by legislation in the United Kingdom, the birthplace of the notion of special privileges for the landed gentry, and by decisions in the United States, Canadian courts have clung to a system of rigid rules and formal categories devised in the last century to protect landowners from unsympathetic juries. True, Canadian judges have noticeably squirmed occasionally, indicating that they "would prefer to avoid categorization", but, rather than abandoning the meaningless ritual, they have usually succumbed for, after all, "the categories are here, and the . . . liability of occu-

28 Wright, op. cit., footnote 9.
30 See generally Fleming, op. cit., footnote 6, p. 404.
32 Occupiers' Liability Act, supra, footnote 25.
34 Fleming, op. cit., footnote 6, p. 404; see also Marsh, The History and Comparative Law of Invitees, Licensees and Trespassers (1953), 69 L.Q. Rev. 182, 359, at pp. 185-186.
piers [is] conventionally determined with reference to them". Authors have attacked this rigid scheme, some urging the creation of additional categories, and others suggesting a reduction in the number of categories, but our legislatures and judiciary are still unwilling to take the drastic steps required to transport this body of law into the twentieth century. Despite this reluctance toward change, there have been some minor improvements, such as the emergence of a new category of contractual entrant, who pays for the right to enter land, to whom the courts have applied ordinary negligence principles, so that a landlord is now under an “obligation to use reasonable care to keep the premises reasonably safe for his tenant”. Moreover, invitees of tenants are now also invitees of landlords, and occupiers must use reasonable care toward all reasonably foreseeable entrants in the conduct of activities on their land. But these are only tiny chinks in the armour; the entire field cries out for a complete overhaul. In the meantime, however, we must do what we can to explain it, to prune it where necessary, and to assist the judiciary in their work of day to day application. One particular concept that we can focus on is that of “unusual danger”, for, under scrutiny, it does not stand up and should be laid to rest.

1. The Dubious Origin of The Phrase “Unusual Danger”.

One of the most unusual developments in tort law in the last century has been the evolution of the concept of unusual danger. All lawyers, text writers and judges agree that, if someone who enters upon land is classified as an invitee, the occupier owes him

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$^{36}$ White v. Imperial Optical Co., supra, footnote 10.


$^{38}$ MacDonald and Leigh, op. cit., footnote 29.


a duty to "use reasonable care to prevent damage from unusual danger which he knows or ought to know". 43 "The foundation of the law" is said to be "contained in the classic statement" 44 of Mr. Justice Willes in Indermaur v. Dames: 45

... with respect to such a visitor, at least, we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as a matter of fact.

Upon its surface, this simple statement appears to express an obligation merely to use reasonable care, that is, the ordinary negligence standard. Dean Prosser has taken it to mean this. 46 Some judges, too, have confused this principle with the usual standard of reasonable care. However, most English and Canadian judges have not been satisfied with this facile interpretation. Instead, they have fastened onto the words "unusual danger" and, as if they were statutory in form, have constructed around them a body of law that is always confusing, often meaningless, sometimes unjust and totally unnecessary. Hypnotized by the prose of Justice Willes, the mid-Victorian architect of the law, 47 whom the "muse has inspired", 48 they have adhered to the concept of unusual danger for over a century without checking its genealogy. Had they done so, they would have discovered that Justice Willes mis-stated the law.

Although his Lordship proclaimed that it was "settled law", the principle he enunciated was not "settled law" at all. Indeed, no mention of "unusual danger" was made by counsel or by any of the judges during the argument of the case. 49 Nevertheless, Justice Willes felt compelled to employ this term in the course of his opinion on no less than five separate occasions. 50 Elsewhere in the opinion, Justice Willes claimed that there was "an undoubted course of authority and practice" to the effect that an occupier

45 Supra, footnote 26, at p. 288, and at p. 313 (Ex. Ch.).
46 Prosser, op. cit., footnote 33, p. 395.
47 Fleming, op. cit., footnote 6, p. 404.
49 (1866), L.R. 1 C.P. 274, at pp. 278-283.
50 Ibid., at pp. 286 (twice), 287, 288, 289.
had to use reasonable care "to prevent damage from unusual danger, of which the occupier knows or ought to know",\(^{51}\) but, strangely, the three cases cited in support of this "undoubted" authority contain not a whisper of the words "unusual danger". In fact, in one of the trio, *Lancaster Canal v. Parnaby*\(^{52}\) Justice Tin-dal stated that "the common law in such a case imposes a duty on the proprietors [of the canal] . . . to take reasonable care . . .",\(^{53}\) just like a shopkeeper, who is liable for "neglect".\(^{54}\) Similarly, in *Chapman v. Rothwell*,\(^{55}\) the second case, the court held that the plaintiff, who fell through a trap door, stated a good cause by alleging "negligence" and "improper conduct".\(^{56}\) The third case, *Southcote v. Stanley*,\(^{57}\) was not concerned with an invitee but with a licensee who was hurt by a glass door in a hotel. The defendant's demurrer was sustained because the plaintiff failed to allege that the occupier, though negligent, had knowledge of the defect. One cannot escape the conclusion that there was no authority prior to *Indermaur v. Dames* to support Justice Willes in so far as he employed the phrase "unusual danger".\(^{58}\) On the contrary, prior to the *Indermaur v. Dames* decision, the duty to an invitee was merely to use reasonable care for his protection.\(^{59}\)

Despite its questionable ancestry, *Indermaur v. Dames* has, over the intervening century, pulled itself up by its own bootstraps rather remarkably. In one article Professor Griffith waxed poetic on the scholarly attributes of Justice Willes and the "exact accuracy of the definition".\(^{60}\) "If learning, care and skill were ever applied in formulating a duty", he declared, "they were applied by Willes J., in *Indermaur v. Dames* . . ." "[He] who alters one word of it does so at his peril . . .," he warned, for Justice Willes was "too accurate a lawyer and too skillful a draftsman to mean anything but what he expressed".\(^{61}\) Soon after, Justice Middleton of Ontario cited this article, by "a very careful writer", to justify

\(^{52}\) (1839), 11 Ad. & E. 223, 52 R.R. 329 (Ex. Ch.).
\(^{56}\) (1856), 1 H. & N. 247, 108 R.R. 549.
\(^{57}\) Charlesworth, *Law of Negligence* (1938), pp. 166 and 167 cites several cases, none of which support him.
\(^{58}\) *Pickard v. Smith* (1861), 10 C.B. (N.S.) 470, 128 R.R. 790 “It was his obvious duty . . . to take reasonable precautions not to injure persons lawfully on the platform . . .” per Williams J. (Plaintiff, who fell into hole on railway platform recovered from lessee).
\(^{60}\) *Ibid.*, at pp. 256 and 267.
his reliance on Willes J.'s formulation. More recently, Justice Spence of the Supreme Court of Canada explained that Justice Willes "outline of liability has been accepted universally since the day it was pronounced", and it has been termed "classic" at least once. Eminent scholars such as Professors Fleming, Friedmann, and Salmond have succumbed and even Sir Frederick Pollock felt that the duty was so "carefully indicated by Willes J. that little remains to be said on that score". Only Sir Percy Winsfield seemed to recognize that there had been no earlier decision on the issue and that Indermaur v. Dames was a new "starting point".

Since its illegitimate birth, this rule has produced confusion rather than clarity. Professor Friedman assailed the "unnecessary and, in some respects, unfortunate specialization", and Justice MacDonald bemoaned the difficulty of applying the concept in a changing world. In the same case an unusual danger may be described as an "unexpected danger" or simply as "a danger", without any descriptive adjective. In another unusual danger case one may meet the terms "concealed danger", "trap" or the unadorned noun "danger". On occasion a court will cite Indermaur v. Dames and then go on to hold that the invitor was obliged to "use reasonable care to make the premises reasonably safe for invitees", which was not what Justice Willes had said at all. Even the Supreme Court of Canada has been guilty of unconsciously blurring the duty owed to an invitee, as in Hillman v. MacIntosh.

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65 Westenfelder v. Hobbs Manufacturing (1925), 57 D.L.R. 31 (Ont. C.A.), at p. 34.
76 Ibid., per Robertson C.J.O., at p. 625.
78 Ibid., per Fisher J.A., at p. 182 (O.W.N.).
79 Ibid., per Robertson C.J., at p. 180 (O.W.N.).
81 Supra, footnote 21, at p. 389.
for example, where Justice Rand, with Justice Judson concurring, stated that "the duty . . . was one of personal responsibility to see that reasonable care was exercised to maintain in proper condition this [elevator]." Justice Martland, with Justices Locke and Cartwright concurring, quoted from *Indermaur v. Dames*, held that there was an unusual danger and then, gratuitously, stated that the premises were "not reasonably safe".\(^79\)

Not only has there been verbal incoherence, but there have been substantive inconsistencies. Ice and snow, for example, has been classified as an unusual danger by some courts,\(^80\) while others have held the opposite.\(^81\) An object on the floor of a department store may sometimes be an unusual danger\(^82\) and other times it may not be,\(^83\) and conflicting cases may also be found that deal with stairways\(^84\) and trap doors.\(^85\) It is no small wonder that judges have complained bitterly\(^86\) and that authors have described the law as "uncertain," "illogical" and "inadequate".\(^87\)

Moreover, as a result of these cases, some incredible anomalies may now exist. It has been suggested that snow and ice cannot be an "unusual danger" in a Canadian winter, but there is no hint anywhere that it could not amount to a "concealed danger" or "trap". If this were so, a licensee, who is normally entitled to less care than an invitee, might recover, while an invitee, who is owed more care, would be denied recovery. This cannot be so! Furthermore, despite the historic protection accorded it, a municipality might be held liable for gross negligence in failing to clear ice and snow from the highway,\(^88\) while a private business in similar circumstances might escape liability. This cannot be right either!


\(^{82}\) Diedericks v. Metropolitan Stores Ltd. (1957), 20 W.W.R. (N.S.) 246, 6 D.L.R. (2d) 751 (Sask. Q.B.) (plastic toy).


\(^{85}\) *Indermaur v. Dames*, supra, footnote 26; Hugget v. Meyers, [1908] 2 K.B. 278 (no liability).

\(^{86}\) Chief Justice Ilsley in *Smith v. Provincial Motors*, supra, footnote 80, at p. 411.

\(^{87}\) Angus MacDonald, *op. cit.*, footnote 29, at p. 365.

\(^{88}\) Municipal Act, R.S.O., 1960, c. 249, s. 443 (4).
Let us now explore in more detail what the Canadian courts have done in practice with this dismal legacy of the Victorian era.

2. What the Courts Have Done.

The Canadian judiciary has attempted to breathe some meaning into this doctrine. Once it is decided that the entrant is an invitee, four additional questions must be asked: First, was there an unusual danger? Second, did the defendant know or have reason to know about it? Third, did the defendant act reasonably? Fourth, did the plaintiff use reasonable care for his own safety or did he voluntarily incur the risk? It is upon the first step only, that of deciding whether there was an unusual danger, that this discussion will concentrate.

The term unusual danger has been held to be a “relative” one, depending upon the kind of premises involved and the class of persons who normally visit them. Courts have also agreed that it is an objective notion, rather than a subjective one, as was previously thought to be the case. Perhaps the most concise judicial declaration was that of Justice Vincent C. MacDonald in MacNeil v. Sobey’s Stores: “Unusual danger is a term of relation; for danger may be unusual having regard to the nature of the premises or the class of persons to whom the invitee belongs”. There is merit in examining these factors. No one expects a coal mine or a construction site to be kept safe enough for frolicking society matrons, for the burden upon the enterprise would be too great. On the other hand, an office building or department store, that is regularly visited by such ladies, might well be required to measure up to this standard.

By utilizing this test, our courts have included in the realm of unusual dangers, a plastic toy, a strawberry or a broken bottle of onions on store floors and a broken bottle of Cheez Whiz on

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89 See Smith v. Provincial Motors, supra, footnote 80, at p. 412 (Illesy C.J.).
94 Diedericks v. Metropolitan Stores, supra, footnote 82.
95 MacNeil v. Sobey’s Stores, supra, footnote 92.
96 Bennett v. Dominion Stores, supra, footnote 71.
a shelf. Similarly, a rock falling in a quarry, excess wax on a floor and an open elevator shaft have been so found. A cavity at the top end of an old-fashioned escalator is an unusual danger as are bricks falling from the ruins of a neighbouring building. A platform on a stairway coloured in a way that was indistinguishable from the floor and an unsteady pillar that contained a light on a dance floor in a hotel gave rise to liability. So too, a plank in a tobacco drying kiln as well as ice and snow have been held unusual dangers.

In many other cases, however, the courts have refused to find that there was an unusual danger involved and the plaintiff’s claim was prematurely extinguished. A stroller on a department store floor, for some strange reason, has been twice held not unusual. Nor are other “inanimate” objects such as chairs, tables and “animate objects such as young children” considered unusual. Likewise, a slippery floor, a puddle, hawthorn branches near a schoolyard, slush on a beverage room floor and a tiny hole in the floor did not qualify. So too, unsupported sheets of roofing material on an unfinished shopping center, a glass door in a

98 Fiddes v. Rayner Construction, supra, footnote 90.
100 Hillman v. MacIntosh, supra, footnote 21.
106 Smith v. Provincial Motors, supra, footnote 80; Levy v. Wellington Square, supra, footnote 80.
111 Portelance v. Trustees of R.C. School Board, supra, footnote 91.
113 Arendale v. Federal Building, supra, footnote 41.
restaurant" and a door closing slowly on a child’s finger were held to be usual in the circumstances there involved. Ice and snow on the steps of a motel in Cache Creek, British Columbia or on the parking lot of a supermarket in Ontario in the middle of the winter were also said not to be unusual dangers.

Professor Harris, in an extremely perceptive article, has suggested that: "The duty to an invitee seems now to be merely an application in the circumstances of the broad rules of negligence law". Without doubt, the mental exercise engaged in by judges does resemble the approach in a negligence case, but, alas, there are recognizable differences also. On occasion, for example, a court reaches the conclusion that, although he has created an unusual danger, the occupier has exercised reasonable care, with regard to eliminating it or warning about it.

In determining whether conduct is unreasonable, judges and juries have always balanced the chance of harm and the seriousness of the danger threatened with the economic burden to reduce that risk. Whatever verbal tests or legal theories are invoked this weighing process cannot be avoided. To rule that a coal mine must be made safe enough to receive children might be oppressive, yet to require that a nursery school be kept this safe would not; this is because children would seldom, if ever, be encountered in a coal mine, while the nursery would be visited almost exclusively by children. In the latter situation, the game is worth the candle, but it is not in the former. The only trouble with this balancing test, however, is that our courts do not openly use it in deciding these invitee cases. On the surface, they first purport to determine whether there is an unusual danger and, then, they begin the balancing process to assess whether reasonable care in the circumstances was employed to remove it or to warn of its presence. Thus an invitee must leap over two hurdles, instead of the one he would have to overcome if ordinary negligence principles were used.

Moreover, the court decides whether there is an unusual danger as a question of law, rather than the jury deciding it as a question

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117 Sanders v. Schauer, supra, footnote 81.
118 Such v. Dominion Stores, supra, footnote 81.
119 See op. cit., footnote 29, at p. 429.
120 For example, Bennett v. Dominion Stores, supra, footnote 71.
121 See Fleming, op. cit., footnote 6, p. 118.
of fact. In other words, when a court decides that there was no unusual danger, the result is that there is no duty owed to the entrant at all. The question of negligence becomes superfluous, and the claimant never gets to the jury. Another result is that the case may become so complicated that counsel, in frustration, give up the right to jury trial. Even where the jury is dispensed with, judges are not agreed upon how one proves the quality of unusualness. Some courts will take judicial notice that certain dangers are usual, while others insist upon evidence to be adduced by the plaintiff as to its unusual quality. One Canadian judge, seemingly oblivious to this problem, was prepared to find simply that the presence of an unusual danger might be "demonstrated by what actually happened."

Nevertheless, when one examines the Canadian decisions closely, one may discern that the balancing process is being undertaken tacitly, despite the word formulae recited by the courts. For example, one factor for which the courts have shown concern is the economic burden that must be shouldered by occupiers in keeping their premises reasonably safe. One judge remonstrated that "it would be unreasonable to expect the defendants to employ a corps of people to be strewn throughout their shop to mop up any dampness or moisture or drippings from umbrellas." In another case, Justice Spence of the Supreme Court of Canada placed some reliance upon "the ease by which the occupier might avoid [the danger]" and, since a few strips of matting would have cured the problem, he was prepared to impose liability "because the danger could have been prevented by these economical and easy precautions." In the same vein, a court may be impressed by the fact that there was little difficulty in clearing what was not a heavy snowfall from the night before.

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127 No fewer than thirty-one jury questions were thought necessary in an unreported case brought to my attention by B. D. Raphael Esq., Toronto, Mulchrone v. Jones (1967), Co. Ct., County of York.
128 Rafuse v. T. Eaton Co., supra, footnote 83.
129 See Justice Ritchie in Campbell v. Royal Bank, supra, footnote 19, at p. 91 (S.C.R.).
133 Relied upon in Farley v. City of Brandon, supra, footnote 80.
134 Levy v. Wellington Square, supra, footnote 80, at p. 293 (O.R.).
Ilsley, in *Smith v. Provincial Motors*, was influenced by the ease with which the ice could be removed and declared that the “[r]emoval of the danger would have been easy—the application of a little salt and sand would have removed it . . .”.

Another factor which seems to weigh heavily with the court is the number of persons exposed to the risk. Where many people are endangered, the chance of harm increases proportionately and more care may be exacted. Justice Spence, in *Campbell v. Royal Bank of Canada*, seemed to stress the fact that the “public resorted [to the bank] in large numbers”, and that it was a “busy day . . . in a large bank in a city of 30,000, in mid-afternoon . . .”. This factor also affected the court in *Levy v. Wellington Square*, where “at this particular location there are many persons using this entrance”, and in *Bennett v. Dominion Stores*, where “large numbers of customers must pass”.

The type of person injured may also be important. For example, ordinary customers in a bank, a trucker on a construction site and a delivery man in a factory are accorded substantial protection, for they are relatively helpless in the circumstances because of a lack of familiarity with the dangers. On the other hand, a window cleaner, a carpenter in an unfinished house, the owners inspecting an incomplete shopping centre and an adult woman used to logging camps are not as well protected for they are better able to look after themselves. The defendant’s conduct should be judged in the light of the type of persons he expects to enter his premises. One who invites or expects ladies, children and deliverymen to enter his premises must govern himself accordingly; one who has no reason to expect such persons upon his land should not be expected to act as if he did. This thinking is, of course, consistent with general negligence principles, as it should be. However, to judge whether a danger is unusual in relation to a particular plaintiff and his individual knowledge thereof

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131 *Supra*, footnote 80, at p. 412. See also *Joubert v. Davidner*, *ibid.*, at p. 332.
134 *Supra*, footnote 80, at p. 293 (shopping centre).
135 *Supra*, footnote 71, at p. 270 (supermarket).
137 *Fiddes v. Rayner Construction*, *supra*, footnote 90.
142 *Sanders v. Schauer*, *supra*, footnote 81.
flies in the teeth of general negligence principles. Yet, for many years Canadian courts followed _London Graving Dock v. Horton_, to the effect that a danger is unusual to one who has knowledge of it, until finally, they saw the light and brought the question of notice into line with their other progressive pronouncements on _volenti non fit injuria_. In these invitee cases, the defendant should be judged solely by reasonableness in the circumstances and then, but only then, should the conduct and knowledge of the individual plaintiff be considered in deciding whether his recovery should be denied on the basis of voluntary assumption of risk or merely reduced because of his contributory negligence.

Another matter that is considered by courts is the seriousness of the damage threatened. A tiny hole, a bit of snow, a puddle did not generate liability, while a gaping elevator shaft, falling bricks or rocks and a dangerous hole in an escalator did. The courts have alluded, on occasion, to the importance of the degree of danger in their deliberations, as in the _Campbell v. Royal Bank_ case, where the trial judge found that there was a "dangerous glaze of water" at the wicket. Similarly, Justice MacDonald, in _Bennett v. Dominion Stores_, stressed the extra danger to shoppers who were distracted by the displays of goods in modern self-service stores.

In deciding these cases most courts have stressed the importance of the facts and the circumstances of the case being decided. Chief Justice Ilsley, for example, struck by the "variations or modifications of the rule", pointed out, in _Smith v. Provincial Motors_, that the cases are reconcilable on the basis the "duty is correctly stated in every case having regard to the facts in that particular case". In addition, Justice MacDonald of British Columbia added his voice to the chorus declaring that, in determining if there is an

143 Foster and Robillard v. C. A. Johannsen & Sons, supra, footnote 114, at p. 496.
146 Such v. Dominion Stores, supra, footnote 81.
147 Nelson v. Lithwick, supra, footnote 110.
148 Cosgrove v. Busk, supra, footnote 112.
149 Hillman v. MacIntosh, supra, footnote 21.
151 Fiddes v. Rayner Construction, supra, footnote 90.
152 Cameron v. David Spencer, supra, footnote 101.
153 Supra, footnote 19, at p. 93 (S.C.R.).
154 Supra, footnote 71; see also _McNeil v. Sobey's Stores_, supra, footnote 92, at p. 763.
155 Supra, footnote 80.
unusual danger, each case must be "considered on its own special facts". The pronouncements add weight to the view that the issue of unusual danger is not and should not be treated as a question of law for the court, but as a negligence issue for the jury.

The ice and snow cases are perhaps the best test of this approach for they seem to wander aimlessly in a non-man's land, sometimes being unusual dangers and other times not. For example, in Levy v. Wellington Square, the court explained that, although some authority indicated that ice and snow was not unusual in a Canadian winter, in this "particular location", where snow was covering ice beneath it, it was an unusual danger. So too, in Smith v. Provincial Motors, a thin film of ice, in the form of a stream between eight and twelve inches wide and the same colour as the asphalt-paved car lot except for a slight shine, was held unusual in the circumstances. On the other hand, in Such v. Dominion Stores, the small patch of ice on the supermarket parking lot was not felt to be unusual in the circumstances, though Justice Schroeder's language, if read indiscriminately, might lead one to the conclusion that ice and snow can never be held unusual in Canada. Of course, there cannot be any general legal rule dictating whether a danger is unusual or not and, indeed, there should not be. Circumstances vary and the results of the cases must alternate accordingly. To fashion a concept of unusual danger that gives the appearance of being a legal rule to govern all ice and snow cases does no help but only misleads.

It is time to discard once and for all the concept of unusual danger. It originated when a great judge mis-stated the law, it lifted itself up by its own bootstraps and hung on miraculously for a century. The Americans, because they had adopted the English law prior to 1866, never accepted the heresy of Justice Willes and the English scrapped the concept years ago. If the Canadian courts do not wish to abandon the notion directly by judicial legislation, they can revert to the original pre-Willes standard of reasonable care or they may choose to follow certain statements in the Supreme Court of Canada to the effect that reasonableness is the test. This would simplify things, for the facts of each case could

156 Cameron v. David Spencer, supra, footnote 101, at p. 288.
158 Supra, footnote 80, at p. 571 (D.L.R.).
159 Supra, footnote 80.
160 Supra, footnote 81.
161 Hillman v. MacIntosh, supra, footnote 21, at p. 389, per Rand J. and at p. 392 "The premises [were] not reasonably safe".
then be put to the jury or to the trial judge to decide if the occu-
plier was reasonable in the circumstances. The jury or judge
would then balance the cost to the defendant and the risk to en-
trants, by looking *inter alia* at the type of premises, the number
and class of people who normally enter, the seriousness of the
harm threatened and the cost of avoiding it. Then, if it is felt that
the occupier had acted in a substandard way, the conduct of the
particular plaintiff should be examined to see if he voluntarily as-
sumed the risk or whether he was contributorily negligent, which
operation should be kept separate and not combined with the duty
issue. If this were done, Justice MacDonald’s prophecy to the effect
that “changes in merchandising will produce ultimate changes in
the governing law . . .” of occupiers liability would become a
reality.166 No one doubts that “there has been an increasing ten-
dency in the courts to give a broader interpretation to what condi-
tions constitute ‘unusual danger’ . . .”166A

II. Products Liability.

The Canadian manufacturing industry has been transformed dra-
matically in the last few decades,162 but the Canadian law of prod-
ucts liability has not kept abreast of these sweeping changes.
True, the rule of no liability without privity has been replaced by
the rule that negligent manufacturers of products may be respon-
sible to persons not in privity with them, but this result, which
Lord Abinger termed “the most absurd and outrageous conse-
quences” over a century ago, did not come easily nor swiftly.164
Various exceptions had to be fashioned over the decades by courts
unhappy with the *status quo*; for example, where the defendant
had *knowledge* of a defect or where the product involved was
“inherently dangerous”, tort liability could be imposed.165 But this
sorry state of affairs could not long endure in a burgeoning indus-
trial society and in 1916 Justice Benjamin Cardozo of the New
York court of Appeals in *MacPherson v. Buick Motors*,166 ex-

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162 Bennett v. Dominion Stores, supra, footnote 71, at p. 270.
163A Joubert v. Davidner, supra, footnote 80, at p. 330, per Disbery J.
163 Since the middle of the depression the value of goods manufactured
in Canada has increased tenfold to twenty-five billion dollars worth, Canada
Year Book (1966), p. 675. I am grateful to Michael O’Keefe of the
British Columbia Bar, for his assistance on this part of the article.
164 Winterbottom v. Wright (1849), 10 M. & W. 109, at p. 114, 152 E.R.
402, at p. 405.
165 See Prosser, op. cit., footnote 33, p. 659; see also Ross v. Dunstall
(1921), 62 S.C.R. 393, 63 D.L.R. 63; *Nokes v. Kent Co.* (1913), 23
O.W.R. 771, 9 D.L.R. 772; Stalleybrass, Dangerous Things and Non-
Natural User (1927-29), 3 Camb. L.J. 376.
166 (1916), 217 N.Y. 382, 111 N.E. 1050.
panded the second exception so as to include "anything which would be dangerous if negligently made". It took sixteen more long years for *MacPherson v. Buick Motors*, to win the *imprimatur* of the English House of Lords and thereby to assure itself of universal acceptance in Canada.¹⁶⁷ It is a virtually unknown and unheralded fact that eleven years earlier, the Canadian Supreme Court had already learned of the existence of *MacPherson v. Buick Motors* and cited it in a decision.¹⁶⁸ Unfortunately, however, the Supreme Court did not recognize the full purport of the *MacPherson* decision and treated it merely as another instance of the "inherently dangerous" exception. The House of Lords, in 1932, demonstrated that it understood fully the significance of the *MacPherson* decision and laid down the principle of *Donoghue v. Stevenson* that is still the heart of products liability law throughout the entire Commonwealth. Lord Atkin formulated the rule thus:¹⁶⁹

A manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation of putting up the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.

Upon the foundation of *Donoghue v. Stevenson* there has been erected a new body of law that has continually improved the position of the Canadian consumer. This development, however, has been abortive. In the United States, where it all began, products liability law has undergone another metamorphosis to a regime of strict liability, which Dean Prosser, who is not normally given to superlatives, has described as "the most rapid and altogether spectacular overturn of an established rule in the entire history of the law of torts".¹⁷⁰ Yet, Canadian courts and counsel seem totally oblivious to this, despite the fact that most of the manufactured goods produced in Canada are fabricated by subsidiaries of American corporations which,¹⁷¹ paradoxically, receive less protection against

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¹⁶⁸ *Ross v. Dunstall*, *supra*, footnote 165.
¹⁷⁰ See *op. cit.*, footnote 11, at pp. 793-794; See also Franklin, When Worlds Collide: Liability Theories and Disclaimers in Defective-Product Cases (1966), 18 Stan L. Rev. 974; Kessler, Products Liability (1967), 76 Yale L.J. 887.
civil liability in their homeland than they do in Canada. In the next decade, Canadian tort law must choose whether we should embrace strict liability to the consumer, reject it outright, or whether we should sit back and let the English House of Lords in the course of time decide the matter for us, as they did before over three decades ago.

1. The Reach of Donoghue v. Stevenson.

a) Who may sue?

In describing the range of claimants to whom the manufacturers owed the new privity-less duty of care, Lord Atkin used the term "consumers" or "ultimate consumers". During the intervening years, as might have been prophesied, this vague term has been stretched to cover a wide assortment of potential claimants. Obviously, any actual "purchasers" of a product would enjoy the protection; where someone buys a bottle of soda pop in a restaurant, a drugstore, a cigar store or from some other retailer, he may launch an action, not only against the seller, but against the manufacturer of that product. It appears to make no difference that the person is a gratuitous recipient of the product or a subsequent purchaser from the original buyer. Similarly, where the product was purchased indirectly through an "agent" of the claimant, the duty is still owed as in the case of a daughter who sent her father to a cafe to buy her a soft drink, a mother who sent her small son to the drug store for some hair dye and a plaintiff whose friend purchased a bottle of beer for him in a hotel. The duty extends to any member of the purchaser's family, such as a young child injured by a defective product brought by an older sister or by his parents and such as a

172 Donoghue v. Stevenson, supra, footnote 167, at p. 599.
173 Mathews v. Coca Cola, [1944], 2 D.L.R. 355 (Ont. C.A.); Corona Soft Drinks Co. v. Champagne (1938), 64 Que. K.B. 353.
wife injured by an exploding beer bottle purchased by her husband.\textsuperscript{184} Other members of the household like a char-woman\textsuperscript{185} and a social guest\textsuperscript{186} are also protected.

Occasionally, a court does not evince any concern at all over whether the claimant is a purchaser, a relative or a member of the buyer’s household,\textsuperscript{187} indicating that the scope of the duty is even broader than this. Anyone who is contemplated as a user of the product or who “takes control” of it is considered to be in the “same relationship as a consumer”,\textsuperscript{188} as is anyone who would reasonably “come in contact with” the product.\textsuperscript{189} Consequently, any reasonably foreseeable bystander, including anyone lawfully on the road like a pedestrian,\textsuperscript{190} a passenger\textsuperscript{191} or a spectator at a fireworks display can now sue.\textsuperscript{192} Moreover, plaintiffs by subrogation including a city that paid workmen’s compensation benefits to an injured employee,\textsuperscript{193} an insurance company that reimbursed someone in the elevator of its insured\textsuperscript{194} and a hospital required to compensate anyone injured by its defective equipment\textsuperscript{195} are countenanced as legitimate claimants. One judge prophesied that liability might be imposed upon “an indefinite number of persons”\textsuperscript{196} and the late Chief Justice Porter, of the Ontario Court of Appeal, accurately summed up the law when he declared that “consumer is not meant in the narrow sense”.\textsuperscript{197} It is clear that the term “consumer” now applies to anyone who could be considered one’s “neighbour” in the broadest sense.

\textsuperscript{189} Rae v. T. Eaton Co., supra, footnote 183, at p. 530.
\textsuperscript{190} Stennett v. Hancock, [1939] 2 All E.R. 578.
\textsuperscript{191} Ibid. (dictum).
\textsuperscript{192} Martin v. T. W. Hand Fireworks Co. (1963), 37 D.L.R. (2d) 455 (Ont. S.C.).
\textsuperscript{195} Murphy v. St. Catherine’s General Hospital (1964), 41 D.L.R. (2d) 697 (Ont. S.C.), at p. 707 (dictum).
\textsuperscript{196} Stennett v. Hancock, supra, footnote 190.
\textsuperscript{197} Shields v. Hobbs Manufacturing, supra. footnote 188, at p. 359.
b) What products?

Virtually every type of product under the sun may now give rise to liability. Although some of the original statements in the House of Lords seemed to limit the duty to manufacturers of “articles of food and drink” or “articles of common household use”, others applied it more generally to any “manufactured products”. Indeed, Lord Buckmaster, in dissenting, contended that the principle could not be limited to food alone, and that “... it must cover the construction of every article” including “the construction of a house”. “If one step, why not fifty?” he warned. Without any doubt whatsoever, the fifty steps have been taken over the intervening years. Defective food products like chocolate milk, bread, soda pop, beer, and pork and substandard containers in which food is packaged may attract liability. The protection spread to articles that might be subject to intimate bodily use such as hair dye, underwear, other clothing, bath salts, perfume, combs for hair, cigarettes, surgical equipment and the like. When a glue can that popped open unexpectedly, a defective oil pump, weed spray, automobiles, an elevator, etc. ...
radiators, fertilizer, a ladder, a stove and other chattels yielded tort liability, it became apparent that all other products would be controlled by tort law's requirement of reasonable care. Indeed, the only "products" that were able to withstand the inexorable spread of *Donoghue v. Stevenson* were houses and fixtures contained therein. By distinguishing *Donoghue v. Stevenson* as dealing with chattels only, the English courts clung to *Malone v. Laskey* and refused at first to apply the duty of care to the builder, repairer or vendor of real property. There they dug in, and only in the last decade have they surrendered to the inevitable, by holding a repairer and a builder of real property liable for their negligence, like anybody else. In Canada, Justice Adamson of Manitoba, in a strong dictum, had indicated the foolishness of distinguishing for this purpose between chattels and realty as early as 1939: "I can see no reason why the legal liability for negligently erecting a heavy fixture in a cottage should be different from negligently erecting a similar fixture in a railway coach or larger motor bus." Refusing to follow the earlier real property cases, Justice Adamson declared that he was bound by the Privy Council's decision in *Grant v. Australian Knitting Mills* which he felt was indistinguishable. Nevertheless, the case, involving a hot water radiator which fell on the plaintiff, was dismissed on other grounds and this opinion does not appear to have been followed in later cases. It was only in 1962, when Justice Richardson, without citing Justice Adamson's dictum, held both the vendor and the builder of a home containing a defective cupboard liable to someone injured thereby, that it became apparent that *Malone v. Laskey* was finally dead.

221 Johnson v. Summers, supra, footnote 185.
224 Coakley v. Prentiss-Wabers Stove Co. (1923), 182 Wis. 92, 195 N.W. 388.
225 See Prosser, op. cit., footnote 33, p. 662, for others.
230 Johnson v. Summers, supra, footnote 185.
231 Ibid., at p. 667.
232 Ibid.
233 Lock v. Stibor, supra, footnote 186.
c) Who may be sued?

The case of Donoghue v. Stevenson234 limited itself to the imposition of liability upon manufacturers and, consequently, the producers of such varied products as underwear,235 a weed spray,236 soda pop,237 and a dairy which processed a bottled chocolate milk238 must observe reasonable care. Liability has also been imposed upon a bakery for glass particles discovered in its bread239 and upon soft drink producers for such items found therein as a mouse,240 a chain,241 glass,242 caustic soda243 and chlorine.244 In one old case there was an indication that a meat packer might not be considered a “manufacturer”, but this statement is of doubtful authority to-day.245 The duty extends beyond manufacturers. For example, it is the soft drink bottler who normally bears the tort liability for foreign objects that emerge from their product, even where the bottles are purchased from a third party,246 whereas the producer of Coca Cola syrup is not liable for an explosion of a bottle of Coca Cola over which it never had any control.247 Similarly, a glue producer was held liable when the top of a glue can flew off unexpectedly, whereas the maker of the container was not, since the negligence consisted of the former’s failure to warn.248 In the same way, because the public relies on their advertising, because they have the opportunity to inspect each part for safety249 and because of the difficulty in discovering which one of the many components is to blame for an accident, assemblers of automobiles,250 composite surgical instruments like a catheter251

234 Supra, footnote 167.
235 Grant v. Australian Knitting Mills, supra, footnote 209.
236 Ruegger v. Shell Oil, supra, footnote 218.
238 Shandloff v. City Dairy, supra, footnote 176.
239 Arendale v. Canada Bread Co., supra, footnote 182.
240 Saddlemire v. Coca Cola, supra, footnote 175; Mathews v. Coca Cola, supra, footnote 173.
241 Corona Soft Drinks Co. v. Champagne, supra, footnote 173.
242 Ferstenfeld v. Kik Cola (1939), 77 Que. S.C. 165 (no liability on other grounds).
243 Willis v. Coca Cola, supra, footnote 176 (no liability on other grounds).
244 Varga v. John Labatt, supra, footnote 181 (beer).
245 Yachetti v. John Duff & Sons, supra, footnote 206 (no liability on other grounds).
246 Swan v. Riddle Brewery, supra, footnote 184.
248 Stewart v. Lepage, supra, footnote 187.
249 Fleming, op. cit., footnote 6, p. 474 et seq.
251 Murphy v. St. Catherine’s General Hospital, supra, footnote 195, at p. 707.
and assemblers of other products such as television sets, washing machines, airplanes and the like labour under this duty. Of course, if the producer of a specific component part could be proved negligent, he would undoubtedly be held liable to the consumer or he would be required to indemnify the assembler for any damages the latter had to pay as a result of the former's fault.

The courts have not stopped there, but have placed repairers as well as producers and assemblers under the obligation to use care. In his dissent in Donoghue v. Stevenson, Lord Buckmaster pointed out the inevitability of this development if the majority view prevailed and later courts have, ironically, utilized his dictum in visiting liability upon repairers. For example, in Marschler v. Masser's Garage a negligent repairer of automobile brakes was held liable to indemnify its owner for an amount paid in settlement to a third person whom the owner had injured. Justice LeBel stated that, "... the repairer of chattels ... may be, and sometimes is, held liable to persons who are complete strangers to him. His responsibility may extend to an indefinite number of persons for indefinite amounts of money over indefinite periods of time for the person who repairs the brakes of a motor vehicle must be assumed to know that if his work is done carelessly that vehicle may cause injury and damage not only to the person with whom he made his contract to repair, but also to others who may be passengers in the vehicle or lawfully upon the highway". Similarly, repairers of a truck wheel and of an elevator were held responsible.

The duty has been broadened still further. A person who installs a product at its place of use is neither a manufacturer nor a repairer, yet he, too, must exercise reasonable care. Thus, where a steam valve was negligently installed in a ship, where an elevator was improperly set up in a building and where a radiator was placed in a home, civil liability may ensue. Similarly, a

252 Evans v. Triplex Glass, [1936] 1 All E.R. 283 (K.B.D.) (defective windshield). But cf. Goldberg v. Kollman Instruments (1963), 191 N.E. 2d 81 where the maker of a defective altimeter was absolved while the airplane manufacturer was held.

253 Supra, footnote 167, at p. 577.

254 Haseldine v. Daw, [1941] 2 K.B. 343, per Scott L.J.

255 Supra, footnote 219.

256 Ibid., at p. 491 (D.L.R.).

257 Stennett v. Hancock, supra, footnote 190.

258 Haseldine v. Daw, supra, footnote 254.


261 Johnson v. Summers, supra, footnote 185 (dictum).
wholesaler or a distributor of a product who places his label upon it is responsible, even though he does not participate in its actual production. Someone who merely recommends the use of a product without giving adequate warning may be caught. So too, liability may be imposed on one who applies or administers a product, as where dangerous spray was applied to cattle, where fertilizer was mixed with a dangerous substance and where harmful hair dye was used on the plaintiff. One court went as far as to indicate that a customer in a store, injured by an exploding jar on a shelf, might be able to recover from the storekeeper on the basis merely of the latter’s “control” of the product, but another court stopped short of making responsible the waiter who served a bottle of beer containing chlorine, at least where he had no knowledge of the defect. The reach of Donoghue v. Stevenson, therefore, has been spread far beyond what could have been contemplated by the Law Lords who fathered it in furtherance of a policy of consumer protection, but the requirement of proof of negligence has hindered the full achievement of this goal.

2. The Standard of Care.

The standard of care demanded of these Canadian manufacturers, distributors, repairers and others is not a strict liability at all; they are charged only with the duty to use reasonable care in the circumstances. Professor Fleming has suggested that the standard has “assumed some characteristics of strict liability . . .” and Professor Alexander, has ruminated that, although negligence is relied upon “in theory”, “our courts, in these products liability cases are in fact imposing virtually strict liability”. Unhappily, this just is not so. Perhaps, by employing devices like res ipsa loquitur, our courts have tended somewhat in this direction.
particularly in the food cases, but proof of fault in the testing, processing, packaging and distribution of goods is still required. If a test is not “commercially feasible” or if government inspectors authorize the sale of a particular product, no liability will be incurred. By and large, liability will be found where someone blunders, but not otherwise. Naturally, the custom of the industry will be given great weight in determining this standard, but it will not be conclusive.

Manufacturers are subject to a duty to warn consumers about any dangerous properties of their product whether they are “inherent dangers” or “dangers attendant on use”. Even where a product is dangerous only to a few people, they must be warned so that they may test the product before using it, but a caution is unnecessary if the danger is “a mere possibility”. All warnings must be reasonably communicated. To bury the caveat in an accompanying brochure will probably not suffice, for, presumably, people rarely read these pamphlets. The warning should be printed on the container’s label; it should be an arresting one and it should clearly describe the specific danger. For example, a caution to the effect that a certain weed killer should be kept away from flowers was held inadequate where an invisible spray therefrom floated without any wind for a quarter of a mile and damaged crops. The courts have evinced no sympathy at all for the complaint that “sales would be prejudicially affected” by clear warnings. A manufacturer is not obligated to give a superfluous warning however. Consequently, one need not warn that a hammer can hurt a finger, that pork must be cooked, that a knife will cut or that a match will burn. Similarly, where the product is a highly technical one that will be used only by experts who have

274 See generally Fleming, op. cit., footnote 6, p. 474 et seq.
275 Yachetti v. John Duff, supra, footnote 206, at p. 197.
276 Ibid., at p. 201 (pork).
277 Fleming, op. cit., footnote 6, p. 122.
278 Stewart v. Lepage, supra, footnote 187.
280 Mrs. J. at trial in O’Fallon v. Inecto Rapid Canada Ltd., supra, footnote 180 (plaintiff sensitive to dye).
281 Rae v. T. Eaton Co., supra, footnote 183, at p. 536.
284 Riegger v. Shell oil, supra, footnote 218.
286 Fillmore’s Valley Nurseries v. N. American Cyanamid, supra, footnote 279, at p. 321.
full knowledge of it and not by the general public, a caution is unnecessary. Thus, a customer need not be warned personally about a hair dye, if the hairdresser is forewarned.

In defective food cases, the Canadian courts have indirectly required more of manufacturers than they have in cases involving other products. In many of the United States, there were two completely different standards applied to producers of food and to makers of other products for many years; food producers were held strictly liable whereas manufacturers of other items were subject only to the standard of reasonable care. In Canada, contrary to early English authority, this dichotomy has been manifested through a novel employment of the doctrine of *res ipsa loquitur*. Normally, *res ipsa loquitur* raises an inference of negligence where an accident occurs that would not normally transpire unless someone was negligent and where the defendant was in control of the conditions giving rise to the accident, but, in the food cases, Canadian courts have permitted *res ipsa loquitur* to do more than merely raise an inference of negligence. Admittedly without referring specifically to the doctrine of *res ipsa loquitur*, Chief Justice Pickup, in *Zeppa v. Coca Cola*, declared that "there is a presumption of negligence on the part of the manufacturer and a burden on him of disproving negligence on his part to the satisfaction of the jury". Soon afterwards, the discovery of chlorine in a bottle of Labatt's beer was said to raise a presumption which, apparently, shifts the onus of proof to the defendant. Nowhere in either opinion is the doctrine of *res ipsa loquitur* referred to by name, however, and nowhere was the conflicting case of *Interlake Tissue v. Salmon* cited. Justice McPhillips, in a confused split decision of the British Columbia Court of Appeal, had earlier hinted that *res ipsa loquitur* might create a "presumption of negligence" which placed on the defendant an onus "to rebut in the most complete way the negligence which will otherwise be as-

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289 *Holmes v. Ashford*, supra, footnote 282.
290 *Cf. Decker v. Capps* (1942), 139 Tex. 609, 164 S.W. (2d) 828 and *MacPherson v. Buick Motor Co.*, supra, footnote 166. This distinction has now been all but swept aside by the victory of strict tort liability to the consumer, see Prosser, *op. cit.*, footnote 11.
295 *Willis v. Coca Cola*, supra, footnote 176 (trial dismissal upheld when court split 2-2).
sumed..." and to "excuse itself or demonstrate that it was in no way responsible for what happened".296 In Arendale v. Canada Bread,297 the court had also spoken of an "onus...on the defendant to offer a reasonable explanation" and held the defendant liable because "the evidence falls short of discharging this onerous burden".298 Earlier in the Arendale decision, however, the court stated that there was a "prima facie case" if glass were found in a loaf of bread on delivery, indicating a less stringent view of res ipsa loquitur than the one taken in Zeppa v. Coca Cola.299 So too, in Saddlemire v. Coca Cola300 the court had defined res,ipsa loquitur as "sufficient evidence to raise a presumption of negligence which must be rebutted by the defendant". Nonetheless, before Zeppa there had been no clear shifting of the onus of proof to the defendant in Canada, although there had been in England301 and sometimes in the United States.302

To be sure, to permit res ipsa loquitur to shift the onus of proof to the defendant pollutes its purity as a mere instance of circumstantial evidence. unworthy of any special name, upon which the jury may or may not rely.303 But there is no need to place the doctrine in a straight jacket, for, as Professor Fleming indicates, res ipsa loquitur may whisper negligence or shout it aloud.304 When foreign objects are found in food products, res ipsa loquitur is like a trumpet blast and one can fairly decide that this is sufficient evidence of negligence in itself, unless the manufacturer satisfies him that this was not the case. Moreover, lacking the courage to impose directly a strict liability in food cases, our courts have utilized res ipsa loquitur as a device to afford better protection for the consumer in a roundabout way.

Another indirect route toward a broader protection for the consumer, negligence per se or statutory negligence, has been so far squandered by the Canadian judiciary. Our judicial cupboard is virtually bereft of any decisions. using by analogy the many criminal statutes that have been passed by legislatures in the products field, although in the United States there are dozens of such

296 Ibid., at p. 167.
297 Supra, footnote 182.
298 Ibid., at p. 44, per Gillanders J.A.
299 Ibid.
300 Supra, footnote 175, at p. 619.
In the distant past one brave Canadian counsel dared to base a civil action, *inter alia*, upon a breach of statute, but, alas, he could not bring his facts within the legislative terms and failed. His descendants have not continued the battle, despite the fact that much headway might be made with such a weapon. Part of the difficulty is the foolish wrangle over whether, constitutionally, federal legislation can "create" civil rights. Yet this problem would vanish if our courts would only recognize that criminal violations do not "create" any tort rights, and that they, themselves, fabricate them by analogy to these statutes. Another impediment has been the temerity of Canadian lawyers to rely upon available statutory material.

The federal Food and Drug Act, for instance, proscribes any sale of "an article of food that a) has in or upon it any poisonous or harmful substance; b) is unfit for human consumption; c) consists in whole or part of any filthy, putrid, disgusting, rotten, decomposed, or diseased animal or vegetable substance; d) is adulterated; or e) was manufactured, prepared, preserved, packaged or stored under unsanitary conditions." One of the unsolved mysteries of Canadian tort law is why breach of this statute has never been relied upon by a court to affix tort liability, nor why it has not even been pleaded in any reported decision, despite the fact that such legislation is commonly used in the United States as a springboard to widen liability via negligence *per se*. In the leading American case of *Doherty v. S. S. Kresge* the plaintiff, whose wife had died from food poisoning contracted when she ate an unwholesome turkey sandwich, recovered tort damages, although there was no evidence of actual negligence in the selection, preparation and serving of the food. The court rested its decision on the contravention of a pure food Act which stipulated that "it shall be unlawful for any person to manufacture, sell, . . . any article of food which is adulterated . . . unwholesome, poisonous or deleterious . . . ". Justice Fairchild explained that the statute created "a species of statutory tort arising out of a failure, however innocent, to comply with a specific mandate of a statute designed to promote public health and safety . . . ". In another American case, *Mesh-
beshler v. Channellen Oil, where an illness resulted from impurities in some cooking oil, the court asserted that "negligence is implied from a violation of the statute", because this was "a salutary and necessary construction of our pure food statute" without which a cause of action would not be stated. It should be emphasized that the court refused to rely on evidence of lack of knowledge as an excuse. The overwhelming bulk of American authority is in harmony with these cases.

There exist other enactments that deal with food and other products but dust seems to have settled on them as well. For example, the Pharmacy Act of Ontario enacts that "No person shall sell any poison... unless the... bottle... is distinctly labelled with the name of the article and the word poison", and that no person shall sell by retail any article in a certain schedule "except on a prescription..." of a qualified person. This statute was considered in a tort case only once long ago, when Justice Britton, in a dictum, hinted that a breach of the section concerning poison labels might give rise to liability. There is one conflicting dictum by Justice Greene, in the Yachetti v. John Duff case, evincing an aversion toward civil actions based upon violation of penal statutes, because "[i]t would be very harsh legislation if so applied to the circumstances under consideration which it is impossible as a matter of practical procedure for the vendor to find out whether the pork is infected with trichinae or not. The result would be to prohibit the sale of fresh pork...".

There is no reason why Canadian courts should not hold violators of pure food legislation civilly liable as most American courts do. The policy advanced by the enactments, the protection of consumers from unwholesome food products, is a noble one and worthy of being buttressed by tort courts and the provision of reparation for the injured fills a statutory void. An additional deterrent lash may also spur the producer to greater efforts to con-

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311 (1909), 107 Minn. 104, 119 N.W. 428.
312 Ibid., at p. 430, per Chief Justice Smart (N.W.).
313 Ibid. He also held that it was not necessary to plead the statutory violation since it is a public law.
315 R.S.O., 1960, c. 295, s. 33, 35 s. 39(1) outlines penalties.
316 Antoine v. Duncombe (1906), 8 O.W.R. 719. No liability to widow of Indian who died from drinking unlabelled wood alcohol since Act construed not to apply to this and evidence scant.
317 Supra, footnote 206, at pp. 199-200.
form with the legislation. The task of the judge and jury in assessing the reasonableness of a food manufacturer’s conduct may be a trying one because of a welter of technical and frequently conflicting testimony. Were liability to be premised on a finding of “adulteration” or on some other violation Simplex, the job of judging would be simplified, predictability would increase and, as a beneficial concomitant of this, tort settlements might become more common.

In 1936 Justice Riddell championed a more direct attack upon the problem of liability for defective food products. Without citing any authorities, and without the support of his brethren, Justice Riddell, in Shandlof v. City Dairy, declared:

It is good sense and should be good law, that anyone manufacturing for public consumption an article of food should be held to warrant to the consumer that it is free from hidden defects, which are and may be dangerous; and it is no hardship to hold the vendor of food as warranting to the purchaser and consumer in the same way.

His Lordship reiterated this “implied warranty” theory five years later in Arendale v. Canada Bread, to the effect that when “one manufactures for human consumption any article, fluid, or solid, he putting it on the market gives an implied warranty that it contains no deleterious substance”. Justice Riddell, however, was only a prophetic voice crying in the Canadian wilderness, although this principle swept across the United States, first in the food cases and, after a pause, in cases of other manufactured articles. By 1963 the fictional notion of warranty, a “freak hybrid born of the illicit intercourse of tort and contract”, was replaced by the more straightforward “strict liability in tort”, as had been urged by Dean Prosser. But this “explosion” has not caused so much as a ripple on our placid Canadian waters, despite the similarity in the products and consumption habits and despite the frequency of American ownership of the manufacturing plants. The policy reasons that were advanced by the American courts, public protection, deterrence, representation of safety, avoidance of circuity and risk distribution, are no less apt in this country, but they have not been adopted by our courts nor even argued by counsel. Moreover, there has been no evidence to date of any American producer being driven out of business as a result of being made to

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318 Supra, footnote 176, at p. 581 (O.R.).
319 Supra, footnote 182, at p. 41.
320 See for a detailed description of the development, Prosser, op. cit., footnote 11.
321 Ibid., at p. 800; See also Greenman v. Yuba Power Products Inc. (1963), 59 Cal. 2d 57, 377 P. 2d 897, 27 Cal. Rptr. 697.
shoulder this additional responsibility. It is time for the Canadian law of products liability to relieve our injured consumers from the onerous burden of proving fault and to require our manufacturers to stand behind their defective products.

III. Automobile Accident Compensation.

The resolution of disputes arising out of automobile accidents is the most important task of tort law to-day, whereas a century ago such actions were completely unknown. In the early days of the motor car, the courts treated them like wild beasts for a time, imposing strict liability in favour of those injured in collisions. In one Ontario case, the owner of a shining red roadster with brass fittings was held civilly liable for an accident that occurred when a horse took fright at the mere sight of his vehicle parked at the roadside. Chief Justice Meredith dissented. He felt that motor cars were “modern means of conveyance” that were used, not only “for pleasure”, but for “business purposes” all over the country and that they should be entitled to the “same freedom as a wagon, carriage, cart or less modern vehicle”. Another Canadian judge felt it necessary to proclaim that “the motor is not an outlaw.”

Gradually, as automobile ownership spread, these views won the day and motor vehicle liability became a branch of the expanding field of negligence law. Consequently, a person injured on the highway was required to establish that the defendant negligently caused his loss in order to recover from him in tort.

1. The Present System.

Veering over to fault liability may have been a mistake. As the toll of those killed and injured on the highways climbed, criticism of the tort system grew, because many victims, unable to secure a tort recovery, had to shoulder their own losses. This was so because some were hurt without fault on the part of anyone, others as a result of their own fault, still others as a consequence of their contributory negligence and the balance were unable to prove how the accident happened. In many cases, although an injured person could prove that another was to blame for his injury, that other was uninsured and impecunious. Thus, tort rights often became paper rights only, worth little or nothing in practice. Moreover, as the

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volume of accidents rose, more cases had to be litigated and delay in court ensued. Eventually, concern for the uncompensated victims of automobile accidents led many to question the propriety of fault as a basis of loss-shifting and to eye the new workmen’s compensation systems longingly. Others wondered whether a tort trial could accurately determine what had occurred several years earlier in a split-second crash.≤≤

The response of tort law itself was disappointing; there was some stiffening of the standard of care required of motorists, some relaxation in the requirement of proof of fault, some increased willingness to use legislative proscriptions as determinative of fault and some expansion of vicarious liability.≤≤≤≤ By and large, however, tort law withstood the pressure of social need. The reaction of our legislatures, on the other hand, was somewhat more satisfactory; they began to alter some of the background in which tort law operated, by enacting legislation making owners liable for all damages occasioned by their vehicles, permitting courts to apportion liability between a contributorily negligent plaintiff and defendant, requiring insurance policies to contain various statutory conditions, allowing direct actions against insurers by third persons and prohibiting iniquitous defences such as drunkenness, racing and the like qua these third persons at least up to basic limits.≤≤≤≤ Assisted by financial responsibility laws, compulsory insurance and such other devices as the “uninsured motor vehicle fee”, the incidence of private liability insurance soared so that the Province of Ontario could boast that almost ninety-eight per cent of its vehicles were insured to basic limits.≤≤≤≤ Moreover, in order to assure that even the so-called “black risks” could secure coverage, assigned risk plans were established by the insurance industry.


≤≤≤≤ Fleming, op. cit., footnote 6, p. 292.

≤≤≤≤ See Ehrenzweig, op. cit., footnote 325, at pp. 11-18; Keeton and O’Connell, Basic Protection for the Traffic Victim: A Blueprint for Reforming Automobile Insurance (1965), pp. 76-123; and see for example, Insurance Act, R.S.O., 1960, c. 190, as am. by S.O., 1966, c. 71, s. 11, and ss. 204 (statutory conditions), 222 (1) (third party rights), 222 (4) (no defences).

≤≤≤≤ Motor Vehicle Accident Claims Act, 1961-62, S.O., 1961-62, c. 84, s. 2(2). See Select Committee on Automobile Insurance, Final Report (1963) p. 5; but see Accident Facts (1965), Ontario Department of Transport indicating that six per cent of the vehicles involved in accidents, were actually uninsured. In the Province of British Columbia this latter figure is three point nine per cent.
Because there were still some uninsured drivers involved in accidents, the Province of Manitoba established the first Canadian "unsatisfied judgment fund". This government-operated fund guaranteed the payment of any automobile accident judgment or part thereof that remained unsatisfied above a minimum and below a maximum amount. Before long all of the other provinces followed suit. In addition to Manitoba, New Brunswick, Ontario, Saskatchewan and Alberta have government-operated schemes, while Newfoundland, Prince Edward Island, Nova Scotia, Quebec and British Columbia have systems operated collectively by the private insurance industry. Through various amendments the hit-and-run driver was covered, the maximum limits were gradually raised to $35,000.00 inclusive and the procedures were streamlined. To-day the problem of lack of compensation due to an uninsured driver has been virtually obliterated in Canada, except in the rare case where the loss exceeds the limits of the fund.

Although not directed exclusively at him, a person hurt in an automobile accident may be assisted by the rather sophisticated social welfare system that has been erected in Canada. Even if he fails to secure any tort recovery, an injured person may still be reimbursed partially by some non-tort source, either government or private. With federal aid, provincially run hospital service plans supply hospital care to virtually every Canadian. Over eighty per cent of the Canadian population is now covered by some form of medicare, operated either publicly or privately. In addition to these two types of coverage, all Canadian provinces have legislation under which they may pay a small pension to a disabled, blind or any other person who is able to qualify by a means test. Workmen's compensation legislation, moreover, supplies complete hospital, medical, and rehabilitative care as well as seventy-five per cent of wages during the period of convalescence for any workman injured on the job. On the horizon are the disability and survivorship benefits that will be available under the Canadian Pension Plan. In addition to all this, Canadians are a very heavily insured people; vast numbers are covered by life, accident, disability and other private insurance that can be called into play in case of in-

329 See the Traffic Victims Indemnity Fund Brief to the Royal Commission on Automobile Insurance (B.C.) (1966), p. 1 and Appendix 1 for a summary of the various provincial plans. In British Columbia the minimum is now $50,000.00.

jury in a car accident as in any other situation of adversity. One study has shown that forty per cent of the moneys received in 1961 by Ontario accident victims came from non-tort sources, which percentage has undoubtedly climbed since that date, and that eighty-six per cent of the victims got something from a non-tort source.

Despite this development, the voices calling for reform have not been stilled. Insurance premiums continue to increase, the problem of delay has not been solved and many victims are still not fully compensated. But the problem of soaring insurance rates is not as much a product of the present system of automobile accident compensation as it is of to-day's automotive society. More cars, more highways and more travel generate more accidents. Higher repair prices, higher medical costs, and higher incomes produce higher losses and, therefore, higher damage awards. Because of the increased accident frequency and cost per claim, the cost of indemnifying these losses rises and, hence, premiums are pushed up. To attack this problem by abolishing tort law is to miss the point; what must be done is to reduce the number of accidents and the severity of injuries resulting therefrom. By stricter enforcement of rules of the road, by clamping down on drunk driving, by offering driver education courses, by building safer roads and crash-proof cars, we may be able to shrink the accident toll. If this were done, not only would the economic problems be mollified, but the human suffering would also be diminished. Whatever steps are taken, however, to avoid accidents, they will never cease to occur altogether, and, therefore, there will still be a place for the law of torts.

At long last, statistics are being gathered to demonstrate the strength and weakness of the present system. For example, the problem of delay has been shown to exist only in a few cases. The vast majority of claims are speedily paid; seventy-two point eight per cent of all the insurance claims studied in British Columbia were settled within sixty days of when the insurer first learned of the loss. Where litigation was required, the average time to conclude it was one year. In Ontario, the figures demonstrated that seventy-three point five per cent of the tort settlements were made within one year after the accident date. As far as the recovery

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333 The Report of the Osgoode Hall Study, etc., op. cit., footnote 330, c.V.
ratio is concerned, the British Columbia study disclosed that seventy-nine point eight per cent of all insurance claims were paid.\textsuperscript{334} The Report of the Osgoode Hall Study on Compensation for Victims of Automobile Accidents demonstrated that there was a tort recovery in only forty-two point nine per cent of the injury cases, but most of the uncompensated did not attempt to recover and many were guest passengers who were barred from recovering by statute in Ontario at that time.\textsuperscript{335} This has not stopped some people from citing this data in provinces where there is no absolute bar to actions by guest passengers. Nor has it prevented others from assailing the insurers because of the large uncompensated loss figures, without carefully studying the basis of the calculations and the law in force at the time. On the other side, defenders of the system sometimes point to the bright spots in the data, ignoring the fact that the delays are longer and the incidence of recovery is less frequent in the more serious cases. Those who wish to destroy tort law and those who want to keep it inviolate are now deadlocked.

2. \textit{A Plan for Peaceful Coexistence.}

Out of this stalemate there is now emerging a consensus that will accommodate the legitimate interests of those who wish to compensate everyone and those who want to preserve tort law—peaceful coexistence.\textsuperscript{336} By the addition of a new limited accident benefits clause to all automobile insurance policies, the tort system can be repaired without being abolished. In other words, basic protection would provide for bodily injury or death to all occupants of an automobile and to any pedestrian struck by that automobile, regardless of proof of fault. Certain set amounts would be paid to the estates of persons killed and to persons dismembered or who lost the sight of one or both eyes. For example, for the death of a married male between eighteen and fifty-nine years $5,000.00 would be paid plus $1,000.00 for each additional dependant. In addition to these specific sums, indemnity of up to

\textsuperscript{334} See Linden, \textit{op. cit.}, footnote 322, at p. 52.

\textsuperscript{335} The Report of the Osgoode Hall Study, \textit{etc.}, \textit{op. cit.}, footnote 330, c. IV. At long last this cruel section has been amended to permit an action if there is "gross negligence", The Highway Traffic Amendment Act, 1966, S.O., 1966, c. 64, s. 20, proclaimed in force, Jan. 1st, 1967.

$2,000.00 above that provided by other non-tort sources would be provided for reasonable expenses incurred for necessary medical, surgical, dental, ambulance and professional nursing expenses. Funeral expenses of up to $350.00 for each person would be provided, where necessary, on top of the $2,000.00. Weekly benefits of $35.00 would be paid to an employed person when totally disabled to a limit of 104 weeks, subject to an extension for an additional 104 weeks in the case of total and permanent disability, but there would be no payment made for the first seven days. Only where a motorist is driving while unlicensed, while intoxicated or while in violation of the Criminal Code would he be precluded from recovery, but if such driver is killed, his family would not be deprived of compensation. One of the most outstanding features of the plan is that there would be no interference with the injured person's right to sue anyone at fault for his injury, except that any benefits received under the proposed new plan would be offset against any tort recovery.

The cost of this new "accident insurance" has been estimated by a technical committee of civil servants in Ontario to be an additional twenty per cent of the basic premium for $35,000.00 minimum limits, which would represent an average premium increase of about $10.00 per motor vehicle.\(^{337}\)

This plan resembles the one operated by the government in Saskatchewan since 1946.\(^{338}\) There is no reason, however, other than doctrinaire socialism, that would prevent private insurers from underwriting such a loss insurance scheme. Its attributes are many: immediate compensation for all; the retention of tort law, jury trial and general damages; no socialism and no new board; the schedule of payments would serve only as a minimum. The defects are few and remediable: the maximum amount of coverage should be eliminated or at least raised; one might also question the adequacy of the amount of the weekly benefit which is lower than minimum wage laws require if calculated on the basis of a forty hour week; moreover, the duration of these payments should not be limited to four years, since the need for assistance is greatest in the long term cases; nor should the payments be limited only to cases of total disability, but they should be available on a scaled down basis for partial disability. Naturally, these improvements


would entail additional expense which may be unwarranted at present, but some money might be saved by introducing a deductible feature of $100.00. When asked whether they would approve of the establishment of such a plan, seventy-eight per cent of the people interviewed in the Osgoode Hall Study indicated that they would.\(^8\)

In Ontario, legislation was enacted which would enable insurers to sell this type of coverage on a voluntary basis,\(^9\) but it has not yet been proclaimed in force. The Royal Commission on Automobile Insurance is considering such a plan for British Columbia. It deserves the attention of the other provinces too for we may be on the threshold of a major breakthrough in auto accident compensation.

IV. Whither Canadian Tort Law?

But perhaps we are rejoicing too soon. While Canadian tort law inexorably spreads its protection ever wider in the areas of occupiers liability, products liability and automobile accident compensation, some torts scholars are having second thoughts about the relevance of tort law in modern society. In their drive to secure compensation for the victims of the accidents generated inevitably by our mechanized world, torts scholars devised the loss-distribution theory. It was contended that, because "enterprisers" could better distribute the losses caused by their activities through increased prices or through insurance, they should be held liable in tort.\(^4\) Although not patently, perhaps, this rationale has spurred much growth in tort law. In retrospect, however, it must be admitted that, because of their dissatisfaction with the state of public social welfare measures, torts scholars were prepared to transform tort law into a private social welfare device. If, however, modern tort law is founded solely upon this theory, the need for it wanes as governments move into more areas of social welfare. Thus, if the rush towards the welfare state continues unabated, much of the law of torts may one day be "doomed to irrelevance".\(^4\) Nevertheless, Professor James has contended that "negligence is far from dead", at least for the near future, and that these new welfare regimes "pose no serious threat to our present structure of tort

\(^8\) See Report of the Osgoode Hall Study, etc., op. cit., footnote 330. c. VIII.
\(^9\) See the Insurance Amendment Act, supra, footnote 327.
liability”. This is so because welfare programmes are not established to cover psychic loss nor even to provide complete economic reimbursement. Consequently, tort law will be able to “supply additional aid” for pain and suffering, loss of enjoyment of life, mental anguish and the like. Tort law, unlike social welfare programmes, is tailored to treat each claimant as an individual, to compensate him for his unique losses, and, if he wishes, to give him his day in court. Some may scoff at the utility of this, but the ability to play golf, to smell the aroma of a good steak and to hear the sound of a symphony, although they may not have any economic value, are prized by the person who has been deprived of them. Despite this, if the role of tort law was merely to compensate and nothing else, one might well decide to do without psychic reparation in return for universal, prompt and inexpensively administered economic compensation.

But tort law is concerned with more than mere compensation. Fault liability is supposed to deter negligent conduct by making those guilty of it pay damages to their victims. The increase of insurance coverage, however, is said to have diluted the prophylactic power of tort law, but, so far, there is no empirical proof of this. It may be that certain individuals are no longer deterred by the threat of civil sanctions while others continue to be. For example, there are, lamentably, still some drivers and enterprisers who are not insured and, presumably, insurance has not blunted their incentive to exercise care. In addition, some extra burden may be imposed on a negligent driver by civil liability, for example, since the loss he causes may exceed the policy limits, it may not be covered by the policy at all, the policy may be cancelled altogether or the premium may be increased. Professor Fleming has even suggested that an increased premium might be a more effective sanction than a tort judgment because the latter often cannot be paid at all while the former must be if the person wishes to continue driving. In addition, the experience of being involved in civil litigation and of being marked publicly as the cause of injuring someone is seldom a pleasant one. An even more important deterrent may be the loss

345 The Report of the Osgoode Hall Study, etc., op. cit., footnote 330 disclosed that nearly seventy per cent of the victims interviewed favoured compensation for pain and suffering in all cases, see c. VIII, p. 13.
of his own tort recovery, either in whole or in part, by the negligent claimant. Moreover, by branding certain conduct as blameworthy, we may contribute something to the education of our people about the hazards of these activities. Nevertheless, all this discussion will remain pure theory until someone tests empirically the validity of these assumptions.

The law of torts is dedicated to the advancement of the notion of individual responsibility, an ideal that retains considerable force in western society. Thus, if someone by his faulty conduct causes an accident, it is felt that he should bear the consequences by paying the costs incurred by his victim. If it is he himself who is injured, he should be expected to shoulder his own expenses. According to Professor Keeton, most people feel it "just and fair" that the guilty, but not the innocent, pay, despite the fact that insurance undoubtedly dulls the impact of civil liability and social welfare mollifies that of bearing one's own loss.

Tort law helps to keep the peace, just as it was supposed to do in its formative days because it permits an aggrieved person to recover money in court rather than to spill blood in the streets. This "appeasement" function of tort law may, although it is speculative, still avoid some further injuries to members of society. Put another way, there are still people in this world who wish to secure revenge from those who injure them and who, if necessary, may resort to anti-social means to do so. By allowing a private tort remedy this urge for vengeance may be assuaged.

That tort law rests in part upon such a psychoanalytical basis may be supported by the experience of the Soviet Union. After the revolution, the tort suit was abolished altogether there, but eventually it had to be re-instituted along with a ban on liability insurance. Another clue to indicate that tort law's roots may reach into the psyche may be our remarkable insistence upon the hypocritical retention of the tort suit against the individual defendant in form, despite the fact that in substance an insurance company is almost always the real defendant who retains counsel, defends the action and pays the judgment, if one is rendered against the individual defendant.

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Keeton, Is there a Place for Negligence in Modern Tort Law (1967), 53 Va. L. Rev. 886, at p. 889.


Ibid.


But, in the long run, the most compelling argument asserted for the continuance of tort law may be that of "general deterrence", developed by Professor Calabresi of Yale University. By demanding that an activity pay its own way, society is able to make a more knowledgeable decision concerning the allocation of its resources. In other words, if motorists were made to pay the full costs of motoring, including the expenses of treating all traffic victims, some of them might give up driving and use a safer method of transportation where the cost of insurance will be less because it produces fewer accidents. Other motorists might decide to reduce their insurance rates through an alteration of their risk category; they might, therefore, stop driving to work or they might deny the car to their teenage sons. However, we may find that, rather than giving up their automobiles, some motorists will chose to drive without insurance coverage, which is by no means desirable. This general deterrence theory, consequently, purports to create an "incentive for loss prevention" that encourages enterprisers to minimize accidents so as to reduce their long term insurance costs, but unfortunately, this theory has not yet been buttressed by solid scientific data. Until the analysis of Professor Calabresi is tested by empirical research it will remain only a theory, albeit a beguiling one. Professor Keeton has attempted to justify morally the imposition of this liability because to do otherwise would be to countenance the "unjust enrichment" of motorists or enterprisers.

Tort law, therefore, is resting on shifting sands. As tort doctrine moves towards more protection for injury victims, it is undergoing a serious reappraisal. The need for a law of torts is being challenged because of wider social welfare legislation and broader insurance coverage. Nevertheless, on closer scrutiny, one must conclude that tort law will survive for some time to come because it fills the lacunae left in the social welfare programmes, because civil liability may still deter some people, because it promotes individual responsibility, because it assists in keeping the peace, because it may satisfy certain irrational psychological drives, and,

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534 Keeton, op. cit., footnote 348, at p. 888.

535 Keeton, op. cit., ibid., at p. 892. Professor Weiler suggests that the cost of accident might have to be included in the price of automobiles rather than insurance premiums, loc. cit., footnote 349, at p. 303.
most importantly, because some general deterrence may be achieved.

In the years immediately ahead, Canadians must reconsider the foundations upon which the law of torts rests. Hopefully, our judiciary will do this not by accepting English authority without question as they have in the past, but by balancing the various competing policy considerations in the light of Canadian social and economic conditions. One good prophecy, however, is that Canadian tort law, in some form or another, will still be in existence in the year 2067. Another safe forecast is that the torts scholars a century from now will regard our present law of torts with as much disgust as we view that of 1867.