

7-1-1976

## Note on Developments in Torts

Michael T. Hertz

Follow this and additional works at: <https://digitalcommons.schulichlaw.dal.ca/dlj>



Part of the [Torts Commons](#)



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](#).

---

### Recommended Citation

Michael T. Hertz, "Note on Developments in Torts", Note, (1975-1976) 2:3 DLJ 729.

This Commentary is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Law Journal by an authorized editor of Schulich Law Scholars. For more information, please contact [hannah.steeves@dal.ca](mailto:hannah.steeves@dal.ca).

### *I. Introduction*

Between October 1974 and March 1975, the *Nova Scotia Law News* synopsised some forty Nova Scotia tort cases. This note will not attempt to duplicate that coverage, but rather to elaborate upon a few of the points raised in those cases and to emphasize a number of Supreme Court of Canada decisions which should have tangible effect upon our provincial tort law.

### *II. Occupiers' Liability*

*Veinot v. Kerr-Addison Mines Ltd.*,<sup>1</sup> was perhaps the most important and controversial tort case decided in 1974. In it, seven of the nine Supreme Court justices accepted the modern approach for dealing with trespassers, as set forth by the House of Lords in *British Railways Board v. Herrington*<sup>2</sup>. Departing from law considered settled since 1929,<sup>3</sup> the Law Lords had held that no longer would the duty of an occupier of land be limited to avoiding injury to a trespasser through "some wilful act involving something more than the absence of reasonable care."<sup>4</sup> Rather,

the question whether an occupier is liable in respect of an accident to a trespasser on his land would depend on whether a conscientious humane man with his knowledge, skill and resources could reasonably have been expected to have done or refrained from doing before the accident something which would have avoided it.<sup>5</sup>

In *Veinot*, the plaintiff, a snowmobile driver, was injured one night on defendant company's private road when he hit a pipe, used as a gate, which stretched across the road at face height. In the vicinity of the road was a hydro right-of-way, heavily used by snowmobiles.

---

\*Michael T. Hertz, Associate Professor of Law, Dalhousie University.

1. (1975), 51 D.L.R. (3d) 533; 3 N.R. 94 (S.C.C.).

2. [1972] A.C. 877 (H.L.).

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

4. *Id.* at 365.

5. *British Railways Board v. Herrington*, [1972] A.C. 877 at 899 (*per* Lord Reid) (H.L.).

Some evidence pointed to past use of the road by snowmobiles<sup>6</sup> and failure to warn off such users. *Prima facie*, the plaintiff was a trespasser, but the Ontario jury found him to be an “implied licensee.” The Supreme Court reversed the decision of the Ontario Court of Appeal that there was no evidence for finding such a licence. Two justices would go no further than to say that the jury had evidence to support their finding. Three others, agreeing on the licence issue, went on to hold that, even if the plaintiff were considered a trespasser, the defendant company was nevertheless liable as it allowed the pipe to continue in existence, even though it “should have been recognized by it as a covert peril, menacing the safety of anyone who came upon the road at night on a snowmobile.”<sup>7</sup> The three justices emphasized the company’s knowledge of past night snowmobile travel in the area, the ease by which the road could be reached by snowmobiles, and the ease in warning of the peril of the pipe. In doing so, they applied and adopted the *Herrington* approach.

Four dissenting justices likewise agreed with the method of the House of Lords, favouring the adoption of “this approach, which recognizes that, in certain circumstances, the conduct of an occupier of land may require him to take steps to enable a person who has entered on his land, without his actual consent, to avoid a danger of which the occupier is aware.”<sup>8</sup> The dissenters would have affirmed the Ontario Court of Appeal decision because the danger from the pipe was not great and the evidence was insufficient to show that the company was aware of the presence of trespassing snowmobilers. In sum, seven justices adopted a version of *Herrington* and agreed that, under certain circumstances, the occupier should owe trespassers a duty of common humanity,<sup>9</sup> a lesser duty than that of using reasonable care.<sup>10</sup> The two groups disagreed as to the circumstances under which that duty of common humanity would arise.

---

6. (1975), 51 D.L.R. (3d) 533 at 537; 3 N.R. 94 at 107.

7. *Id.* at 555; 3 N.R. at 103.

8. *Id.* at 545; 3 N.R. at 117-118.

9. *Id.* at 555; 3 N.R. at 103 (Dickson J.); *id.* at 546; 3 N.R. at 118 (Martland J.)(occupier required to enable trespasser to avoid danger of which former is aware).

10. *Id.* at 541; 3 N.R. at 113 (Martland J., dissenting). Accord, The Law Commission (Gr. Brit.) Working Paper No. 52, *Liability for Damage or Injury to Trespassers and related questions of Occupier's Liability* (London, England: The Law Commission, 1973) at 18. [herein called “Law Commission”].

The disagreement is traceable to the speeches of the Law Lords in *Herrington*. The Lords agreed that the duty of the occupier to the trespasser did not arise from the status of occupier *qua* occupier<sup>11</sup> but rather from the occupier's ability to foresee the presence of the trespasser on his premises. Lord Reid, applying a subjective test,<sup>12</sup> would hold the duty of common humanity to arise if the occupier "knew before the accident that there was a substantial probability that trespassers would come."<sup>13</sup> In a subsequent Privy Council case,<sup>14</sup> Lord Reid muddied the waters somewhat, saying on the one hand that the occupier may have to act where he creates a danger "when he knows there is a *chance* that trespassers will come that way and will not see or realize the danger",<sup>15</sup> but saying later that the occupier's duty arises "when he knows facts which show a *substantial chance* that trespassers may come there."<sup>16</sup> This "substantial chance" test was adopted in *Veinot* by Martland J. for the four dissenting justices.<sup>17</sup> Lord Pearson, on the other hand, employed an objective test,<sup>18</sup> holding the occupier to the common humanity duty "if the presence of the trespasser is known to or reasonably to be anticipated by the occupier",<sup>19</sup> the position adopted by Dickson J. for three justices.<sup>20</sup> For the moment, therefore, Canada knows that occupiers may owe a duty of common humanity to trespassers but not whether the occupier's duty will arise in accordance with subjective or objective standards.

The national reaction to the *Veinot* case has not been entirely favourable. The Ontario legislature responded by amending *The Motorized Snow Vehicles Act* to provide that the occupier of land would owe no duty of care to either trespassers *or* licensees riding or being towed by a snowmobile, other than a duty not to inflict intentional injury or act in reckless disregard of the plaintiff's

---

11. Law Commission at 17.

12. (1975), 51 D.L.R. (3d) 533 at 549-50; 3 N.R. 94 at 97 (Dickson J.); Law Commission at 17.

13. [1972] A.C. 877 at 899.

14. *Southern Portland Cement Ltd. v. Cooper*, [1974] A.C. 623 (P.C.) (Aust.).

15. *Id.* at 644 (emphasis added).

16. *Id.* (emphasis added).

17. (1975), 51 D.L.R. (3d) 533 at 548; 3 N.R. 94 at 121, citing Lord Reid's statement in *Southern Portland Cement Ltd. v. Cooper*, [1974] A.C. 623; Dickson J. cited Lord Reid's exposition, *id.* at 644, at (1975), 51 D.L.R. (3d) 533 at 551; 3 N.R. 94 at 99.

18. Law Commission at 17.

19. [1972] A.C. 877 at 922.

20. (1975), 51 D.L.R. (3d) 533 at 555; 3 N.R. 94 at 103.

presence.<sup>21</sup> Whether Nova Scotia will take similar steps remains to be seen.<sup>22</sup>

The adoption of *Herrington* was foreshadowed by an earlier Supreme Court of Canada case, *Mitchell v. C.N.R.*,<sup>23</sup> reversing a decision by the Appeal Division of the Nova Scotia Supreme Court.<sup>24</sup> A nine year old boy, while walking down an icy footpath on railroad property, fell down an embankment and under the wheels of a passing train, losing a leg. Finding the boy contributorily negligent in using the icy footway while a train was passing, the Court nonetheless held the railroad fifty percent liable for failure to warn people off the path in the first place. The court emphasized how broadly other jurisdictions had viewed the duty owing by an occupier to children, citing, *inter alia*, the *Herrington* case.<sup>25</sup>

Speaking for the majority, Laskin J. (as he then was) also paused to inter the remains of *London Graving Dock Co. v. Horton*.<sup>26</sup> *Horton* had held that knowledge of a danger by an invitee would exonerate the occupier inductor from injuries caused by that danger. Laskin J. cited *Campbell v. Royal Bank of Canada*<sup>27</sup> as rejecting *Horton*.<sup>28</sup> However, there remained doubts as to whether *Campbell* had truly spelled *Horton's* demise in Canada, because the evidence in *Campbell* was actually that the plaintiff had *not* had full knowledge of the danger involved.<sup>29</sup> Those doubts may perhaps now be laid to rest. Laskin J. clearly stated that "it is no longer proper hold that mere knowledge of likely danger is any more exonerative of a licensor than of an inductor."<sup>30</sup> Although his words remain *dicta* with respect to inductors, *sciens* is obviously finished as a complete bar to the liability of an occupier. Laskin J.'s statement

---

21. *The Motorized Snow Vehicles Act*, S.O. 1974, c. 113, s.19.

22. A private member's bill (Bill No. 21, 2d Sess., 51st General Assembly, N.S.) which copies s. 19 of *The Motorized Snow Vehicles Act*.

23. (1974), 6 N.S.R. (2d) 440; 46 D.L.R. (3d) 363 (S.C.C.).

24. (1973), 6 N.S.R. (2d) 131 (S.C., A.D.).

25. (1974), 6 N.S.R. (2d) 440 at 450; 46 D.L.R. (3d) 363 at 379.

26. [1951] A.C. 737 (H.L.).

27. [1964] S.C.R. 85; 43 D.L.R. (2d) 341.

28. (1974), 6 N.S.R. (2d) 440 at 450-1; 46 D.L.R. (3d) 363 at 379-80. Accord, A. Linden, ed., *Studies in Canadian Tort Law* (Toronto: Butterworths, 1968) at 381; A. Linden, *A Century of Tort Law in Canada* (1967), 45 Can. B. Rev. 831 at 834.

29. See *Campbell v. Royal Bank of Canada*, [1964] S.C.R. 85 at 94; 43 D.L.R. (2d) 341 at 349; *City of Brandon v. Farley*, [1968] S.C.R. 150 at 156; 66 D.L.R. (2d) 289 at 294.

30. (1974), 6 N.S.R. (2d) 440 at 450; 46 D.L.R. (3d) 363 at 379.

clarifies the question of the occupier's duty with respect to dangers known to his invitee. Unfortunately, the statement also has suddenly introduced uncertainty into the matter of the occupier's duty to his licensee, because it seems to impose upon occupiers a duty to licensees for dangers known to the latter. Traditionally, the occupier has only had the duty to warn licensees of "concealed dangers" or "traps" of which the occupier had knowledge.<sup>31</sup> A danger, though, can hardly be considered "concealed" if it is known to the licensee, and the cases have exonerated the occupier from liability where the licensee knew of the danger<sup>32</sup> or where any danger apparent to the occupier would be quite as apparent to the visitor.<sup>33</sup>

In *Mitchell*, however, Laskin J. clearly stated that, since the plaintiff was in an area where he had tacit permission to be, "no question of trap . . ." arose.<sup>34</sup> For him, the finding of the trial judge that there was no trap or allurement was inconsequential because neither of the courts below had considered the condition of the pathway upon which the plaintiff had slipped. However, under the traditional view, that "consideration of the pathway" would have to result in a finding that the ice constituted a "concealed danger" in order for the occupier to be held liable.<sup>35</sup> But Laskin J.

31. See, e.g., *Robert Addie & Sons (Collieries) v. Dumbreck*, [1929] A.C. 358 at 364 (H.L.). Lord Hailsham's classic exposition has been faulted for his assertion that a licensor will owe a duty to a licensee with respect to concealed dangers of which he *ought* to know, as well as what he actually knows. See, e.g., *Hanson v. City of Saint John*, [1974] S.C.R. 354 at 364, 373; 39 D.L.R. (3d) 417 at 423, 431. But four of the five justices in *Hanson* quite clearly accepted the need for a "concealed danger", and the fifth did not touch on the matter. *Id.* at 364, 373; 39 D.L.R. at 423, 430. The matter was well settled prior to *Hanson*. *Hambourg v. T. Eaton Co.*, [1935] S.C.R. 440 at 450; [1935] 3 D.L.R. 305 at 313; *Greisman v. Gillingham*, [1934] S.C.R. 375 at 384; [1934] 3 D.L.R. 472 at 479; *Van Oudenhove v. D'Aoust* (1969), 70 W.W.R. 177 at 190; 8 D.L.R. (3d) 145 at 157 (Alta. S.C., A.D.); *Daneau v. Trynor Construction Co.* (1971), 7 N.S.R. (2d) 207 (S.C., T.D.). See generally J.G. Fleming, *The Law of Torts* (4th ed. Australia: Law Book Co., 1971) at 397.

32. See, e.g., *Summers v. Niagara Parks Commission*, [1945] O.W.N. 329 at 332; [1945] 2 D.L.R. 689 at 694-695 (H.C.), *aff'd on other grounds*, [1945] O.W.N. 817; [1946] 1 D.L.R. 34 (C.A.); *Baker v. Vandepitte* (1944), 6 B.C.R. 44 (S.C.).

33. *Hambourg v. T. Eaton Co.*, [1935] S.C.R. 440 at 450; [1935] 3 D.L.R. 305 at 313.

34. (1974), 6 N.S.R. (2d) 440 at 449; 46 D.L.R. (3d) 363 at 378.

35. The dissenters in *Mitchell*, Pigeon and Ritchie JJ., found no duty had been breached by the defendant railroad as the danger was "obvious" to the plaintiff. (1974), 6 N.S.R. (2d) 440 at 453 (Pigeon J.), at 457-458 (Ritchie J.); 46 D.L.R. (3d) 363 at 365 (Ritchie J.), at 370 (Pigeon J.).

merely remanded the case for consideration of damages and apportionment of fault, the licensee's awareness of the icy condition of the path being one element of that apportionment.<sup>36</sup> This approach, if adhered to in succeeding cases, could revolutionize occupiers' liability law, bringing it into the realm of modern negligence law and beyond the rigidities of the traditional categories and their trappings.<sup>37</sup>

In *Rafuse v. Lunenburg County Exhibition Association*,<sup>38</sup> Cowan C.J. of the Nova Scotia Supreme Court, Trial Division, was presented with a classic occupiers' liability case involving an invitee. The plaintiff had participated for a prize in a cross-cut sawing competition held by the defendant. The competition was held on a stage at the South Shore Exhibition, Bridgewater. After competing in the competition, the plaintiff went back and leaned against the stage rail to watch the rest of the competition and wait for the mixed competition, in which he was entered with his wife. The rail gave way and the plaintiff fell and was injured. It was discovered that the wood in one of the posts was rotten and had broken off. There were no warnings against leaning on that or any other part of the railing.

Finding that it was customary for the contestants to lean on the railing and that there were no chairs provided for them, Cowan C. J. held that the railing constituted an "unusual danger", which he defined as "such danger as is not usually found in carrying out the function which the invitee has in hand."<sup>39</sup> The "function" was that of

being in and about the stage occupied by the defendant for some considerable period of time, after taking part in one or more competitions . . . , being expected to remain on the stage with a number of other people and with no seats or benches provided, upon which those on the stage could rest for short periods between times of actual competition.<sup>40</sup>

The defendant ought to have known of the danger, as it was one

36. *Id.* at 450; 56 D.L.R. at 380.

37. *Mitchell* has been hailed as establishing "an orderly confluence of the streams of modern negligence principles with occupiers' liability law." *Lynch v. Brewers' Warehousing Co.* (1974), 3 O.R. (2d) 157 at 161; 44 D.L.R. (3d) 677 at 681 (Ont. Ct. Ct.).

38. (1974), unrep. S.B.W. 0042 (Oct. 31, 1974, N.S.S.C., T.D., Cowan C.J.T.D.).

39. *Id.* at 10, citing *Campbell v. Royal Bank of Canada*, [1964] S.C.R. 85; 43 D.L.R. (2d) 341.

40. *Id.* at 11.

which “was discoverable by the exercise of reasonable care and skill”; and, finally, the defendant had not used reasonable care to prevent damage to the plaintiff, who had used reasonable care for his own safety.

### *III. Nuisance: The Flow of Surface Water*

In *Loring v. Brightwood Golf and Country Club*,<sup>41</sup> the Appeal Division of the Nova Scotia Supreme Court had occasion to deal definitively with a common problem of surface water run-off. The plaintiff’s land abutted on the defendant’s golf course. The natural contours of the golf course resulted in large amounts of surface water flowing towards the plaintiff’s land during heavy rainstorms. The plaintiff’s land, however, was protected in part by a stone wall which had existed for some forty years on defendant’s property. Brightwood employees removed the stone wall, and, in a heavy storm, water flowing from the golf course flooded plaintiff’s basement. Although the defendants had done nothing to increase the flow of water, by removing the wall they had removed protection which their neighbour had previously enjoyed. For this act, the Appeal Division found liability.

The court found that the water did not flow in a watercourse, as it did not flow in a closely defined channel,<sup>42</sup> and consequently had to be considered as surface water. Reviewing the law, the court stated that Nova Scotia, as does the rest of common law Canada,<sup>43</sup> follows the so-called “common enemy” rule with respect to surface water. This rule, according to the court, “treats surface water as a ‘common enemy’ which each owner may fight off or control as he wills or is able to barring off, retaining, or diverting water.”<sup>44</sup> In contrast, under civil law rules, the lower owner may not bar off the flow of water coming from upper lands. Each rule, however, appears to prevent the upper landowner from increasing the burden which the lower one would naturally have.<sup>45</sup> Under the common

---

41. (1974), 8 N.S.R. (2d) 431; 44 D.L.R. (3d) 161 (S.C., A.D.), *reversing in part*, (1972), 7 N.S.R. (2d) 501 (S.C., T.D.).

42. (1974), 8 N.S.R. (2d) 431 at 443-4; 44 D.L.R. (3d) 161 at 171-2.

43. Alberta may be an exception. See A. Reid, “Surface Water at Common Law” in G.V. La Forest, ed., *Water Law in Canada — The Atlantic Provinces* (Ottawa: Information Canada, 1973) at 383.

44. (1974), 8 N.S.R. (2d) 431 at 445; 44 D.L.R. (3d) 161 at 173.

45. Compare *Les Ecclesiastiques du Seminaire des Missions Etrangères v. Kieffer* (1902), 11 Que. K.B. 173, *reversing* (1898), 14 Que. S.C. 325 (civil law rule),

law rule, “[g]enerally speaking the upper proprietor may dispose of the surface water upon his lands as he may see fit, but he cannot . . . collect it . . . and cast it in a body upon the proprietor below him to his injury.”<sup>46</sup> The *Loring* court pointed out that the common law rule prohibiting diversion of water into neighbouring land is one which seems to be derived from “cases where the upper landowner collected or accumulated surface water in substantial quantity and permitted it to escape or diverted it by artificial channels or barriers to flow on the neighbour’s land.”<sup>47</sup> The court viewed the facts before it as presenting such a case.<sup>48</sup>

The *Loring* case is of interest because it did not involve the collection of water but the destruction of an artificial barrier which removed an impediment to the natural flow of the water. The Appeal Division reasoned that the plaintiffs “may well have acquired prescriptive rights to have the wall continue under s.31 of the Statute of Limitations.”<sup>49</sup> The prescription point is not mentioned in the judgment below,<sup>50</sup> although it was in the Appeal Division.

In general, the dominant estate may remove artificial barriers to the flow of the surface water,<sup>51</sup> provided that there is neither prescriptive right<sup>52</sup> nor the operation of an equitable estoppel.<sup>53</sup> The defendant may not, for instance, suddenly remove a barrier in order to remove accumulated water from his land and have it flow into his neighbour’s property.<sup>54</sup> On the other hand, again assuming no prescriptive rights, the dominant owner may remove even natural barriers to drainage, provided that they are recently formed<sup>55</sup> and

with *Ostrom v. Sills* (1897), 24 O.A.R. 526, *aff d.*, (1898), 28 S.C.R. 485 (common law rule).

46. *Ostrom v. Sills* (1897), 24 O.A.R. 526 at 539, *aff d.*, (1898), 28 S.C.R. 485.

47. (1974), 8 N.S.R. (2d) 431 at 447; 44 D.L.R. (3d) 161 at 174.

48. *Id.* at 449; 44 D.L.R. at 176.

49. *Id.* at 439-40; 44 D.L.R. at 168.

50. *Loring and Loring v. Brightwood Golf and Country Club Ltd.* (1974), 7 N.S.R. (2d) 501 (S.C., T.D.).

51. *Thomas & Evans, Ltd. v. Mid-Rhondda Co-operative Society, Ltd.*, [1940] 4 All E.R. 357 at 362-63 (C.A.).

52. *E.g.*, *Felton v. Simpson* (1850), 33 N.C. (11 Ire.) 84 (plaintiff’s prescriptive right against defendant’s removal of dam).

53. *Canton Iron Co. v. Biwabik-Bessemer Co.* (1896), 63 Minn. 367; 65 N.W. 643 (S.C.).

54. *Whalley v. Lancashire & Yorkshire Ry. Co.* (1884), 13 Q.B.D. 131 (C.A.); *Martin v. Schwertley* (1912), 155 Iowa 347; 136 N.W. 218 (S.C.).

55. *Taylor v. Frevert* (1918), 183 Iowa 799; 166 N.W. 474 (S.C.).

there is no reliance on the continuation of such a temporary obstruction to the flow.<sup>56</sup>

*Loring's* case demonstrates that, where prescription exists, the artificial barrier becomes assimilated to a natural barrier, and may thereafter be removed only if its removal would not cause surface water to be cast "as a body" upon lower-lying property.

The *Loring* case presented a second feature, the applicability of the rule in *Goldman v. Hargrave*<sup>57</sup> to surface water problems. The gravamen of *Loring's* claim was not, in fact, the removal of the wall, although it was upon that basis that the Appeal Division affirmed in part the judgment below. Rather, the plaintiff had charged the defendant, Brightwood, with failure to keep certain drains open and clear. A number of catchbasins had been constructed by the City of Dartmouth on the country club's property.<sup>58</sup> City employees kept them clear, although Brightwood employees also cleared them in the "interest of good relations with" the golf course's neighbours.<sup>59</sup> The Trial Division had held on the basis of *Goldman v. Hargrave* that Brightwood had a duty to keep the drains cleared and had failed to discharge it. The Appeal Division rejected that holding.

In *Goldman*, lightning started a fire in a tree on the defendant's property, and the defendant cut the tree down and sprayed it with water. Instead of completely extinguishing the fire, the defendant left the tree to burn itself out. The fire smouldered for three days and then spread across the plaintiff's boundary, causing damage. The Privy Council found for the plaintiff, holding that there was a general occupier's duty to take reasonable steps to remove hazards upon his land which threaten his neighbours, irrespective of whether the origin of the hazard is natural or otherwise.

*Goldman* has been hailed as a bold forward step overcoming the notorious reluctance of the common law to impose liability in negligence on a defendant who remains passively inactive in the face of a hazard, when a course of affirmative action . . . could save his neighbour from impending harm.<sup>60</sup>

---

56. *Farnell v. Parks* (1917), 13 Alta. L.R. 7 at 17; 38 D.L.R. 17 at 21 (S.C.) (*dicta*). See also, *Qualley v. Day*, [1929] 2 D.L.R. 928; 23 Sask. L.R. 425 (C.A.); A. Reid, "Surface Water at Common Law" in G.V. La Forest, ed., *Water Law in Canada — The Atlantic Provinces* (Ottawa: Information Canada, 1973) at 380.

57. [1966] 2 All E.R. 989 (P.C.) (Aust.).

58. (1974), 8 N.S.R. (2d) 431 at 435; 44 D.L.R. (3d) 161 at 163-4.

59. *Id.* at 436; 44 D.L.R. at 165.

60. *Id.* at 451; 44 D.L.R. at 177-8.

So saying, the Appeal Division went on to distinguish the case on two grounds. First, it said, the *Goldman* defendant was not completely passive, but rather had assumed a task which he failed to complete. Thus, the case did not overrule cases “like that of the classic capable rescuer watching a drowning man, of one who stood idly by and assumed no legal duty however amoral his action might be.”<sup>61</sup> Second, relying upon Professor Fleming’s view of *Goldman*,<sup>62</sup> the court held that “the principle exempting owners from liability for natural flow of surface water is too well entrenched in our law to be dislodged or affected by general statements . . . laid down in quite different circumstances.”<sup>63</sup> The court felt that the duty of keeping the catchbasins free might be quite onerous in areas with heavy winter snow. It elected to leave the prime responsibility for clearing with the municipal authorities.

It is quite clear that the Appeal Division has made a policy decision, and that neither of the two points made in support of its position is totally convincing. First, Brightwood was not completely passive with respect to the catchbasins. As noted above, it had taken upon itself to keep the drains clear, raising at least the strong possibility that Loring relied on the defendant’s actions to preserve his property. Without getting into the complexities of where non-feasance ends and misfeasance begins,<sup>64</sup> it is fair to suggest that a practice of clearing drains is somewhat analogous to the railroad cases, where one undertaking to warn the public of passing trains has a duty to continue it or else clearly state that he is not doing so.<sup>65</sup> Second, Professor Fleming’s remarks appear to be directed at situations involving completely natural drainage, whereas *Loring* involved artificial drainage. It is true, of course, that the drains in *Loring*, when blocked, merely returned the flow of water to its natural state. Yet it could be argued that the country club, having adopted the catchbasins for their own purposes,<sup>66</sup> and

---

61. *Id.* See, e.g., *Vanvalkenburg v. Northern Navigation Co.* (1913), 30 O.L.R. 142; 19 D.L.R. 649 (S.C.).

62. J. Fleming, *The Law of Torts* (4th ed. Australia: Law Book Co., 1971) at 358.

63. (1974), 8 N.S.R. (2d) 431 at 452; 44 D.L.R. (3d) 161 at 179.

64. See, e.g., W.L. Prosser, *Handbook of the Law of Torts* (4th ed. St. Paul, Minn.: West Publishing Co., 1971), s. 56.

65. Compare, e.g. *Mercer v. S.E. & C. Ry. Co.*, [1922] 2 K.B. 549, with *Soulsby v. City of Toronto* (1908), 15 O.L.R. 13; 9 O.W.R. 871 (H.C.).

66. See *Sedleigh-Denfield v. O’Callahan*, [1940] 3 All E.R. 349 (H.L.), in which a local authority, without defendants’ permission, laid a pipe in a ditch on defendants’ land for carrying off rainwater. Due to poor construction, the pipe

having tended to them on a regular sort of basis, could not thereafter allow the *status quo* suddenly to revert to a “natural” state which had not really existed for an appreciable period of time.<sup>67</sup>

#### IV. Collateral Benefits

In *Zinck v. Anderson*,<sup>68</sup> Cowan C. J. reversed his earlier decision in *Wolfe v. Oliver*<sup>69</sup> concerning collateral benefits and held that no deductions should be made from a plaintiff’s claim for damages by taking into account payments made to the plaintiff under insurance and disability policies funded by the plaintiff’s employer. *Wolfe* had earlier been called into question by a decision of Dubinsky J. in *Rigby v. Pearl*.<sup>70</sup>

In *Wolfe*, the plaintiff was covered under disability insurance, half of the premiums for which were paid by his employer. Adopting the reasoning of *Smith v. CPR*<sup>71</sup> which itself relied upon English authority, *Browning v. War Office*,<sup>72</sup> the court had held that there should be deduction from damages awarded to the plaintiff because the plaintiff was receiving payment through insurance

---

tended to clog. The pipe became blocked and, during a heavy rainfall, plaintiff’s adjacent premises were flooded. The occupiers were held responsible because they had acquired knowledge of the tendency of the pipe to block and had “adopted the nuisance” by using the pipe for the purpose of allowing water to escape from their own land, without remedying its defects.

67. Very much in point, but coming prior to the *Goldman* case, is *Thomas & Evans v. Mid-Rhondda Co-operative Society*, [1940] 4 All E.R. 357 (C.A.), which did not find applicable the *Sedleigh-Denfield* case, note 66, *supra*. *Thomas & Evans* involved an artificial wall on defendants’ property, which the defendants had breached in order to erect a building. A flood which occurred thereafter flooded defendants’, and as a result plaintiffs’, lands. It was held that defendants owed no duty to plaintiffs either to erect or maintain the wall. Compare the *Whalley* case, note 54, *supra*, where the defendants were liable for suddenly breaching their wall and letting water escape from their property to plaintiff’s. The cases are distinguishable because, in the *Whalley* case, the defendant intentionally transferred an injury from himself to the plaintiff. If *Thomas & Evans* can be distinguished from *Loring*, it is because the degree of reliance on the defendants’ activities was probably far greater in the latter case than the former, and the knowledge of the plaintiffs so much greater in the former case that they could no longer count on the protection of the wall.

68. (1975), unrep. S.H. 05410 (May 14, 1975, N.S.S.C., T.D., Cowan C.J.T.D.).

69. (1973), 34 D.L.R. (3d) 669 (N.S.S.C., T.D.), *rev’d on other grounds*, (1974), 8 N.S.R. (2d) 313; 46 D.L.R. (3d) 380 (S.C., A.D.).

70. (1973), unrep. S.H. 02591 (March 13, 1974, N.S.S.C., T.D., Dubinsky J.).

71. (1964), 41 D.L.R. (2d) 249; 45 W.W.R. 170 (Sask. Q.B.).

72. [1962] 3 All E.R. 1089 (C.A.), *refusing to follow*, *Payne v. Ry. Executive*, [1951] 2 All E.R. 910 (C.A.).

funded by his employer. *Browning*, however, had been disapproved by the House of Lords in *Parry v. Cleaver*.<sup>73</sup>

In *Boarelli v. Flannigan*,<sup>74</sup> the same issue had arisen in Ontario with respect to welfare payments that a plaintiff received while unemployed as a result of personal injuries suffered in a motor accident. At that time, the leading Ontario collateral benefits case was *Menhennet v. Schoenholz*,<sup>75</sup> which likewise relied wrongly on *Browning*, because *Parry v. Cleaver* had not been brought to the attention of the court. The court elected to reconsider the *Menhennet* decision and then disapproved it. Under *Menhennet*, payments in the nature of employee fringe benefits were considered collateral benefits, whereas employer payments *ex gratia* were deducted from plaintiff awards.<sup>76</sup> Under *Boarelli*, this distinction would be made no longer. With *Zinck* and *Rigby* now decided, the *Boarelli* rule may be considered likely to be adopted in Nova Scotia.<sup>77</sup>

#### V. Motor Vehicles

Tort law governing motor vehicles has, by and large, developed with a thrust towards utilization of insurance to spread the bearing of risks created by automobiles. Our laws reflect this direction, in that we are willing to impute the liability of drivers to owners<sup>78</sup> (the party most likely to be insured) and shift the burden of proof from the uninsured pedestrian to the insured motorist.<sup>79</sup> Two recent cases are worth mentioning in this context.

In *Abraham v. Piskorski*<sup>80</sup> the plaintiff, a woman aged 75, fell across a tow line between two motor vehicles. The vehicles were joined by the line because the second defendant had asked his employee, the first defendant, to tow his car and get the engine started. The second defendant argued that his vehicle was not

73. [1969] 1 All E.R. 555 (H.L.).

74. [1973] 3 O.R. 69; 36 D.L.R. (3d) 4 (C.A.).

75. [1971] 3 O.R. 355; 20 D.L.R. (3d) 395 (C.A.).

76. [1973] 3 O.R. 69 at 81; 36 D.L.R. (3d) 4 at 16.

77. See also *Abraham v. Piskorski* (1972), unrep. S.H. 01195 (Apr. 25, 1975, N.S.S.C., T.D., Morrison J.) (sick leave benefits not deductible where plaintiff benefitted from sick leave but was not entitled to balance of unused sick leave on termination). See generally, D. Oliver, "The Collateral Benefits Rule Today" in H.N. Janisch, ed., *Recent Developments in Torts and Automobile Insurance* (Halifax: Dalhousie University, 1974) at 53-62.

78. The Motor Vehicle Act, R.S.N.S. 1967, c. 191, s. 221(3) & (4).

79. *Id.*, s. 221(1).

80. (1972), unrep. S.H. 01195 (Apr. 25, 1975, N.S.S.C., T.D., Morrison J.).

present “upon a highway” under s.221(1) of the Motor Vehicle Act, because it had not reached the street. If s.221(1) did not apply, then the burden of proof of negligence would not be lifted from the plaintiff pedestrian.<sup>81</sup> Assuming that the vehicle was on the sidewalk but had not reached the street, the trial court held that the sidewalk was part of the highway and s.221(1) applied.<sup>82</sup>

Similar issues involving the geographic application of s.221(1) have arisen in the past. In *Comeau v. Murphy*,<sup>83</sup> for instance, the plaintiff was not on the highway but was struck by a vehicle which had careened off the highway and hit him. Section 221(1) was nevertheless applied. Not so in *McQuarrie v. Purkis*<sup>84</sup> which held that a lane or driveway through a shopping centre lot was not a highway.

The trend of the cases seems to be to make a fairly careful dividing line between mere presence of a motor vehicle upon private lands, which is not covered by s.221(1), and presence on a public thoroughfare. The *Comeau* case demonstrates that the injury which results need not actually occur on the highway so long as it bears a connection with the presence of a motor vehicle upon it. The *Abraham* case demonstrates that injury through mere presence and not motion of the motor vehicle is all that is required. In the case, the car was virtually at a standstill.

By way of contrast, a lacuna appeared in the Motor Vehicle Act in the case of *Russell v. Pope*.<sup>85</sup> Plaintiff was a passenger in an automobile driven by his son. As the car was passing defendant’s parked vehicle, the passenger door of defendant’s car opened and struck the moving vehicle in which the plaintiff was riding. Plaintiff’s son braked and plaintiff was thrown forward and injured.

---

81. Although s. 221(1) is sometimes referred to as the “pedestrian” section, it is not limited to pedestrians. Rather, the scope of subsection (1) is limited only by subsection (2). Thus, for example, in *Roy v. Apt* (1973), 9 N.S.R. (2d) 110 (Cty. Ct.), *aff’d*, (1974), 9 N.S.R. (2d) 108 (C.A.), it was irrelevant to consider whether or not the plaintiff bicyclist was a “pedestrian” under s. 1 (ap) of the Motor Vehicle Act. It was sufficient that a bicycle does not constitute a “motor vehicle” under s. 1(g), defined as “a vehicle propelled by any power other than muscular power . . .”

82. The Motor Vehicle Act, R.S.N.S. 1967, c. 191, s. 1(b1), defines “sidewalk” as “. . . any part of a highway especially set aside for pedestrian travel and separated from the roadway”.

83. (1971), 3 N.S.R. (2d) 674 (S.C., T.D.).

84. (1969), 1 N.S.R. (2d) 317 (S.C., T.D.).

85. (1975), unrep. S.T. 00166 (May 26, 1975, N.S.S.C., T.D., Dubinsky J.).

The door of defendant's car had been opened by defendant's sister, a passenger.<sup>86</sup> The action against the defendant, who both owned and was driving the car, failed. There was not, said the court, "a scintilla of evidence to indicate that anyone had opened the door with [defendant's] instructions, thereby making him vicariously liable for the collision."<sup>87</sup> The court held that, in opening the door of the car, the passenger in defendant's automobile could not be said to be "operating the motor vehicle"; if she had, the defendant would have been liable for her actions under s. 321(3) of the Motor Vehicle Act.<sup>88</sup>

The "operation" of a motor vehicle has, in other jurisdictions, been held to include the opening of a passenger door.<sup>89</sup> So, too, have such acts as the spraying of chemicals from a motor vehicle<sup>90</sup> and the failure to attach a truck tailgate properly,<sup>91</sup> neither of which is directly connected with actual driving. As one court put it:

We construe the "operating" . . . of a motor vehicle . . . as encompassing all acts necessary to be performed in the movement of a motor vehicle from one place to another or fairly incident to the ordinary courses of its operation, including . . . all acts which are reasonably connected with entering the vehicle at the point of departure and alighting therefrom at destination.<sup>92</sup>

Obviously, one cannot divorce the terms of the statute from its *raison d'être*. In *Schuster v. Whitehead*,<sup>93</sup> relied on for precedent in *Russell v. Pope*, the court distinguished the negligent opening of a

---

86. *Id.* at 3.

87. *Id.* at 4.

88. "A person operating a motor vehicle, other than the owner thereof, shall be deemed to be the servant and agent of the owner of the motor vehicle and to be operating the motor vehicle as such servant and agent acting in the course of his employment and within the scope of his authority as such servant and agent unless and until the contrary is proved."

89. *E.g.*, *Karnes v. Ace Cab Co.* (1956), 287 S.W. 2d 378 (Mo. C.A.). The cases have gone both ways. In New York on November 9, 1971, two different judges in the same New York City court interpreted the same statute and arrived at diametrically opposite conclusions. Compare *Lynton v. Metcalf* (1971), 68 Misc. 2d 779; 327 N.Y.S.2d 823 (N.Y.C. Civ. Ct.) (passenger's opening taxi door was not "operating" taxi within taxi owner's insurance policy protecting persons legally operating a motor vehicle in the business of the insured), with *Epstein v. Kernon* (1971), 68 Misc. 2d 29; 326 N.Y.S. 2d 137 (N.Y.C. Civ. Ct.) (*contra*).

90. *Bright v. East Side Mosquito Abatement District* (1959), Cal. App. 2d 7; 335 P.2d 527 (Dist. C.A.) (spraying chemical fog from vehicle caused accident).

91. *Orlowski v. Jackson State Prison* (1972), 36 Mich. App. 113; 193 N.W. 2d 206 (C.A.).

92. *Karnes v. Ace Cab Company* (1956), 287 S.W. 2d 378 at 380 (Mo. C.A.).

93. [1960]O.R. 125; 21 D.L.R. (2d) 609 (C.A.).

car door by the vehicle driver, which it would have held part of the “operation” of the car, and the same act by a passenger, which it would not.<sup>94</sup> In doing so, it underscored its desire not to extend unduly the principle of vicarious responsibility.<sup>95</sup> *Schuster*, however, is bottomed upon the concept that accidents are caused by individuals, with the corollary that one individual should not be held liable for the acts of another unless he can be said to have caused them. The modern trend is to look not so much at individuals as at activities, such as automobile driving, which create hazards. In that light, the hazard of a door being negligently opened by the driver is really no different than the hazard of a door being negligently opened by a passenger. Both are imputable to the driving activity, which is a highly insured activity, and should be considered a part of the operation of the vehicle.

---

94. *Id.* at 130; 21 D.L.R. at 613.

95. *Id.* at 132; 21 D.L.R. at 615.