TORTS

The ordinary, reasonable man, without legal training, is the norm most commonly employed by the law of torts to judge the adequacy of human conduct. But does the adequacy of the law of torts itself come up to the expectations of the average layman? If an intelligent "man-on-the-street", unfettered by the preconceptions that result from legal training, could be persuaded to make a thoughtful study of tort law, would he be satisfied with what he found? Let us suppose, for example, that he examined the significant tort developments of the past year.

At first, no doubt, he would be seduced by the kaleidoscopic view of life provided by the tort cases (man sues provincial premier for defamation;[1] beer parlour patron slips on floor;[2] hockey player hits another over the head;[3] huge wave damages vehicle on ferry boat;[4] architect loses his fee when plaintiff's action causes shopping centre plans to be abandoned;[5] driver, provoked by refusal of another driver to let him pass, punches him and breaks his jaw;[6]) and by the sheer fun of analysing outlandish fact situations (driver, a diabetic, suffers insulin shock and drives 10 miles through heavy city traffic in an unconscious state before colliding with another vehicle;[7] tree being felled has a rotten core, and a sudden gust of wind causes it to fall prematurely, and in the wrong direction, where it breaks a power line, which becomes entangled in the plaintiff's domestic power line, and causes a surge of power to the plaintiff's house which, because of the unexplained failure of a circuit breaker, burns it down.[8])

But as this initial fascination begins to fade, I think the lay observer would become more and more deeply disturbed about what he saw.

He might wonder why so many relatively straight-forward problems take so long to resolve, and why the solutions so frequently vary among the different parts of the common law world. His eyebrows would probably rise to learn how long there has been disagreement about whether the right of a husband to sue someone who wrongfully injures his wife, for compensation for loss of her domestic services and companionship, is affected by the fact that the wife was contributorily negligent herself; and

1. Jones v. Bennett (1966) 55 W.W.R. 143.
2. Cosgrave v. Busk (1967) 1 O.R. 59.
3. Agar v. Canning (1965) 54 W.W.R. 302.
4. Turgel v. Northumberland Ferries (1966) 59 D.L.R. (2nd) 1.
5. Dirassar & James v. National Trust (1966) 58 W.W.R. 257.
6. Bruce v. Dyer (1966) 58 D.L.R. (2nd) 211.
7. Boomer v. Penn (1966) 52 D.L.R. (2nd) 673.
8. Morris v. Fraser (1965) 53 W.W.R. 693.

to discover that during the past year a British Columbia court decided to reduce the husband's damages in proportion to his wife's share of the blame,[9] while an Australian court decided to ignore the wife's contributory negligence altogether.[10] (What lawyer would have the courage to tell him that *wives*, whose husbands are injured by someone else's tort, have no corresponding right to sue at all, under English law at least, unless the injury was fatal.[11]) He might also find it hard to understand why it took 10 years, and a large number of conflicting judgments by provincial courts, before the Supreme Court of Canada finally rejected the House of Lords' 1956 decision that a deduction should be made in calculating damages for loss of income for income tax that would otherwise have been paid.[12] And what would the layman think of the uncertainty about whether a court may award punitive damages in addition to compensatory damages in a tort case? In 1964, the House of Lords, overruling a long-standing decision of a lower court, held that punitive damages may only be awarded in a few narrowly restricted circumstances, which it specified.[13] This decision was soon adopted by the British Columbia Supreme Court,[14] but during the past year it has been rejected by the Australian High Court,[15] and the Saskatchewan Court of Queen's Bench, in awarding punitive damages in a situation other than those specified by the House of Lords, stated: "I do not think that their Lordships intended that the categories should in all cases be exclusive, but rather to be used as a useful guide of general application."[16]

If he were puzzled by the uncertainties of tort law, the lay observer would probably be distressed by some of its anomalies. The English Court of Appeal held recently that barristers (but not solicitors) are immune from liability in negligence to their clients.[17] Fortunately, Canadian lawyers do not have to justify this particular aberration to the man on the street, because the merging of the professions has probably forestalled a similar decision here.[18] There are, nevertheless, many features of Canadian tort law that a layman would be inclined to question. What

9. Enridge v. Copp (1966) 55 W.W.R. 457 (B.C. Supreme Court). This is consistent with the approach of most other Canadian courts.
10. Curran v. Young (1965) 112 C.L.R. 99 (High Court of Australia). This approach is also taken by British courts: Mallett v. Dunn (1949) 2 K.B. 180.
11. Best v. Samuel Fox Ltd. (1952) A.C. 716.
12. Jennings v. Cronsberry & the Queen. (1966) 57 D.L.R. (2nd) 644, refusing to follow British Transport Commission v. Gourley (1956) A.C. 185.
13. Rookes v. Barnard (1964) 2 W.L.R. 269.
14. Schuster v. Martin (1965) 50 D.L.R. (2d) 176.
15. Uren v. John Fairfax (1966) 40 A.L.J.R. 124.
16. Unrau v. Barrowman (1967) 59 D.L.R. (2d) 168, at 187.
17. Rondel v. Worsley (1966) 3 All E.R. 657.
18. Leslie v. Ball (1863) 22 U.C.Q.B. 512 (Ont. C.A.)

justification is there, for example, for the rule that municipal corporations are liable for "misfeasance", but not "nonfeasance"? Could the average man be persuaded to agree that the right to compensation of someone injured by an overhanging branch of a tree growing on municipal property should depend on the outcome of a sophistic debate, like that which took place in a recent British Columbia case,[19] about whether the municipality's negligence was nonfeasance (mere failure to inspect) or misfeasance (part of a positive course of conduct beginning with the planting of the tree)? Why is it that when a highly paid business executive is negligently injured to the extent of being in a permanent coma, his university-aged son has no action for loss of his father's support (as he would if the father had been killed); but the court will award *to the unconscious father* a huge sum of money which he can never enjoy, and far in excess of the probable cost of caring for him and completing the son's education?[20] And why do courts capable of such generosity refuse to grant compensation in cases like *Elliott v. McAlpine*[21] where the plaintiff, whose business depended on the telephone, lost considerable income due to the defendant's negligent damaging of the telephone, was held unable to recover his lost profits?

The lay observer would probably find that the most mystifying of all the year's tort developments were those related to the problem of remoteness of damage. By now most lawyers are familiar with the unusual accident that occurred in the harbour of Sydney, Australia, in October, 1951, and caused such intense interest to be focussed on the remoteness issue all over the common law world. The crew of the "Wagon Mound", which was being loaded with bunkering oil, negligently allowed a large quantity of the oil to spill into the harbour, where it eventually spread to the vicinity of a certain wharf, where welding operations were in progress. Fearful that sparks from the welding might ignite the oil, employees of the wharf owner suspended operations until advised by an oil company employee that the oil had too high a flash point to be ignited by falling sparks when lying on water, and the welding was then resumed. In some unknown way, however, the sparks did set fire to the oil (perhaps by falling on a piece of floating waste, which smouldered until it reached the necessary temperature to ignite the surrounding oil) with the result that the wharf and two ships moored to it were damaged by fire. When the wharf owner sued the owner of the "Wagon

19. Millar & Brown v. Vancouver (1966) 58 W.W.R. 191 (B.C. C.A.)
20. Jennings v. Cronsberry & the Queen (1966) 57 D.L.R. (2d) 644 (S.C.C.)
21. (1966) 2 Lloyd's L.R. 482.

Mound" for negligence, the court held that the fire was not a reasonably forseeable consequence of the negligent spilling, but that it was a "direct" consequence. On the basis of previous decisions, the lower court felt that the defendant must be held liable in these circumstances, "directness" being the only criterion by which damage could be judged to be remote. The Privy Council held for the defendant, however, stating that any damage that cannot be reasonably foreseen as a consequence of the defendant's carelessness is too remote to be compensated in a negligence action.[22]

This principle was soon adopted by most British, Australian, and Canadian courts, although it was quickly qualified by exceptions, some of which a layman might find difficult to grasp. One of the most important of these exceptions is illustrated by a 1966 Queensland case.[23] A welder suffered an electrical shock due to the defendant's negligence, and developed polio as a result, the shock having apparently activated a dormant polio virus. He succeeded in a negligence action, the court holding that his loss was not too remote, even though clearly unforeseeable. In doing so, the court was applying the rule (often called the "thin skull" rule) that the defendant must take the plaintiff as he finds him. To explain to a layman (or anyone else) the circumstances in which the thin skull rule will be applied in preference to the foreseeable consequence rule is a task that few lawyers would be willing to undertake.

Matters were further complicated during the past year by an incredible sequel to the *Wagon Mound* decision. The owners of the two ships that had been burned in the same fire also sued the "Wagon Mound's" owner. The action was based on *nuisance* as well as negligence, the plaintiffs contending that while reasonable foresight might be an appropriate standard of remoteness in a negligence action, this is not true of nuisance, where the concept of reasonable foresight has never played a role for any purpose. This case also came before the Privy Council, which held[24] that because some forms of nuisance have involved negligent conduct, and because all forms of nuisance should be treated uniformly, reasonable foresight must be the criterion of remoteness in nuisance as well as negligence. This did not mean, however, as a layman might expect, that the action failed. On the contrary, the Privy Council held in favour of the two ship-owners. How? This time (the evidence having been slightly, though I'm

22. The Wagon Mound, (1961) A.C. 388.
23. Sayers v. Perrin (1966) Q.L.R. 74 (trial) & 89 (Full Ct.)
24. The Wagon Mound No. 2 (1966) 2 All E.R. 709.

not convinced significantly, different) the Privy Council felt that the fire loss *was* reasonably foreseeable. Had they been asked, the crew members of the "Wagon Mound" would have admitted that oil spilled into the harbour involved a *very slight* risk of such a fire. If the activity involved were a lawful one (such as the cricket game in *Bolton v. Stone*[25]) this slight risk would not be the basis of reasonable foresight, but since the activity here was unlawful, being a public nuisance,[26] it was not reasonable to take even so slight a chance.

To a lawyer, the ramifications of this second *Wagon Mound* case may be even more significant than those of the first one. The court's analysis of "reasonable foresight" punctures the commonly held fallacy that it involves some fixed level of probability that harm will result; and points out that *any* degree of probability (other than "a mere possibility which would never influence the mind of the reasonable man") can support "reasonable foresight", if the risk involved is "unreasonable" in the light of the surrounding circumstances. Secondly, by requiring reasonable foresight of damage for nuisance liability, the Privy Council may have taken a large step toward merging negligence and nuisance. If "foreseeable harm" is necessary, should not a "foreseeable plaintiff" also be necessary? And if so, would a nuisance action ever succeed in circumstances where a negligence action would not also succeed?

But a layman might be excused for asking whether, as between the defendant and plaintiffs, a similar (and infinitely faster and less expensive) outcome could not have been reached by tossing a coin.

Even if our lay observer were less cynically inclined than that, he would probably conclude from his survey of the past year's tort decisions that the judicial process is not well suited to the task of resolving the uncertainties and rooting out the anomalies of tort law; it is too slow, inconsistent, expensive, and hard on individual litigants. He would, I think, be inclined to ask why some government agency does not undertake to determine the form that modern tort law should take, and then embark on a legislative program that will put the plan into effect. There are some signs of a quickened legislative interest in tort law. In Great Britain, besides the various tort studies in which the Law Commission is involved, a scheme of Criminal Injuries

25. (1951) A.C. 850.

26. But was it fair to classify the activity in this way? Should it not have been classified instead as "taking on bunkering oil without adequate precautions to prevent spillage", which is not an inherently unlawful act.

Compensation is in operation which, during the past year provided compensation to hundreds of persons who would formerly have had to rely on the vagaries of tort law, but who were fortunate enough to be injured by an act that happened to be criminal. Several Canadian provinces (including Manitoba) are looking into the establishment of similar schemes, and Ontario has just established a much more modest plan which will compensate only those injured while assisting the police. Many jurisdictions (again including Manitoba) are also studying the possibility of instituting non-fault compensation for automobile accidents and have made legislative changes during the year which will permit some "non-fault" type insurance to be sold on a voluntary basis. During the past year the Manitoba legislature made several changes to the Limitation of Actions Act, the most important being to allow the extension of a time period by one year from the time when the plaintiff knew about the "material facts" affecting liability.[27] But the type of fundamental reform suggested above is not likely to occur until more members of the lay public are made aware of the many inadequacies of tort law.

Are laymen ever likely to acquire this knowledge? This is hard to predict, but it may be significant that two important books on tort law published during the past year are expressly addressed to the general public. In *Basic Protection for the Traffic Victim: A Blueprint for Reforming Automobile Insurance*,[28] two distinguished American law professors made a very strong case for non-fault automobile accident compensation, and proposed a detailed plan whereby this could be achieved by the existing automobile insurance companies, without the need for a government-administered fund. In *An Introduction to the Law of Torts*,[29] Professor J. G. Fleming, one of modern tort law's most acute chroniclers, attempted to provide the general reader with a bird's-eye view of the major areas of the field. His book offers insights of the type that will facilitate large-scale reform, although he may have assumed too much knowledge on the part of his readers to have much impact on the average citizen. It is to be hoped that more books of a similar nature will soon be forthcoming. Law is too important to be left to lawyers.

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27. Bill 62 - An Act to amend The Limitation of Actions Act; assented to May 4, 1967.
28. By Robert E. Keeton & Jeffrey O'Connell, 1965, Little, Brown & Co., Boston.
29. (1967), Clarendon Press, Oxford.
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