

she wished to marry the co-respondent and legitimize their offspring. The judge at first instance held, after considering all the circumstances, that it was not the type of situation where the court should exercise its discretion.

On appeal, Lord Denning, M. R., held that, "the court would not interfere with the discretion of the judge unless he had gone wrong." In this case the judge did not give *sufficient weight* to the considerations set out in *Blunt v. Blunt*.

Salmon, L. J., stressed that it was a very important point that the woman and children were living with the co-respondent and would continue to do so if the divorce was refused. *Sufficient consideration* had not been given to this factor by the trial judge.

It seems, therefore, that the position is the same now in England and Canada, England having reached this point by what might be described as the *back door*, whereas Canada, certainly Manitoba, walked boldly in the *front door*.

My personal feeling, however, is that it is undesirable that an appellate court should have power to review the discretion of the trial judge. He is, after all, the person who sees the demeanour of the witnesses, and of the parties, and has all the evidence given before him. He is, surely, in a much better position to exercise such a discretion in the spirit of *Blunt v. Blunt*. The appellate court should only interfere where the judge has disregarded completely the principle on which the discretion is based. Such a case would be *Baert v. Baert and Sintag*.

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## TORTS

The law of torts is badly out of step with the times.

Recognizing this, English Courts have been remarkably creative in the last few years. In 1956, in *British Transfer Commission v. Gourley*,<sup>1</sup> the House of Lords held that the effect of income tax should be taken into account in calculating damages for lost earnings. This was the beginning of a series of decisions<sup>2</sup> which will probably result in the complete abolition of the rule that *res inter alios acts* are disregarded in damage awards.<sup>3</sup> In 1961 the principles of remoteness of damage in tort were revolutionized by the Privy Council decision in *The Wagon Mound*<sup>4</sup> to the effect that a negligent defendant is only responsible for

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1. [1956] A.C. 185.

2. For example, see *Browning v. War Office* [1963] 2 W.L.R. 52 (C.A.) and *Parsons v. B.N.M. Laboratories* [1964] 1 Q.B. 95 (C.A.).

3. See McGregor, *Compensation Versus Punishment in Damages Awards*, (1965) 28 M.L.R. 629.

4. [1961] 1 All E.R. 404.

resulting injuries which are reasonably foreseeable. A powerful *dictum* by the House of Lords in *Hedley Byrne & Co. v. Heller*<sup>5</sup> in 1963 has probably established liability for negligent statements, even where the resulting loss is purely economic. The circumstances in which exemplary damages may be awarded were severely limited by the 1964 House of Lords decision in *Rookes v. Barnard*.<sup>6</sup>

But the task of reforming the law of torts is too difficult for the courts to handle alone. In the first place, not even the English courts are uniformly creative in their approach. For example, the Privy Council recently repudiated what had generally been regarded as a beneficial liberalizing trend in the law of occupiers' liability. A line of cases has developed which held that the traditional (and generally unsatisfactory) rules of occupiers' liability apply only to the *passive* condition of the premises, while liability for the *active* conduct of the occupier is governed by the general law of negligence.<sup>7</sup> But in *Commissioner for Railways v. Quinlan*<sup>8</sup> the Privy Council refused to accept this approach, and held that at least in the case of trespassers the rules of occupiers' liability apply to both the condition of the premises and the conduct of the occupier.<sup>9</sup> Even if the courts were consistently reform-conscious, they could not be expected to play the lead role in modernizing the law. The opportunities for reform that are presented to the court are few and haphazard, depending on the vagaries of litigation; and the tools a court has at its disposal are often unequal to the task. Law reform, at least the radical type that appears to be necessary in tort law, is primarily a legislative, rather than judicial, responsibility.

In Great Britain, parliament seems to have accepted this responsibility. The Occupiers' Liability Act, 1957, which substituted simple negligence principles for the ancient rules (except where trespassers are involved) established a lead which it is hoped the rest of the commonlaw world will one day follow.<sup>10</sup> Perhaps even more significant in pointing the direction that future reforms in tort law must take was the establishment in Britain in 1964 of the Criminal Injuries Compensation Board, which provides compensation from a government adminis-

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5. [1963] 2 All E.R. 575.

6. [1964] 2 W.L.R. 269.

7. The distinction has been most fully developed in Australian decisions: see Fleming, *Law of Torts*, 3rd ed. (1965), p. 406. See also the *dicta* of MacDonalld, J. in *Graham v. Eastern Woodworkers Ltd.* (1959) 18 D.L.R. 260, at 267, ff. (N.S.S.C.) and Denning, M. R. and Harman, L. J. in *Videan v. British Transport Commission* [1963] 2 All E.R. 860.

8. [1964] 2 W.L.R. 817.

9. Professor Fleming, in the new edition of his *Law of Torts* (3rd ed. 1965, p. 433) is severely critical of this decision: "... the Privy Council... would brook no such compromise with the old verities, thus dispelling again all sanguine hope of replacing the presently fragmented pattern of legal rules by a more systematic and reformed modern solution."

It is disappointing that the first Canadian court to follow the *Quinlan* case took no notice of such criticism: *Stanton v. Milne* [1965] 52 D.L.R. 374 (British Columbia Supreme Court).

10. An excellent article in the current issue of the *University of Toronto Law Journal*, D. C. McDonald and L. H. Leigh, *The Law of Occupier's Liability and the Need for Reform in Canada* (1965) 16 U.T.L.J. 55, calls for similar legislation in the commonlaw provinces, but it is probable that this plea, like similar earlier ones, will fall on deaf ears.

tered financial fund for persons who suffer in juries as a result of violent crimes.<sup>11</sup>

However, such piecemeal legislation, valuable though it is, is not enough. What is needed is a large-scale, long-term program of systematic reforms, based upon a consistent philosophy. And with the establishment in 1965 of the British Law Commission, a full-time body of experts charged with examining and suggesting improvements in every field of law, there is a good chance that this will be achieved. The first program of the Commission lists seventeen projects which it feels ought to be given priority. Among these are several in the field of torts: personal injury litigation (including the law of damages), civil liability for dangerous things and activities, civil liability for animals, and defective premises.<sup>12</sup> This bodes well for the future of tort law in Great Britain, though one wonders why the Commission did not go the last mile, and investigate codification of the entire law of torts, as it is doing with contract.

After this chronicle of British progress, it is discouraging to turn to developments in Canadian tort law during the past year.

It is true that in areas where British courts have shown the way, Canadian courts generally tend to follow. There were, for example, Canadian decisions during the past year adopting recent British changes regarding remoteness of damage,<sup>13</sup> exemplary damages,<sup>14</sup> and liability for negligent statements.<sup>15</sup> However, in spite of this tendency, it appears that to achieve substantial law reforms through judicial action is an even more hopeless expectation in Canada than it is in Britain.

Apart from the Supreme Court of Canada, Canadian courts seldom display the policy-oriented approach necessary to effective reform. The judgment of the Exchequer Court of Canada in *Manor & Co. Ltd. v. M. V. "Sir John Crosbie"*<sup>16</sup> provides a good illustration of this. The facts are stated sufficiently in the head-note:

Defendant ship was moored at plaintiff's wharf, discharging coal for the plaintiff, when a wind of hurricane force arose which so pressed the vessel against the wharf that the latter was crushed in and damaged to the extent of several thousand dollars. Plaintiff brought action for damages, alleging that the captain of the ship was negligent in failing to move it away from the wharf when the storm arose. Held, that to cast off the ship in the circumstances would have exposed it and her crew to grave danger and the decision of the captain to remain moored to the wharf was prudent and proper. Accordingly, no liability attached and the action must be dismissed.

11. Cmnd. 2323. See (1965) 28 M.L.R. 460. New Zealand put a similar scheme into operation a few months earlier than Britain. California did so during 1965. Canadian legislation on the subject has been advocated by many. See, for e.g., Kennedy, *Compensation for Victims of Crime*, (1966) 14 Chitty's L.J. 1.

12. See Chorley and Dworkin, *The Law Commission's Act, 1965*, (1965) 28 M.L.R. 675.

13. *Lauritzen v. Barselead* (1965) 53 W.W.R. 207 (Alta. S.C.). Note however, that in *Buchanan v. Oullton* (1965) 51 D.L.R. 383, the Appeal Division of the New Brunswick Supreme Court declined to say "whether *The Wagon Mound* doctrine should be applied as part of the law of New Brunswick."

14. *Schuster v. Martin* (1965) 50 D.L.R. 176 (B.C. S.C.). Note, however, that in *Kirisits v. Morrell & Hanson* (1965) 52 W.W.R. 123, Collins, J., of the same court held that while "exemplary" damages could not be awarded, the "brutal" nature of the assault he suffered and the resulting "indignity", "humiliation", and "mental suffering" entitled the plaintiff to "aggravated damages".

15. *Dodds & Dodds v. Millman* (1965) 45 D.L.R. 472 (B.C. S.C.)

16. (1965) 52 D.L.R. 48 (*per* Puddester, D.J.A.)

In reaching this conclusion the court ignored a Minnesota decision<sup>17</sup> which reached the opposite result in identical circumstances, on the ground that while the defendant was justified in remaining at the plaintiff's wharf to protect his ship from damage, "the defendant could not also demand that the plaintiff should bear the expense of so preserving the defendants property".<sup>18</sup> This rather compelling policy argument does not appear to have been considered in the *Manor* case. Even the cases incorporating British reforms into Canadian law often show a reluctance to examine the policy underlying the change, and seem to be based on a feeling that decisions of the House of Lords or Privy Council are automatically binding on Canadian courts.<sup>19</sup>

Another factor that hampers judicial law reform in Canada is the multiplicity of legal systems within the country. The courts of the various commonlaw provinces strive to be as consistent as possible, but, inevitably, they frequently fail. The confusion that results is troublesome enough when it involves relatively minor questions, such as whether the owner of a shopping centre retains "possession" of the unleased parts for purposes of tort liability,<sup>20</sup> or whether damage caused by the overflow of gasoline or oil being pumped from a tank truck is damage "occasioned by a motor vehicle" to which the one year limitation period under the Highway Traffic Act applies.<sup>21</sup> When the inconsistencies involve major principles, law reform can be seriously retarded. For example, the question of whether an award of damages for lost earnings should be reduced by the amount of income tax that would have been paid had the salary been earned is still a matter of speculation here, although it was settled in England by the *Gourley* case almost ten years ago. Since that case was reported there have been several Canadian decisions following it in holding that the effect of income tax should be taken into account,<sup>22</sup> and two cases disapproving the *Gourley* decision, and holding that income tax should be dis-

17. *Vincent v. Lake Erie Transportation Co.* (1910) 124 N.W. 221. The case has been included in all three editions of Wright, *Cases on the Law of Torts*; see 3rd ed., p. 125.

18. Editorial note, (1965) 52 D.L.R. 48, at 49.

19. See the editorial note to *Power v. Stoyles* (1958) 17 D.L.R. 239, deploring the court's uncritical acceptance of the *Gourley* case. A similarly mechanical approach to British decisions was taken in *Dodds & Dodds v. Millman*, *supra*, note 15, and *Schuster v. Martin*, *supra*, note 14. In *Jennings v. Cronsberry* (1965) 50 D.L.R. 385, the Ontario Court of Appeal awarded \$180,000.00 to a man who was permanently unconscious and had a life expectancy of 5 years. No justification was provided for awarding a sum so greatly in excess of what could ever be used by the plaintiff, except to quote some unconvincing assertions from British cases that the court should not be concerned with whether the plaintiff can use the amount awarded.

20. In *Grossenor Park Shopping Centre v. Waloshin* (1965) 46 D.L.R. 750, the Saskatchewan Court of Appeal held that the owner of a shopping centre could not maintain a trespass action against persons using the parking lot to picket one of the shops in the centre, because the owner, having leased the shops to individual tenants and invited the public to use the unleased parts, was not in possession of the parking lot. However, in *R. v. Page* (1964) 44 C.R. 350 (Ontario High Court) a trespass action by the owner of a very similar shopping centre was successful, and in *Levy v. Wellington Square Ltd.* (1965) 47 D.L.R. 567 (Ontario County Court) the owner of a shopping centre was held to be the "occupier" of the common parts thereof, and liable as such for injuries suffered by a member of the public thereon.

21. Dickson, J., of the Manitoba Court of Queen's Bench, held in *Peters v. North Star Oil* (1965) 53 W.W.R. 321, at 333, *ff.*, that the section did not apply in such circumstances. Landreville, J., of the Ontario High Court, held in *Beamish Stores v. Argue* (Not yet reported—see (1965) November C.C.L. No. 80) that an almost identical Ontario section did apply in very similar circumstances.

22. *Power v. Stoyles* (1958) 17 D.L.R. 239 (Newfoundland Supreme Court); *Walker v. Copp Clark* (1962) 33 D.L.R. 338 (Ontario High Court); *Widrig v. Strazer* (1963) 41 W.W.R. 257 (Alberta Supreme Court, App. Div.); *Smith v. C.P.R.* (1964) 41 D.L.R. 249 (Saskatchewan Queen's Bench).

regarded.<sup>23</sup> Matters have been further confused by the recent decision of the Ontario Court of Appeal in *Jennings v. Cronsberry*<sup>24</sup> to reject the *Gourley* approach for the interesting reason that the damage award itself *may* be taxable in Canada.

In theory, of course, all this confusion can be set right by the Supreme Court of Canada which is generally quite progressive in its approach. And during the past year the Supreme Court did render some significant decisions, such as *Co-operators Insurance v. Kearney*<sup>25</sup> which established that a master's duty of care to his employees overrides the statutory exemption from liability for injuries caused to gratuitous passengers in automobiles, and *Sun Life v. Dalrymple*<sup>26</sup> which held that in a defamation action the malice of one co-defendant does not affect the liability of the other defendants. Unfortunately, however, most problems take a very long time to reach the Supreme Court. Moreover, that court is sometimes a source of confusion itself. For example, in *Sterling Trusts v. Postma and Little*,<sup>27</sup> three members of the court chose to make comments, *obiter dictum*, about the important question of whether the breach of a statutory duty automatically results in liability, regardless of fault, and reached three somewhat different conclusions. And in *Gilchrist v. A. & R. Farms Ltd.*,<sup>28</sup> the Supreme Court had an opportunity to settle the dispute over whether a defendant can be liable for negligence in circumstances where the general type of harm suffered is reasonably foreseeable, but not the precise manner in which it occurs,<sup>29</sup> but it chose instead to decide the case on an issue of fact. The majority judgment contains a very brief *dictum* in support of the view that only the general type of harm need be foreseeable, but this cannot be regarded as a satisfactory solution for so important a problem.

Clearly then, there is even greater need for massive legislative action in the field of torts in Canada than there is in Britain. Yet, there were almost no statutory changes made during the past year. The most significant tort statute in Manitoba was an Act<sup>30</sup> designed to restore to a section of the Animal Husbandry Act, relating to liability for injuries caused by dogs, the meaning it was generally thought to convey before the tortured interpretation given to it in *Lamontagne v. Brown*.<sup>31</sup>

23. *Soltys v. Middup* (1963) 44 W.W.R. 522 (Manitoba Court of Queen's Bench); *Buck v. Rostill* (1965) 51 W.W.R. 319 (British Columbia Supreme Court).

24. (1965) 50 D.L.R. 385.

25. (1965) 48 D.L.R. 1.

26. (1965) 50 D.L.R. 217. The Manitoba Court of Queen's Bench had stated a contrary view in *Paul v. Van Hull* (1963) 36 D.L.R. 639, at 659.

27. (1965) 48 D.L.R. 423.

28. Judgment pronounced December 14, 1965. Not yet reported.

29. The Manitoba Court of Appeal had decided by a 3-2 majority in *Oke v. Government of Manitoba* (1963) 43 W.W.R. 203 that a defendant would not be liable in such circumstances, but the opposite conclusion had been reached by the House of Lords in *Hughes v. Lord Advocate* [1963] 2 W.L.R. 779, and by the Alberta Supreme Court in *Lauritzen v. Barstead* (1965) 53 W.W.R. 207.

30. Statutes of Manitoba, 1965, c. 4.

31. (1963) 39 D.L.R. 199 (Manitoba Court of Queen's Bench). See comment in (1964) 42 *Canadian Bar Review* 141.

Undoubtedly the most important development in Canadian tort law during 1965 was the publication, by Professor Allen M. Linden of Osgoode Hall Law School, of *The Report of the Osgoode Hall Study on Compensation for Victims of Automobile Accidents*. This was the first significant attempt in Canada to examine the nature of the financial losses suffered by victims of automobile accidents and the extent to which these losses are compensated, both by legal processes, and by extra-legal sources, such as hospitalization, medical and accident insurance, workmen's compensation, disability pensions, welfare schemes, etc. It was based on detailed personal interviews of 590 accident victims (or their survivors)—a representative sample of all those killed or injured in automobile accidents in the County of York (including Metropolitan Toronto) in 1961. The study was commissioned by the Ontario government in order to discover whether, as many assert, improvements are needed in the method of compensating automobile accident victims. Its findings support the view that changes are needed, "although most people do not lose a great deal of money as a result of an automobile accident, there are substantial numbers who lose enormous amounts . . ."<sup>32</sup>

It is hoped that the Ontario legislature will come to the aid of those who suffer these crippling losses. In addition to meeting the immediate problem, such legislation might help to make the other Canadian legislatures aware of the huge job of law reform in the field of torts that they must face sooner or later.

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#### COMMERCIAL LAW - SALE OF GOODS

The case of *Weller v. Fyfe*<sup>1</sup> is notable chiefly for the dissenting judgment of Schroeder, J. A. It also reveals, incidentally, some of the absurdities of s. 16 of the Sale of Goods Act.<sup>2</sup> Essentially, the case turns on questions of fact, namely, whether the plaintiff had relied on the seller's skill and judgment, and whether he had "accepted" the goods by retaining them after the lapse of a reasonable time. There was no real dispute that the goods—a tree stump cutting machine—were neither fit for their purpose nor of merchantable quality.

The plaintiff had thus established a breach of the implied condition under s. 16(b), and most of court's time was taken up in deciding whether he had not also made out a case under s. 16(a). One cannot help feeling that such a duplication of remedies was the last thing that

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32. Chapter VII, p. 5.

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1. (1964) 46 DLR 2d. 531 (Ont. CA).

2. RSM, 1954, c.233. The corresponding provision in Ontario is s. 15, RSO, 1960, c.358.