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CIVIL LAW

on

AUTOMOBILE ACCIDENTS

QUEBEC

By

WILLIAM C. J. MEREDITH, M.A.,
Law Tripos, Honours; Cambridge.
Member of the Bar of the
Province of Quebec, Canada.

WILSON and LAFLEUR, Ltd.
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PREFACE

Many months ago, I set about the task of revising a collection of notes which, from time to time, I had prepared for my own use in automobile accident cases. It was during the course of that work that I conceived the idea of producing this book. My object has been to confine the subject matter to material of practical use, principally to my *confrères*, but also to insurance and transportation companies, and others interested in cases of this kind. With that end in view, I have refrained from academic discussions, and, for the most part, I have dealt only with the statutory law and jurisprudence of this Province. The danger of treating English Common Law decisions as precedents in Quebec has been stressed by the Supreme Court of Canada on several occasions, and I have endeavoured to restrict references to judgments outside this Province to those which, under appropriate circumstances, may usefully be cited in our Courts.

In numerous instances I have confined the judgment reports to the Reporter's summary, or headnote, such summaries being preceded by the letters "R.H.". While this method of presenting jurisprudence is sometimes abused, I trust that by explanations in the text, and a suitable division of the subject, I have kept within reasonable bounds. I believe the citations from many decisions which are not to be found in the Reports may serve a useful purpose.

Should the book prove useful in practice, I shall be satisfied.

WILLIAM C. J. MEREDITH

3011 Cedar Avenue, Montreal.

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1940

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ABBREVIATIONS

A.C. .....Appeal Cases: The Law Reports — House of Lords, Judicial Committee of the Privy Council.

All E.R. ....All English Reports.

Ap. Div. ....Appelate Division.

Art. .....Article.

Asp. M.C. ...Aspinall's Reports of Maritime Cases (English).

B.C.R. .....British Columbia Reports.

Board, the...The Board of Transport Commissioners, formerly called the Board of Railway Commissioners.

C. .....Chapter — referring to chapter of a Statute.

C.A. .....Provincial Court of Appeal in some Province other than Quebec.

C.C. .....Referring to Civil Code of Lower Canada or to Circuit Court, as the case may be.

C.C.C. .....Canadian Criminal Cases.

Ch. .....Referring to Chancery, or Chapter (of Statute), as the case may be.

Ch. Ap. .....Chancery Appeal Cases (English).

C.N.R. .....Canadian National Railway Company.

C.P. .....Code of Civil Procedure of the Province of Quebec.

C.P.R. .....Canadian Pacific Railway Company.

C.R. .....Court of Review (no longer in existence).

C.R.C. .....Canadian Railway Cases Reports (now called Canadian Railway and Transport Cases).

C.R.T.C. ....Canadian Railway and Transport Cases Reports.

C.S. .....Cour Supérieure — Les Rapports Judiciaires de Québec; Cour Supérieure, or to the Superior Court itself.

Corp. .....Corporation.

D.L.R. .....Dominion Law Reports.

Eng. .....English, referring to a case in one of the Courts of England.

Ex.C.R. .....Canada Law Reports: Exchequer Court of Canada.

G.T.R. .....Grand Trunk Railway Company.

H. & C. .....Hurlstone & Coltman Reports (English).

I.L.R. .....Insurance Law Reporter.

K.B. .....Les Rapports Judiciaires de Québec; Cour du Banc du Roi (en appel), or to Court of King's Bench (Appeal Side,) or (in a case marked "Eng") to the King's Bench Division.

L.C.J. .....The Lower Canada Jurist.

L.J. .....Law Journal Reports — followed by letters indicating Court (English).

L.R. .....Law Reports — followed by letters indicating Court (English).

L.T.R. .....Law Times Reports (English).

Man. L.R. ...Manitoba Law Reports.

M.C. .....Municipal Code of the Province of Quebec.

M.L.R. .....Montreal Law Reports.

M.P.H. .....Miles per hour.

M.P.R. .....Maritime Provinces Reports.

M.T.C. .....Montreal Tramways Company.

Mtl. .....Montreal.

M.V.A. .....Motor Vehicle Act of the Province of Quebec.

O.L.R. .....Ontario Law Reports.

O.W.N. .....Ontario Weekly Notes.

P.C. .....Judicial Committee of the Privy Council.

Q.B. .....Referring to Les Rapports Judiciaires de Québec; Cour du Banc de la Reine, or to the Court of Queen's Bench (Appeal Side), or (in a case marked "Eng") to the Queen's Bench Division.

Q.P.R. .....Quebec Practice Reports.

R.A. .....The Railway Act.

R.H. .....“Reporter's Headnote” — referring to the summary by the Reporter at the head of a Case Report.

R.J. ..... La Revue de Jurisprudence.

R.J.R. ..... Rapports Judiciaires Revisés.

R.L. ..... La Revue Légale (*nouvelle série*).

R.S.C. ..... The Revised Statutes of Canada.

R.S.O. ..... The Revised Statutes of Ontario.

R.S.Q. ..... The Revised Statutes of Quebec.

S. ..... Section.

Ss. ..... Subsection.

S.C. ..... Referring to the Supreme Court of some other Province, as distinct from the Supreme Court of Canada.

S.C.C. ..... Supreme Court of Canada (also referred to simply as Supreme Court).

S.C.R. ..... Canada Law Reports: Supreme Court of Canada.

S.L.R. ..... Saskatchewan Law Reports.

T.L.R. ..... Times Law Reports (English).

Unrep'd ..... Indicating that a case is apparently unreported.

W.W.R. .... Western Weekly Reports.

SECTION 1

INVESTIGATION OF AUTOMOBILE ACCIDENT CASES

Investigator.

Proper preparation of an automobile accident case must start with prompt and thorough investigation, and considerable responsibility rests upon the person in charge of this important stage of the proceedings. The nature of the investigator's work is outlined in the following notes.

Accident report.

It is customary for transport and other companies making regular use of vehicles to supply their employees with report forms, which drivers involved in accidents are instructed to complete and file with the least possible delay. These forms should include a conspicuous notation to secure the names and addresses of all available witnesses. While independent eye witnesses are, generally speaking, the most helpful, a common mistake is to overlook the importance of securing witnesses as to the positions of the vehicles after the accident and as to any tire tread, skid or other marks left upon the roadway. Such marks may be of considerable value in determining if and when the brakes were applied, the approximate speeds of the vehicles, and the courses they followed. [1] Remaining, as they do, after the excitement of the accident has subsided,

1. See, e.g. *Alary vs Pageau*, 34 R.L. 220 (C.C. 1928) at p. 223, and see *infra* p. 35 n.

the story they tell is often the deciding factor between two conflicting versions.

Some companies include in their report forms a statement to the effect that the document is intended for the exclusive use of their attorneys in conducting any legal action which may arise out of the accident. This will assist counsel in maintaining, if necessary, that the report is *privileged*, thereby preventing the opposing attorneys from compelling its production in Court. A report containing the names of witnesses has been held to be privileged in any event: see:

> *Glickman vs Mtl. Street Ry.* Co., 13 Q.P.R. 143 (C.S. 1911); *Mtl. Street Ry Co. vs Feigleman* (1912) 7 D.L.R. 6; *Stocker vs C.P.R.*, 5 Q.P.R. 117 (C.S. 1901); *Savignac vs Mtl. Tramways Co.*, 18 Q.P.R. 360 (C.S. 1917).

Police report.

If a police report has been made, it is important to obtain or make a copy of it. Frequently it will contain the names of witnesses and a sketch. It is also good practice to interview the police constables or officers who made the report. Sometimes further useful information is gained in this way.

Witnesses.

The investigator should follow up the information contained in the accident and police reports and in order, if possible, to obtain further evidence, he should make a thorough canvass of the neighbourhood where the accident happened. A minimum of time should be lost before interviewing the available witnesses. Their full names and addresses should be taken and signed statements obtained

where possible.[2] Frequently a witness is unwilling to sign a statement and in such event a detailed memorandum of his version should be written out, together with a note of the time, date and place of the interview. The memorandum should be signed by the investigator and, where possible, by any other party who may have been present at the interview. For such purposes the investigator is often accompanied by an assistant. In some instances, it may be advisable to advertise in the daily newspapers for any witnesses who may have seen the mishap. This course is quite commonly adopted by accident victims who previously had neglected or had not been in a position to secure independent evidence.

In interviewing witnesses the investigator should bear in mind the important points of the case, remembering always that points of considerable value from a legal standpoint may sometimes appear trivial to a layman, and that a witness may be inclined to pass over important matters while stressing others of no legal consequence.

Because of the delay which elapses between the date of the accident and the trial, it sometimes happens that a witness cannot be located when he is needed. Situations of this kind may be very serious and, to avoid them, the witnesses' addresses should be checked from time to time.

Weather reports.

Sometimes an official weather report is helpful. This will depend upon the circumstances of the case.

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2. In cases where the investigator writes out the statement it is well to add the following two questions at the end:— "Have you carefully read the above?" — "Is the above statement in all respects correct?" After reading the statement the witness should *himself* write in the word "yes" in answer to both questions and then sign the document.

As to *statements obtained from the victim* of accident see *Art. 1056b* (*infra* p. 318).

Inquest proceedings.

In cases of fatal accident the investigator, if not the attorney, will in all probability have attended the Coroner's Inquest and will have made a note of the witnesses' names and addresses and of their evidence. In any event a certified report of the proceedings should be obtained.

Plans.

In most cases it is desirable to have a plan or scale tracing of the scene of accident. A useful scale for general purposes is 20 feet to the inch. The size of the plan will depend upon circumstances. Landmarks referred to in the witnesses' statements, such as manholes, lamp posts, etc., should be included. It is important, however, to omit anything which the Court might hold to be leading or suggestive. For example, objection could properly be taken to the production of a plan at the trial if the supposed positions of the automobiles were marked upon it, or if it included notations such as "where plaintiff's car stopped" — "point of impact", etc. In the case of intersection collisions careful study should be given to the respective lines of vision of the two drivers as they approached the crossing. It is sometimes better to prepare a separate plan on which such lines of vision are shown.

Strictly speaking, the plan should be prepared by a duly qualified surveyor, although in a great number of cases this formality is waived and the plan is drafted by the investigator, or by some other party, and by consent of both counsel is used at the trial. The person who prepares the plan, whether a surveyor or not, should be available to attend at the trial to prove it. However, this further expense may be avoided by first submitting the plan to the

opposing attorneys and obtaining their consent to its production without proof. In many instances, of course, it is advisable, if not necessary, to have the plan prepared by a competent surveyor and to call him as a witness to testify as to grades, visibility, etc.

Photographs [3].

In addition to a plan, it is often an advantage to have photographs of the scene of accident. Photographs of skid or other marks left upon the roadway are extremely useful, if taken soon enough after the accident to be positively identifiable with the vehicles. In most cases several photographs should be taken at different angles. It may or may not be necessary to use them all at the trial, but a solitary photograph may be open to suspicion. Photographs of the damaged vehicles before repairs have been made may be very important and are generally of assistance to the Court in determining responsibility. The photographer should be available to attend at the trial, if required.

Traffic by-laws.

Where the accident takes place within the limits of a municipality, the local traffic by-law, if any, should be consulted for any relevant provision. Such by-laws are amended from time to time and care should be taken to obtain an up to date copy. (*infra* p. 96)

3. *Moving picture* photographs may be admissible in evidence under certain circumstances and have been used in our Courts on several occasions, e.g. *Bonneau vs Myers et al*, C.S. 170190 March 1939; *M.T.C. vs Beauregard*, 67 K.B. 578 (1939). However, in the latter case Barclay, J., expressed serious doubt as to whether the moving picture had any place in an appellate court. He pointed out that the speed at which the picture is run off is an important factor and that "without evidence in this court that the tempo is the same the exhibit is valueless."

Correspondence.

Before instituting action it is customary for the attorney instructed to collect damages to write to the opposite party setting forth briefly the allegations of fault and the damages claimed. In cases where the damages are not immediately assessable, it is as well to point this out in the letter. In claiming from corporations special formalities as to notice are sometimes required, and care should be taken to see that the notice of claim is given in the proper manner and within the legal delay. [4]

It is generally preferable that any negotiations for settlement should, as far as possible, be carried on verbally. If it is necessary to write in such connection, it should be made clear that the letter is written without prejudice to the rights of either party in the event of ultimate failure to reach a settlement. It is not as a rule good practice for the parties to enter into detailed correspondence regarding the facts of the accident. This may later result in placing a litigant in an embarrassing position.

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4. E.g. the *Charter of the City of Montreal* (as amended by *25-26 George V. Chapter 113, Section 536*) requires that notice of any claim against the City for damages resulting from bodily injury caused by an accident or for damages to property must be received by the City within thirty days from the date of the accident or damages. The notice must be in writing and contain the particulars of the damages claimed, together with the date and place of accident and full name, occupation and address of the claimant. (In claims for damages resulting from falls on sidewalks or roadways the City's Charter requires that notice be given within ten days). No action may be instituted against the City before expiration of thirty days from the receipt of the notice. A further example of special requirement as to notice of claim is to be found in the Charter of the *Montreal Tramways Company*. By *1 George V., Chapter 77, Section 20*, any person claiming loss or damage from that Company must within the delay of one month before the institution of any action give notice in writing by serving it upon the secretary of the Company. The notice must contain a detailed statement of the damages claimed. (See also *infra* p. 229)

Personal injury cases.

In cases of personal injury the claimant should keep an accurate record of his disbursements and other losses arising from the accident, being careful to retain receipts and other relevant documents for later use. If it becomes necessary for him to endeavour to enforce payment, he should see that the claim is placed in reliable hands for collection. This means a qualified attorney.

A party likely to become defendant in a personal injury action should take appropriate steps in order to be as well posted as possible on the claimant's medical condition and progress. Quite frequently the hospitals and doctors rightly refuse to give information on their patient's condition without his permission. However, an independent medical examination may be held with the patient's consent, and it is customary — before action is instituted — for a company from which damages may later be claimed to send a doctor to examine the claimant and report on his condition as a matter of routine and without prejudice to the company's defence. In the event of an action being taken later, the defendant is entitled to have the plaintiff examined again. *(Article 286 (b)* C.P.) : see :

> ***Simard vs Bonneau,*** **40 Q.P.R. 58 (K.B. 1932). For *scope of examination* see *Fortier vs Lamontagne,* 40 Q.P.R. 66 (C.S. 1936); *Lorquet vs Sun Life Ass'ce Co.* (1937) 5 I.L.R. 167 (K.B.)** [5]

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5. Where a minor, for whom damages are claimed for personal injuries, has been examined by defendant's doctor under *Art 286 (b)* the Court may permit defendant's doctor to make another examination before trial when, in the interval, the minor has attained majority (and has accordingly changed his status) and has become plaintiff *en reprise d'instance — Bellefeuille vs C.P. Express Co.*, C.S. 171049 *McDougall, J.*, Nov. 1939 *(unrep'd)*. See also *Painchaud vs Millen*, 68 C.S. 487 *(infra* p. 297).

As almost every personal injury case involves at least a temporary incapacity, it should be ascertained if and where the claimant was employed, what wages or salary he was earning, when he returned to work, and what wages or salary he earned after his return. If there is reason to suspect bad faith, a special investigator may be assigned to cover the claimant's previous record. If the injury is unduly slow in healing, syphilis may be suspected (see *infra* p. 298).

Property damage cases.

In cases involving property damage it is customary, but not essential,[6] for the claimant or his representative to write to the opposite party advising him of the approximate extent of the damages, and affording him a reasonable opportunity of examining them before repair work is started. In some cases, however, repairs are commenced without any such notification and it is, therefore, important from the defendant's point of view to have the automobile or other damaged property examined by an expert assessor as soon as possible after the accident, and, in any event, before repairs are under way.

The foregoing is a summary of the routine generally to be followed during the preliminary stages of an automobile accident case. Other lines of investigation will no doubt suggest themselves according to circumstances.

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6. See, however, *supra* p. 6.

SECTION 2

CIVIL RESPONSIBILITY IN GENERAL

Article 1053 C. C.

Article 1053 C.C., which sets forth the general rule of responsibility for offences and quasi-offences, provides that *every person capable of discerning right from wrong is responsible for the damage caused by his fault to another whether by positive act, imprudence, neglect or want of skill...* [1] Commenting upon the wide scope of this provision *Greenshields, J.* (now C.J.) said:

> **"Article 1053 of our Code is as sweeping and all embracing as could be any enactment. It imposes upon every one the obligation to repair the damages done to every one by reason of his negligent act."** [2]

The application and interpretation of the traffic laws are considered in subsequent Sections. However, it must not be assumed that compliance with the traffic laws will in every case afford a valid excuse for damage caused by a vehicle. Such laws are not exclusive, and they presuppose that a driver will not depart from the ordinary rules of prudence and observation. (*Letourneau, J.* in *Norton vs Perrault,* unrep'd, see *infra* p. 102). Moreover, there is no necessity for a law on each and every fault a man may commit because Article 1053 provides for all

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1. The degree of skill required is "*reasonable and average skill*" — *Henderson vs Rosen,* 76 C.S. 1 (1937).

2. *Merchants & Employers Guar. & Acc. Co. vs Brunet,* 58 C.S. 77 (1920).

faults. (*Dorion, J.* in *Giroux vs Wright*, 38 K.B. 466 at 471 (1924)). For example, the fact that a driver is faced with a green traffic light at a crossing of two streets does not entitle him to proceed across the intersection regardless of the rules of safety and prudence. (*Bedard vs Ranger*, 36 R.L. 397 (1930)). Nor does the signal of a traffic officer, whether erroneous or not, excuse a motorist from exercising proper care and diligence to avoid an accident. (*Gravel vs Donohue*, 40 K.B. 41 (1925)). And even when another user of the road is negligent, a driver must exercise reasonable skill in trying to avoid the consequences of that negligence. (*Terrell, The Law of Running Down Cases*, p. 2). A person in charge of an automobile has been likened to a person in charge of a firearm. (*Dorion, J.* in *Robertson vs Stewart*, 43 K.B. 402, see *infra* p. 42). He should realize the powerful and dangerous nature of the machine he is handling and keep it under proper control.

Proof of negligence.

The burden of proof lies upon the plaintiff to establish that the fault or negligence[3] complained of *caused or contributed to* the plaintiff's injury: (see *Cowans vs Marshall*, (1897) 28 S.C.R. 161; *Marchessault et al. vs C.N.R.*, 42 K.B. 355 (1926); *Radley vs London & North Western Ry. Co.*, 1 A.C. 754). And when the cause of an accident is unknown and cannot be established the plaintiff's action should be dismissed. (*Collin vs G.T.R.*, 48 C.S. 106 (1915)). Hence fault on the part of an automobile

3. "...what is negligence depends on the facts with which you have to deal. If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions." — *Lord Dunedin* in *Fardon vs Harcourt-Rivington*, (1932) 48 T.L.R. 215, 216, cited in *Royal Trust Co. vs Toronto Transportation Comm.*, (1935) S.C.R. 671, 676.

driver is not sufficient to hold him responsible for damages resulting from a collision with another automobile unless that fault was the determining or a contributing cause of the collision. For instance, the sole fact that the defendant was driving at an excessive speed will not render him liable for the consequences of a collision, if the collision would have happened even had he been driving within the legal speed limit. (*Proulx vs Montreal Tramways Co.*, 52 C.S. 6 (1917); *Naird vs Thomson, infra* p. 83; *Wieland vs Beauregard*, 43 R.L. 447 (1937); *Becker vs Sauvé*, 19 R.J. 309 (1913)). And where a jury finds a party guilty of fault which is not proven to have had any influence over the accident it does not establish a cause of action against the defendant. (*Darling vs Emery*, 60 C.S. 509 (1921)).

Presumption of fault.

Applying the general rule of burden of proof, it follows that if cars driven respectively by A and B come into collision, and A sues B for damages resulting to his car, the burden is upon A to prove relevant fault or negligence on the part of B, and if he fails to discharge that burden, he is not entitled to judgment. However, this rule is subject to important exceptions, for, under certain circumstances, the law *presumes* fault and, once the plaintiff has proved that such circumstances existed, the burden is shifted to the defendant to rebut that presumption of fault. For example, if A proves that while walking on the highway he was struck and injured by an automobile driven and owned by B, and A sues B for his damages, the burden is upon B to prove that those damages did not result through his fault or negligence (*Section 53 (2) Motor Vehicle Act*).[4] This and other exceptions to the

4. *R.S.Q. 1925, C. 35.*

general rule of burden of proof in practice are discussed later.

Contributory negligence.

It is clear that if the plaintiff is entirely to blame for his own misfortune, his action should be dismissed. However, contributory negligence on his part does not necessarily mean that his action will fail altogether, for where the Court finds that both the plaintiff and the defendant were guilty of fault contributing to the accident i.e. where there is what is generally, if unfortunately, termed "common fault",[5] there will be a division of damages. *E.g.* A sues B and proves damages of $300.00. The Court holds both parties to blame in the proportions of A 1/3 and B 2/3. A is entitled to judgment for $200.00. Under the English common law the rule is different and proof of contributory negligence, in the proper sense of the term, is a complete bar to plaintiff's success in an action for damages. This distinction was dealt with at some length by Lord Atkinson in the Privy Council judgment in *C.P.R. vs Fréchette,* (1915) A.C. 871, 24 K.B. 459.

Volenti non fit injuria.

In order to succeed on a plea of *volenti non fit injuria*[6] the defendant must establish that the plaintiff *freely and voluntarily,* with *full knowledge and realization of the risk* he ran, consented to that risk. Scienti non fit injuria is not sufficient; it must be *volenti:* see:

5. For meaning and application of the principle of *common fault* see also *"The Theory of Common Fault in the Province of Quebec"*, (1934) *XII Canadian Bar Review*, p. 535; *Silver Granite Co. vs Goulet*, 50 K.B. 424 (1930), *Letourneau, J.*, at p. 433; *C.P.R. Co. vs Fréchette*, (1915) A.C. 871 at p. 879; *Montreal Tramways Co vs McAllister*, 26 K.B. 174 at p. 180 (1916), (judgment affirmed by P.C. see 51 D.L.R. 429 (1920); *Brillant vs The King*, 15 Ex. Cr. R. 42 (1914).

6. "No act is actionable as a tort at the suit of any person who has expressly or impliedly assented to it: *volenti non fit injuria.* No man can enforce a right which he has voluntarily waived or abandoned." (*Salmond, The Law of Torts* 8th Ed. p. 37.)

***Letang vs Ottawa Electric Ry. Co.*, (P.C.) (1926) A.C. 725, 41 K.B. 312; *C.P.R. Co. vs Fréchette*, (P.C.) (1915) A.C. 871, 24 K.B. 459; *Osborne vs N.W. R. Co.*, 4 T.L.R. 591, 21 Q.B.D. 220; *Lavoie vs Drapeau et al.*, 31 L.C.J. 331 (1887); *Barbeau vs Caron et al.*, 27 R.L. 317 (1921); *Nolin vs Canadian Vickers Ltd.*, 34 R.J. 222 (1928); *Lamu vs Joki*, (1938) 3 D.L.R. 754. See also *infra* pp. 153, 215.**

English precedents.

Having referred to the English law of contributory negligence, it is as well to draw attention to the danger in treating English decisions as precedents in Quebec. It is true that they are frequently cited in our Courts, but English decisions can be of value in Quebec cases involving questions of civil law only when it has first been ascertained that in the law of England and that of Quebec the principles upon which the particular subject matter is dealt with are the same and are given the like scope in their application, and, even then, not as binding authorities but rather as *rationes scriptæ:* (see *Anglin, Brodeur* and *Mignault, JJ.* in *Curley vs Latreille*, 60 S.C.R. 131 (1919)). In *Desrosiers vs The King*, 60 S.C.R. 105 (1919) *Anglin, J.* said (at p. 119) :

"...This case affords an excellent illustration of the danger of treating English decisions as authorities in Quebec cases which do not depend upon doctrines derived from the English law."

That statement was repeated by *Rinfret, J.* in *Hallé vs Canadian Indemnity Co.*, (1937) S.C.R. 368, at p. 384. Likewise, care must be exercised in applying in this Province *judgments of the Supreme Court* based upon the laws of other Provinces. "... Once again it is evident that the decisions of our highest tribunal, based upon the law of other Provinces, can only be applied with extreme caution

in this Province..." *(McDougall, J.* in *Blair vs Berry,* 76 C.S. 189 at p. 192 (1937)).

An interesting comparison between *Lord Campbell's Act* and *Article 1056* C.C. was made by *Anglin, C.J.C.* in *The Town of Mtl. West vs Hough,* (1931) S.C.R. 113 at p. 116. (See *infra* p. 299).

Questions of fact and law — appeals.

In determining responsibility for an automobile accident it is necessary to consider questions both of fact and of law. In cases of trial by jury *Article 474* C.P. declares it to be the province of the judge to declare whether there is any evidence and whether that evidence is legal. *Article 475* provides that the jury find the facts but must be guided by the directions of the judge as regards the law. It is for the jury to pass upon the credibility of witnesses and, where there are conflicting versions, to decide which version is the right one, and the judge should not substitute his opinion on such matters for that of the jury. (*Kearns vs Mtl. Tramways Co.,* 50 K.B. 340 (1931)). Moreover, the Appeal Courts will not interfere with a jury's finding of fact nor disturb a verdict *reasonably* arrived at; the test is not whether the verdict appears to the Appellate Court to be right, but *whether the jury as reasonable men could have reached such conclusion*: see:—

> ***McCannell vs McLean*** **(1937) 2 D.L.R. 639,** ***Supreme Court; Metropolitan R. Co. vs Wright,*** **(1886) 11 A.C. 152;** ***C.N.R. vs Muller*** **(1934) 1 D.L.R. 768;** ***Winnipeg Electric Co. vs Geel*** **(1932) 4 D.L.R. 51;** ***McLean vs Bell*** **(1932) 48 T.L.R. 476;** ***Hutcheon vs Storey*** **(1935) S.C.R. 677 at 685;** ***Vallée vs The Shedden Forwarding Co.,*** **40 C.S. 454 (C.R. 1911). See also** ***Articles 501 and 502*** **C.P.**

If it is obvious that on all the available evidence no verdict for the plaintiff could be supported, the Appeal

Court may, instead of ordering a new trial, order a verdict and judgment to be entered for the defendant. (*Mechanical & General Inventions Co. et al. vs Austin* (1935) A.C. 346). But where there is conflicting evidence on a question of fact, then, notwithstanding the opinion of the appeal court judges as to the value of that evidence, the verdict should not be disturbed. (*Laporte vs C.P.R.*, (1924) S.C.R. 278). The verdict of a jury should always be read with and construed in the light of the issues presented by the pleadings, the evidence and the charge of the trial judge. (*Anglin, J.* (later C.J.C.) in *B.C. Electric Co. vs Dunphy* (1919) 50 D.L.R. 264 at 268; *Mtl Tramways Co. vs Yervant* (1936) 3 D.L.R. 241, *Rinfret, J.* at p. 243; *Grand Trunk Ry. vs Mayne*, 56 S.C.R. 95 (1917), *Sir Charles Fitzpatrick, C.J.* at p. 97)). An Appellate Court is not justified in reducing the general damages awarded by a jury for personal injuries reasonably warranted by the evidence. (*Warren vs Gray Goose Stage Ltd.*, (1938) 1 D.L.R. 104 (Supreme Crt.)).

Where — as is customary in jury trials of automobile accident cases — there is an *assignment of facts*, the verdict must be *special, explicit and articulated* upon each fact submitted. (*Article 483* C.P.) In such cases it is not sufficient for a jury to give a general expression of opinion; they must indicate in their verdict the fact or facts constituting the fault or omission alleged. (*Davis vs Julien*, 25 K.B. 35 (1915); *McGivren vs Chars Urbains de Montréal*, 19 R.L. 356 (K.B. 1913); *Colonial Coach Lines Ltd. vs Davies*, 64 K.B. 118 (1937)). However, there is no sacramental form in which a jury may make known its decision, and it is for the Court to give an intelligent effect to the finding of jurors. (*Temple vs Mtl. Tramways Co.*, 47 C.S. 121 (1915)). The jurors are not as a rule versed in legal phraseology and in construing their find-

ings it is not right to apply too meticulous a criticism. (*Mtl. Tramways Co. vs Yervant*, above cited; *Grinnell Co. of Canada et al. vs Warren*, (1937) S.C.R. 353). If upon a fair interpretation of the findings, they can be supported upon a reasonable view of the evidence adduced, effect should be given to them. (*C.N.R. vs Muller*, cited above). "A jury must not be held too rigourously to the niceties (perhaps subtleties) of judicial expression". (*McDougall, J.* in *Blair vs Berry, (supra* p. 14).

In cases tried by a judge without a jury, the judge must, of course, decide the questions of fact as well as those of law. In the event of an appeal, the Appellate Court, in the words of *Lord Blackburn*, "ought to give great weight, but not undue weight, to the opinion of the judge who tried the cause, and saw the witnesses and their demeanour... Though the Court of Appeal ought not lightly to find against the opinion of the judge who tried the cause, I think that the Court of Appeal if convinced that the inference in favour of the plaintiff ought not to have been drawn from the evidence, should find the verdict the other way." (*Smith vs Chadwick* (1884) 9 A.C. 187 at p. 194). But when the question of estimating the relative credibility of witnesses arises and the question turns on manner and demeanour, the Court of Appeal must be guided by the impression made on the judge who saw the witnesses, (*Creighton vs Pacific Coast Lbr. Company* (1899) 12 Man. L.R. 546). An Appellate Court will not interfere with the decision of a Judge on questions of fact, when such Judge has seen the witnesses, and has been able, with the impression thus formed fresh in his mind, to decide between their contending evidence, unless there is some good and special reason to throw doubt upon the soundness of his conclusions. (*Hall vs Grant* (1926) 1 D.L.R. 141; *Hardwick vs Riley*, (1929) 1 D.L.R. 697).

However, there may obviously be other circumstances to show whether a statement is credible or not; and these circumstances may warrant the Court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen. *(Lindley, M.R.* in *Coghlan vs Cumberland,* (1898) 1 Ch. 704, at p. 705).

See also *Chalmers vs Mackray,* 26 D.L.R. 529 and 55 S.C.R. 612; *Gordon vs Handford,* (1906) 16 Man. L.R. 292.

The Supreme Court has held that if a sufficiently clear case is made out the Court will allow an appeal on mere findings of fact against the concurrent findings of two Courts. *(North British & Mercantile Ins. Co. vs Tourville et al.,* 25 S.C.R. 177 (1895)). It will take questions of fact into consideration on appeal and, if it clearly appears that there has been an error in the admission or appreciation of evidence of the Courts below, the decisions may be reversed or varied: see:—

***Buxman vs Winnipeg Electric Company* (1925) 3 D.L.R. 635, *Perdue,* C.J.M. at p. 637, citing *Lefeunteum vs Beaudoin,* 28 S.C.R. 89 (1897) and *Annable vs Coventry* (1912) 5 D.L.R. 661, 46 S.C.R. 573. See also *Freedman vs Baittle et al.,* 36 K.B 62 (1923); *Mersey Docks & Harbour Brd vs Procter* (1923) A.C. 253, *Viscount Cave* at p. 258; *Hanada vs B.C. Electric Co,* (1939) 4 D.L.R. 763.**

However, when the case turns upon the judge's appraisal of the witnesses' credibility in an action arising from an automobile collision, the Supreme Court will follow the rule of not interfering with the judgments below where there are concurrent findings of fact. *(Canadian Consolidated Grain Co. Ltd. et al. vs Golden,* (1939) 4 D.L.R. 784).

A new trial will not be ordered for the improper rejection of evidence where it is clear that the rejection oc-

casioned no substantial wrong or miscarriage of justice. *(Wilson vs International Sales Co.,* (1929) 1 D.L.R. 712 (N.S. Supreme Crt).

See *Sershall vs Toronto Transportation Commission,* (1938) 4 D.L.R. 369 in which the Ontario C.A. set aside the jury's findings as perverse. This judgment was reversed by a majority of the Supreme Court which held that the trial judgment should be restored (1939) S.C.R. 287. See also *All-Canada Digest, Vol. 1 Cols. 286 et seq.*

SECTION 3

LAWS OF OPERATION AND CIRCULATION

(I) REGISTRATION AND LICENSES

Motor vehicle.

Section 2 (1) M.V.A.[1] defines the words *"motor vehicle"* as follows:—

> **"Every vehicle propelled by any power other than muscular force, and which is adapted for transportation on the public highways, but not on rails, and comprise, as private vehicles, the pleasure vehicle, the farm vehicle, the service vehicle and the commercial vehicle, and, as public vehicles, the autobus, the taxi and the delivery car."**

Registration.

Registration of motor vehicles is dealt with in *Sections 3 et seq.* M.V.A. *S.* 7 deals with special provisions regarding registration of public vehicles; *S.* 8 with registration by a dealer; *S.* 9 with gratuitous registration, and *S.* 10 with exemptions from registration in the case of vehicles possessed in this Province by persons resident elsewhere.

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1. *Motor Vehicle Act, R.S.Q., 1925, C. 35: Amendments by 16 Geo. V, C. 19; 17 Geo. V, C. 20; 18 Geo. V, Cs. 20-21; 19 Geo. V, C. 21; 20 Geo. V, C. 31; 21-22 Geo. V, Cs. 27-28-29; 23 Geo. V, C. 17; 24 Geo. V, C. 15; 1 Ed. VIII (2nd Sess.) C. 13.* The Statute, as amended, is referred to throughout as M.V.A. Sections and subsections thereof are hereinafter referred to as *S* and *Ss* respectively.

Transfer of ownership.

S. 11 M.V.A. deals with transfer of ownership of a registered motor vehicle and *Ss 1* and *Ss 2* provide as follows:—

> "11. 1. In the event of the transfer of ownership of a registered motor vehicle, both parties to the transfer must give immediate notice to the Bureau, and sign the said notice before the competent revenue officer and deposit it with him. The officer shall mark on such notice the date and hour of its deposit and endorse on the certificate of registration of such motor vehicle the date of such deposit and the name and address of the person in whose favour such transfer is made; he shall then deliver the certificate to the latter upon payment by him of the fee fixed by the Minister, and send the notice with the fee to the Bureau.
>
> "2. Until the notice of such transfer has been given, signed and deposited in the manner indicated in subsection 1 of this section, the person who made the transfer shall be jointly and severally liable with the person in whose favour the transfer is made for any loss or damage occasioned by the latter with such motor vehicle within the limits indicated in section 53 [2] of this act."

Lorrain vs Lacombe, 34 R.L. 216 (C.C. 1928), *Stackhouse, J.* at p. 219:—

> "This provision of the law is an extension of the common law principle governing delicts and quasi-delicts. The only protection that an injured person has as to the ownership of a car is through its public registration. In order to prevent any fraudulent transfer, to avoid liability, the law has extended the responsibility of the actual owner, to the person in whose name the car is still registered, and who has neglected to notify the Bureau

2. See *infra* p. 135.

of the transfer of ownership. By this provision they are both made jointly and severally responsible to the injured party."

Frattani vs Larouche et al., 69 C.S. 467 (1931). Held (R.H.) :—

"Celui qui vend un véhicule automobile continue d'être responsable des dommages-intérêts causés par cette voiture aussi longtemps que la vente n'est pas enregistrée. Cette règle n'empêche pas le propriétaire non enregistré qui souffre lui-même un dommage par le fait d'un autre, de le lui réclamer."

Brault vs Laganière, 66 C.S. 521 (1928). Held (R.H.) :

"Le vendeur qui n'avise pas le Revenu du transport de son véhicule automobile ne peut décliner la responsabilité d'un accident survenu par la faute d'un préposé de l'acheteur."

Berger et al. vs Gotfredson-Joyce Corporation Ltd., 30 R.L. 479 (1924). Held, in part (R.H.) :—

"Le propriétaire d'une automobile qui n'en a pas enlevé les plaques, doit être tenu responsable des dommages causés par ladite automobile dont il n'a pas abandonné la propriété mais qu'il a simplement cédée temporairement dans le but d'en abandonner la propriété, s'il parvient à la vente."

Collerette vs Verreault et al., 77 C.S. 216 (1939). Held (R.H.) :—

"Pour déterminer légalement qui est le véritable propriétaire d'une automobile, il faut s'en rapporter exclusivement au nom de la personne qui figure au certificat d'enregistrement. Une demande en dommages-intérêts formée, à la suite d'un accident d'automobiles, par une femme séparée de biens ne peut être accueillie si la voiture est enregistrée au nom du mari."

Ss 3 and *Ss 4* of *S. 11* deal respectively with transfers following death and following cancellation of a conditional sale.

Reports of sales [3], purchases, exchanges.

By *S. 64* M.V.A.:—

> **"Every dealer in motor vehicles shall make to the Bureau at Quebec, in such form as the said Bureau may prescribe, a monthly report of all sales and of all purchases and exchanges made by him of new or used motor vehicles, during the month."**

Refusal, etc., of registration.

By S. 13 the Minister (the *Provincial Treasurer)* may refuse a registration or limit its effects. He may annul a registration or suspend its effects and require that the registration certificate and the registration markers be returned.

Licenses.

S. 15 and *S. 16* M.V.A. deal with licenses to operators, chauffeurs and machinists in motor vehicles and provide as follows:—

> **"15. 1. No person shall drive a motor vehicle upon a public highway, unless he be at least eighteen years of age, and, in the case of an autobus, unless he be twenty-one years of age, and unless he has obtained from the**

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3. As to *vendor's liability for accident resulting from structural defect*, see *Choquette vs Legaré Auto & Supply et al*, 63 C.S. 178 (1924). In *Lajoie vs Robert*, 50 C.S. 395 (C.R. 1916) it was held that an automobile manufacturer and his agent are liable for an accident resulting from latent structural defect of a car sold by them and guaranteed to be in perfect order when delivered: the liability is not merely contractual but also delictual. See authorities referred to in that report. See also *Art. 1527 C.C.*; *Samson et al vs Davie Shipbuilding & Repairing Co.*, (1925) S.C.R. 202.

Bureau an operator's or a chauffeur's license, upon payment of a fee of five dollars for each license year, and unless such license be in force."

However, by *Order in Council No. 306* (1939) the annual fee for an operator's or a chauffeur's license was reduced to $2.50 effective from March 1st, 1939.

"2. Any person who has reached the age of eighteen years may however drive without a license any motor vehicle other than an autobus, during a period of not more than two months, provided a permit to that effect has been granted to him by the Bureau, upon payment of a fee established by the Minister, and provided that while driving he be accompanied by a person licensed to drive.

"3. The person who drives, while in the employ of the owner of the motor vehicle, must be the bearer of a chauffeur's license, unless such person be the owner or the manager of an establishment in which motor vehicles are sold, situated in a city.

"4. No license may be issued under subsection 1, nor shall any permit be issued under subsection 2 of this section, to any person of eighteen years of age and under twenty-one years, unless the written consent of the father, mother or tutor, as the case may be, of such person, to the issuing of such license or permit, be filed in the Bureau.

"16. 1. The license of "Machinist in Motor Vehicles" confers upon the holder thereof, apart from the right to drive motor vehicles on the public highways, if he has paid a fee of five dollars as a chauffeur, the privilege of being advertised as such by the Revenue Branch to the automobile clubs, and to the owners of motor vehicles. It also confers upon the holder of a garage license, who employs such licensee, the right to advertise that such licensee is in his employ.

"2. No person shall take the title of 'Machinist in Motor Vehicles', nor enjoy the advantages accruing from such title, unless he be at least eighteen years of age, and have obtained a license as such from the Bureau, and unless such license be in force."

Competency.

S. 17 deals with competency and *Ss 1* and *Ss 2* provide as follows:—

> **"17. 1. An operator must be acquainted with the traffic laws, must be able to drive a motor vehicle and be familiar with the transmission and control systems thereof. A chauffeur must, in addition, be able to put in running order a motor vehicle which is out of order. A machinist in motor vehicles must, in addition, be able to build an engine and the mechanism above mentioned, and to properly remake any part or piece of the engine or of its mechanism which is liable to break, to wear out, or to loosen.**
>
> **"2. In the case of a chauffeur, the competency shall be established by an examination passed before a professor of a technical school, under the control of the Province, or before another examiner appointed for that purpose by the Minister and being himself the holder of a certificate of competency from such a technical school. If the examination has been successfully passed, a certificate of competency is issued by the examiner upon the payment of three dollars by the candidate."**

Machinists.

Ss 3 and *Ss 4* of *S. 17* deal with machinists and the examination they must pass to establish competency.

Non-residents.

S. 18 applies to non-residents and provides:—

> **"The privilege conferred by section 10, respecting the registration of a motor vehicle owned by a person having his residence or place of business outside of this Province, shall apply, *mutatis mutandis*, to the license required to drive such a motor vehicle on the public highways of this Province, with the same restrictions and subject to the same conditions. In every other respect, such person shall**

be subject to the provisions of this act and to the regulations passed thereunder, while possessing or driving a motor vehicle in this Province."

Duty to carry license, etc.

S. 25 provides for the carrying of licenses and certificates, as follows:—

"25. 1. Every person driving a motor vehicle upon any public highway must carry with him his license or his permit to drive and the registration certificate of the motor vehicle.

"2. Such person shall exhibit such license, such registration certificate, when requested to do so by any officer of the Bureau, bearing a certificate of identification signed by the Comptroller of Provincial Revenue, establishing that such officer is charged with the carrying out of this act, or at the request of a municipal officer in charge of the traffic, or of a constable or to any interested party in case the motor vehicle driven by such person is involved in an accident."

Driving without license.

The sole fact of a person driving without possessing a license, although an infringement of the M.V.A., does not prevent such person from recovering damages for injuries caused by another's negligence. In *Halpin vs Grant Smith & Co.*, 53 D.L.R. 381 (1920) the *Alberta Supreme Court* in referring to the *Alberta Motor Vehicle Act* held (R.H.):—

"One who is guilty of a violation of sec. 3 of the Motor Vehicle Act, 2-3 Geo. V. 1911-12, ch. 6, in operating an automobile which has not been properly registered as required by the Act, is not on that account prevented from recovering damages for injuries caused by the negligence of another."

In *City of Vancouver vs Burchill* (1932) S.C.R. 620 the Supreme Court in referring to the *Motor Vehicle Act Amendment Act* of British Columbia held, in part (R.H.):

> "...At common law and as a member of the public, any individual has the right to the use of the highway under the protection of the law; and the liability of the municipality exists towards every member of the public so using the highway. This principle should not be taken to have been altered in the Motor-Vehicle Act, except by express words or by necessary intendment. The whole scope of the Act is to prescribe certain requirements for those using the highway with motor vehicles, and to impose certain penalties upon the offenders; it does not provide that they will not be entitled to recover damages, if the damages are suffered while they are infringing the Act."

Lavery vs Chainey, 33 R.L. 502 (1927). Held (R.H.):

> "Le propriétaire d'une automobile ne perd pas son droit de réclamer les dommages qui lui sont causés par le propriétaire d'une autre automobile, pour la seule raison qu'au moment de la collision il n'avait pas obtenu de licence de conducteur; l'absence de telle licence ne crée pas de présomption de faute..."

See also ***Leblanc vs Bourque,*** **43 R. L. 469 at 471 (1936); *Bullock vs Hansen* (1928) 37 Man. L. R. 450.**

Prévost vs Roméo et al., 67 C.S. 200 (1929). Held, in part (R.H.):—

> "La victime d'un accident d'auto ne peut exercer de recours contre un tiers non propriétaire du véhicule qui a causé le préjudice, sur le seul motif que ce tiers aurait prêté sa licence au propriétaire de l'auto, lorsque le prêteur de la plaque avait avisé le réclamant, avant toute poursuite, de l'identité du véritable propriétaire, en lui fournissant des informations faciles à vérifier.
>
> "Dans les circonstances, le demandeur doit supporter les dépens de l'instance."

See also *Stewart vs Chickadee Ltd.* (1938) 3 D. L. R. 779 (*infra*, p. 287).

Duty to stop after accident, give certificate number, etc.

S. 39, M.V.A. provides:—

"In case of any accident to a person or property on the public highway, due to the operation of a motor vehicle thereon, the person operating such vehicle shall stop, and upon being required by any person present, shall give such person his name and address, together with the registration number and the name and address of the owner of such vehicle."

(II) REPORTS TO REVENUE BRANCH.

Reports of sales, purchases, exchanges.

See *S. 64*, M.V.A. (*supra* p. 22).

Report of theft.

S. 66, M.V.A.:—

"The owner of any motor vehicle which has been stolen in this Province must without delay notify the Bureau, in such form as the latter may determine, both of the theft of the motor vehicle and of its recovery if so effected."

Report of complete destruction.

S. 67, M.V.A.:—

"The owner of any motor vehicle, which has been completely destroyed while in this Province, must without delay notify the Bureau, in such form as the latter may determine, of such destruction."

(III) ACCESSORIES.

Lights.

S. 27, M.V.A. provides as follows:—

"1. Every motor vehicle must, when operated on a public highway, be provided with two lamps showing a white light in front, and one lamp showing a red light at the rear; if such vehicle hauls a trailer or a semi-trailer, the red light shall be placed at the rear of such trailer or semi-trailer; if such vehicle is a motor cycle, it shall carry a lamp showing a white light in front, and another lamp showing a red light at the rear; if a side-car is fitted to the motor cycle, the side-car shall also be provided with a lamp showing a white light in front; if such motor cycle hauls a trailer, the red light shall be placed at the rear of the trailer.

"2. When a motor vehicle is on a public highway, between one hour after sunset and one hour before sunrise, its lamps must show lights, each one lighting up a distance of at least one hundred feet in front and visible at a distance of at least one hundred feet at the rear, whether the motor vehicle is stationary or in motion, and the rear lamp must have a capacity of at least four candle power, and must throw a red light in a horizontal direction, and a white light in a vertical direction, in such manner that the white light will be spread evenly upon the entire surface of the rear marker, and it shall be sufficient in quality to allow the reading of the numerals on such marker at a distance of at least one hundred feet.

"3. When two motor vehicles meet on a public highway or when a motor vehicle meets another vehicle drawn by an animal, the glare of the lights in front must be so replaced, directed, obstructed, or reduced in strength, as not to dazzle or blind the person driving the motor vehicle or the vehicle drawn by an animal coming in the opposite direction." (See *Larose vs Decary* 76 C. S. 536).

"4. The lamps in front of a motor vehicle shall not show a red light.

5. (Added by *24 Geo. V., Ch. 15*). "Every bicycle or tricycle operated on a public highway between one hour after sunset and one hour before sunrise must be provided, in front, with a lamp showing a white light or with a reflector of the same colour, approved by the Bureau, and, in rear, with a lamp showing a red light or with a reflector of the same colour, approved by the Bureau. Each lamp or reflector must be placed in such a way that the luminous signal shall be visible at a distance of at least two hundred feet.

"For the purposes of this subsection 5, a bicycle and a tricycle are deemed to be motor vehicles."

By *S. 68 (1e)* M.V.A. the Lieutenant-Governor in Council may "change and regulate the use and placing of lamps and the colour and strength of their lights."

Order in Council No. 921 (April 1934) provides, in part, that during the hours mentioned in *S. 27 (2)* M.V.A. a motor vehicle composed of a *tractor* and of a *trailer* or *semi-trailer* must carry a red light at the rear of such trailer or semi-trailer; and by *Order in Council No. 922 (8)* a *motor train* must (during the same hours) carry a red light at the rear of the last unit constituting such motor train. (See *Ss 1* of same Order in Council, and *S. 2 (10)* M.V.A.).

The *Animal-drawn Vehicle Lamps or Reflectors Act, 19 Geo. V, Ch. 38* empowered municipal corporations to make by-laws to compel owners and drivers of animal drawn vehicles [4] to provide their vehicles either with reflectors or with lamps.

Reference should be made to local by-laws [5], e.g. *Article 100* of *Montreal By-law No. 1319* provides:—

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4. For cases of *collision with horse-drawn vehicle* see *infra* p. 178.
5. See also *provisions respecting municipalities*, M.V.A. *Sections 59-61 a.* inclusive.

> **"Between sunset and sunrise, every horse-drawn vehicle on the City streets must have a lamp or lamps lighting up a distance of at least two hundred (200) feet and visible from the front and the rear and from both sides. If the lamp is in front, it shall be placed on the left-hand side. The light must be white in front, but it may be of another colour on the sides and at the back."**

Article 94 of the same By-law provides:—

> **"All *projections* beyond three (3) feet of the regular length of a vehicle shall be provided, during the day, with a red flag, and during the night, with a lamp showing a red light, which shall be kept lighted between sunset and sunrise."**

It is to be noted that although the M.V.A. does not oblige an animal-drawn vehicle to carry any light or reflector, the absence of such light or reflector may nevertheless constitute negligence in certain cases. (See *infra* p. 184).

A motor vehicle on a public highway between one hour after sunset and one hour before sunrise must show lights in accordance with the M.V.A. *(Sawyer vs Giguere,* 59 C.S. 520 (1921)); and it is negligent to operate an automobile between those times when the lamps fail to light up a distance of at least 100 feet. *(Lemenu vs Lacoste et al.,* 36 R.L. 131 (1930)). "C'est une grave imprudence pour le chauffeur que de circuler sur le chemin public quand l'une des lanternes de sa voiture ne fonctionne pas . . ." (*Forbes vs Savard,* 39 R.L. 58 (1931)). However, when an automobile is stopped within a lighted portion of a municipality and in such a place as to make the automobile itself visible, it has been held that failure to light the lamps does not constitute negligence. (*McIntyre vs Patterson,* 38 K.B. 8 (1924); *Mancini vs Morin,* 33 R.L. 91 (1927)). As the law does not require the lamps of an automobile to be lighted until one hour after sunset, a driver who puts

on his lights at 7 P.M., the sun having set at 6.43 P.M., is not guilty of negligence on that ground. (*Coppola vs Deguire,* 35 K.B. 339 (1923)).

The driver of a tractor having in tow a road levelling machine, or plough, must indicate the presence of such machine with a suitable red light, and when the machine extends beyond the width of the tractor the machine must be so lighted as to make it visible to traffic approaching both from the front and the rear. (*Demers vs Regem,* 71 C.S. 223 (1932), affirmed by K.B. and S.C.C. (1935) S.C.R. 485).

In applying the relevant provisions of the *Ontario Highway Traffic Act (Sections 9 (1)* and *41 (1))* the Supreme Court held *(Hall vs The Toronto Guelph Express Co. et al.,* (1929) S.C.R. 92) that if the collision is caused by failure to have a *tail light* burning and visible at the rear of a motor vehicle, civil liability may be involved even though the light was burning only shortly before the accident and went out without the knowledge or personal fault or negligence of the driver of the vehicle. (*Great Western Railway Company vs Owners of the S.S. "Mostyn",* (1928) A.C. 57, applied).

Tires.

By *S. 28* M.V.A. — (1) Every wheel of a motor vehicle operated on a public highway shall be fitted with a tire made of rubber or of any other material having the same elasticity. (2) The thickness of a non-pneumatic tire shall not be at any time or at any point thereof, less than one inch. (3) The pneumatic tire shall be kept sufficiently inflated so that the compressed air will support the weight allowed for such tires. (4) Every motor vehicle intended for the transportation of persons shall be fitted

entirely with pneumatic tires. (5) The width of pneumatic and non-pneumatic tires shall be that established in *S. 40 (1)* M.V.A.

By Order in Council No. 492 (March 1934) it is provided, in part:—

> **"Any motor vehicle shall be equipped on its one or two driving axles at the rear with tires of sufficient width to carry 75% of its total weight, vehicle and load, without exceeding, however, 500 pounds per inch width of the tires on that or on those driving axles".**
>
> **The same Order provides:**
>
> **"Any motor vehicle or motor train shall be equipped with tires of sufficient width on its one or more driving axles so that the total weight of the motor vehicle or the combined weight of the motor train shall not exceed 1,500 pounds per inch width of the tires on that or on those driving axles."**
>
> **Examples are given in the Order in Council in question. See also local by-laws (e.g. *Arts 65, 66, 68, 79, Mtl. By-Law 1319; Art. 60 Westmount By-Law 501).***

Tire burst.

In *Cross vs Dollouf*, 73 C.S. 199 (1935) defendant's automobile travelling at 15 to 20 M.P.H. went off the roadway as the result of a puncture or tire burst, and plaintiff, who was a passenger in the automobile, was injured. Expert evidence was given that the tires were all in good condition previous to the accident. The Court held that under these circumstances there was no fault on the part of the defendant and the action was dismissed. (See *Fink vs Herer et al.*, 72 C.S. 509 (1934), *infra* p. 152).

Weights of motor vehicles.

S. 40 M.V.A. sets forth the provisions regarding weight of motor vehicles with load. *Order in Council No. 492* (March 1934) contains "regulations concerning maximum weight, maximum total weight and maximum combined weights of certain motor vehicles or of certain motor trains". *Order in Council No. 595* (Feb. 1936) provides for maximum total weights of autobuses operated on certain highways.

Additional protection of roads.

S. 42 M.V.A. provides:—

"1. No vehicle shall be driven on any public highway, having on its tires, or on one or more of them, non-skid devices in the form of *cleats* or *caterpillars*, or other apparatus of a nature to damage such highways, or which the Minister of Roads has specifically prohibited.

2. No *building* may be moved nor any object dragged over a public highway, when, by so doing, the public highway would be damaged."

Sounding device.

S. 29 M.V.A. provides:—

"1. Every motor vehicle must, when operated on any public highway, be provided with a horn or other sounding device sufficient in capacity to be heard at a distance of two hundred feet, but which must not be used otherwise than as signal of danger, or when approaching a curve, or the intersection of two streets, or when coming into a street or highway from any garage or private ground, and in such a manner as not to produce a harsh or prolonged noise. Between the hours of midnight and six o'clock in the morning, the sounding device shall be used, in cities, towns and villages, only in case of absolute necessity.

"2. The sound of such device shall be different from that of the types of signals specially adapted for other uses.

"3. The above restrictions as to the use of sounding devices shall not apply to ambulances nor to motor vehicles used by a municipality in connection with its fire and police services."

See also local *traffic by-laws*, which sometimes forbid the *unnecessary sounding of the klaxon* (e. g. *Art. 9* of the *Montreal By-Law No. 1448* and *Art. 82 of Westmount By-law No. 501).*

An automobile must be equipped with a sounding device enabling the driver properly to signal his approach. *(Taillon vs Coté*, 24 R.J. 80 (C.C. 1917) ; *Dussault vs Chartrand*, 54 C.S. 488 (1918)). In *Todasko vs Bourgie*, 71 C.S. 442 (1933). *Trahan, J.* held that a driver having the right of way at an intersection should nevertheless announce his approach.

Although a local by-law may provide that other vehicles shall stop (*infra* p. 81) on the approach of an emergency vehicle answering a call, the approach of the latter should nevertheless be signalled in an effective manner. *(Letourneau vs London & Lancashire Guarantee & Accident Co.*, 49 K.B. 110 (1930)).

It has been held to be the duty of the driver to sound his horn at a distance of about 36 feet from a person crossing the street. *(Armstrong vs Rubenstein*, 27 R.L. 324 (1921)). However, a driver on seeing a pedestrian crossing in front must not content himself merely by blowing his horn. If he strikes the pedestrian when he could easily have stopped, he is at fault. *(Becker vs Goodman*, 51 K.B. 159 (1931)). After blowing his horn the driver must continue to keep a lookout for the pedestrian. (*Bibeault vs Ramsey*, 69 D.L.R. 111 (Alberta Supreme Crt. 1922)).

S. 36 (4) M.V.A. provides that the driver of an automobile *preparing to pass another*[6] shall give warning of his intention to do so by means of the sounding device: "A driver is at fault in attempting to pass another car without sounding his horn..." *(Drolet vs Demers,* (1937) see 4 I.L.R. 360). As a general rule, however, there is no obligation upon the driver of an automobile to signal his approach to a *stationary automobile.* (*McIntyre vs Patterson,* 38 K.B. 8 (1924); *Schonberner vs Barron,* (1927) 3 D.L.R. 708, at p. 709).

Positive evidence as to signals is preferable to negative; see *infra* p. 237.

Brakes.

By *S. 30 (1)* M.V.A. — All brakes on a motor vehicle shall be in good order, and sufficient in strength to control such vehicle when required.[7] In *Stackhouse vs Mtl. Public Service Corporation,* 55 C.S. 177 (1918) the Court of Review held that the proper manner to stop an automobile in order to avoid an accident is to cut off the power and apply the brakes, and not to put the machine in low gear before applying the brakes. (See *Control infra.* p. 41).

Distance Required for Stopping.

Exhaustive tests by automobile experts have shown that it takes the average driver three-quarters of a second to react to a warning. From this it follows that an automobile travels an appreciable distance from the moment the driver realizes he must stop until the moment he ap-

6. See *Overtaking, infra* p. 64.

7. In *Mitchell vs Turner et al.,* C.S. 159540 Jan. 1939 *(unrep'd) Forest J.* held one sided skid marks to be evidence that the brakes of an automobile were either defective or improperly adjusted.

plies the brakes — the distance depending, of course, upon the speed of the car at the time (see *Table infra* p. 60). For example, we are told that at only 20 M.P.H. the average driver travels 22 feet before he can put his brakes into operation, and that once he has applied the brakes the car will travel another 18 feet before it comes to a complete stop. While these figures and those in the Table below may at first sight appear on the high side, they have been generally approved and have been applied by our Courts in numerous accident cases: (see, for instance, *Henderson vs Rosen*, 76 C.S. 1 (1937) at p. 3). They are based upon the assumption that the road conditions are favourable, and that the automobile is equipped with good tires and an efficient 4-wheel braking system.

Speed Miles per hour	*Feet travelled during mental reaction*	*Feet travelled while using brakes*	*Total number of feet to stop*
10	10	12[8]	22[8]
20	22	18	40
30	33	40	73
40	45	70	115
50	56	109	165
60	66	156	222
70	79	240	319

8. However, at slow speeds such as 10 M.P.H. and under, the stopping distance will vary considerably according to circumstances. It should also be mentioned that several experts estimate the average mental reaction period at 3/5 of a second; and, on that basis, the total stopping distances in the above table would, of course, be shorter. But the latest information available from the Technical Data Department of the General Motors Corporation, and from the Industrial Accident prevention Associations (Toronto), indicates that the average mental reaction time is ¾ of a second, although it is pointed out that this time will vary somewhat according to circumstances.

The stopping distances given in the table above will, of course, be longer on a wet concrete or gravel road, and considerably longer on ice or snow. The following factors which "affect stopping" are listed

See also *Control infra* p. 41 et seq. and pp. 59, 71 et seq.

Muffler.

By *S. 30 (2)* M.V.A. — Every motor vehicle shall be provided with a muffler, so constructed as to prevent any intense or prolonged noise, caused by the escape of gas from the motor vehicle, in cities, towns and villages, or when meeting draught animals or cattle. (See *S. 36 (8)* M.V.A. *infra* p. 179).

Lock.

S. 31 M.V.A. provides:—

> **"1. Every motor vehicle shall be provided with a lock or other device to prevent such vehicle from being set in motion.**
>
> **2. When a motor vehicle is left unattended on a public highway, it shall be locked or made fast in such a manner that it cannot be set in motion.**

In *Cohen vs Supple et al.*, 29 R.L. 156 (1922), *Surveyer J.* held that *Article 1430*, R.S. (1909) (the provisions of which were similar in general effect to S. 31 of the present Act) was a precaution ordered by law in the interest of the owner of the automobile, but not in the interest of third parties. The defendant Supple had left his automobile in front of plaintiff's store and while there it

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in the General Motors Chart: 1) Surface of the road: type, worn, dirty. 2) Leaves, sand, mud, water on the road. 3) Slope of the road: up or down hill. 4) Tire condition: worn tread, tire pressure. 5) Condition of the brakes: worn. 6) Two or four wheel brakes. 7) Strength of driver. 8) Reaction time. 9) Chains. 10) Equalization of brakes.

It is to be noted that "the shortest stopping distances are obtained when the brakes are applied hard enough for good braking and still allow the wheels to turn." *Skidding* the wheels *lengthens* the distance to stop.

was struck from behind by the other defendant's automobile, the impact causing it to be set in motion and to run into and damage plaintiff's store. Plaintiff's action against Supple was dismissed, the Court ruling in part (p. 157) that "the law requires no other precaution from the party in charge of the motor vehicle which is left unguarded, than a lock and key, making fast the vehicle in question".

In *Blais vs Lortie Ltée.,* 63 C.S. 63 (1923) the defendant's automobile, which had been left on a hill side, started to move of its own accord and ran into and damaged the plaintiff's house. It was held that the defendant, having failed to provide and make use of a lock and key to prevent the automobile being set in motion, was responsible for the plaintiff's damages, and it was immaterial whether the automobile at the time was in the possession of an employee or *préposé* of the owner, or in the possession of some other party who had taken it without the owner's knowledge. *Sir François Lemieux, C.J.* at p. 67 stated as follows:—

> **"... La loi fait donc un devoir, une obligation au propriétaire ou possesseur d'un véhicule-moteur de le munir d'une fermeture à clef ou autre appareil pour l'empêcher de se mettre en mouvement, et de le fermer à clef chaque fois que tel véhicule stationne ou séjourne seul dans un endroit quelconque. C'est là une mesure de prudence imposée par la loi pour la sécurité publique que tous les garages ou propriétaires de garages ou d'autos doivent prendre afin de ne pas être la victime d'indiscrets, d'imprudents ou de voleurs."**

At p. 68 of the same report (63 C.S. 63, 68) reference was made to *Goulet vs Brindamour* (apparently unreported). In that case an automobile in charge of the defendant's chauffeur killed a man, and the latter's heirs took action for damages. The defendant pleaded that he

was not responsible because at the time of the accident his chauffeur was acting contrary to instructions and was outside the scope of his employment. [9] The Court of King's Bench, unanimously affirming judgment of the Court of Review, held that the defendant was in any event responsible for the damages caused because he had allowed his automobile to be left on the highway without locking it or committing it to the care of some responsible person. (See also *McDuff vs Perfection Dairy*, 77 C.S. 170 (1939)).

Volkert vs Diamond Truck Co., 66 K.B. 385 (1939).[10] Held (R.H.) :—

> **"The mere fact of leaving an unprotected truck with its key in the switch on a highway, thus permitting an employee of the owner to use it without authorization and while he was not in the performance of the work for which he was employed, does not render such owner responsible for an accident causing injuries to a passerby through the negligence of the driver.**
>
> **"A motion made by the defendant to have the case withdrawn from the jury for insufficiency of evidence to justify a verdict, should be granted."**

Spiegel vs Tatem et al., 60 K.B. 275 (1936). Held (R.H.) :—

> **"L'emprunteur d'une automobile qui remise la voiture dans un garage au-dessous d'une maison de rapport dans laquelle il a sa demeure, répond du vol de ce véhicule au regard du prêteur lorsqu'il avait négligé de fermer à clef la voiture ainsi que son moteur, sachant que le garage servait à l'usage de ses colocataires, que les portes en étaient presque constamment ouvertes pendant la saison d'été et que, d'autre part, personne n'était préposé à la garde de ce garage.**

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9. See *infra* p. 119 et seq.
10. Appealed to *S.C.C.*, and under advisement.

> **"Le propriétaire d'une maison de ce genre qui fournit à chacun de ses locataires faisant usage en commun du garage, une clef pour en ouvrir les portes n'est point responsable du vol d'une automobile remisée dans ce local."**

If an insurance policy against theft contains a condition that the automobile shall be kept locked when unattended, the insurance company is not responsible in the event of the automobile being stolen at a time when it is unlocked. (*Ward vs Alliance Insurance Co. of Philadelphia*, 55 O.L.R. 451).

Mirror.

S. 32 M.V.A. provides:—

> **"Every autobus, commercial vehicle, or delivery car must, when operated on the public highway, be provided with a mirror sufficient in size and quality, and so placed as to enable the driver of such motor vehicle to see from his seat any vehicle coming from the rear."**

Windshield wiper.

There is no legal obligation upon the owner to equip his automobile with a windshield wiper: — *McIntyre vs Patterson*, 38 K.B. 8 (1924). However, in that case it was not proved that a wiper would have been of material assistance. The judgment should not be interpreted as meaning that the absence of a windshield wiper, or suitable device to keep the windshield clear, may not constitute negligence under certain conditions.

Special accessories for public vehicles.

S. 34 M.V.A. provides:—

> **(1) All public vehicles save the ambulance and the hearse, shall be provided with a speedometer. (2) Autobuses and taxis shall, in addition, be provided with chains**

to prevent skidding, and with a spare tire. (3) Autobuses shall, in addition, be provided with: (a) At least two doors, one in the front, and the other at the rear, unless there be doors on the sides; (b) One chemical fire-extinguisher; (c) A light of at least two candle power, to light the interior of such autobus at night.

Markers, etc., Alterations.

Sections 26, 33 and *35* M.V.A. deal respectively with Markers, Identification Numbers, and Alterations in Motor Vehicles.

Dimensions.

Regulations as to the *width, height and length* of motor vehicles and motor trains are contained in *Order in Council No. 1047* (June 1925).

(IV) REGULATIONS BY LIEUTENANT-GOVERNOR IN COUNCIL.

By *S. 68* M.V.A. the Lieutenant-Governor in Council may amend or add to certain regulations contained in the Act on those matters set forth in *S. 68*. By *S. 68 (2)* "All regulations, made by the Lieutenant-Governor in Council under the authority of this Act, shall, after their publication in the *Quebec Official Gazette*, have the same force and effects as if incorporated in this Act."

(V) DRIVING CONTROL.[11]

A motorist is obliged to drive in such a manner as to have his automobile always under proper control in order to avoid any danger to other persons or property. (*Long-*

11. The word *Control* is used in this subsection in the sense of *driving control*. For "*Doctrine of Control*" see *infra* p. 119 et seq.

pré vs Moranger, 28 R.L. 200 (C.R. 1922)). The person in charge of *any type of vehicle* is obliged to take all necessary measures to avoid accidents, and failure in that regard may be considered the cause or one of the determining causes of the accident. (*Proulx vs Montreal Tramways Co.,* 52 C.S. 6 (1917)).

The strictness with which the Courts have held automobile drivers to their duty to keep their cars under proper control is illustrated by the judgments in the following leading cases:—

Ruel vs Crépault, 43 K.B. 258 (1926); *Letourneau, J.* at p. 261:

> **"...Il faut que le chauffeur d'une automobile en conserve le contrôle toujours et partout, et ce contrôle doit être en raison des dangers possibles, en regard à l'espace et aux autres moyens dont il dispose pour éviter ces dangers possibles; en manquant à cette règle, le chauffeur commet une faute.**
>
> **"Dans une ville, il est à chaque instant possible qu'un enfant ou même une grande personne laisse le trottoir pour traverser la rue. Le chauffeur, au lieu de s'apprêter à l'invoquer comme cas fortuit, doit prévoir et redouter cette éventualité; sans prétendre qu'il sera toujours en faute quant à la personne qui se sera ainsi placée devant lui, je dis qu'il doit compter avec ce danger, le prévoir, et surtout garder de son automobile, un contrôle tel que l'espace de la rue puisse dans tous les cas lui suffire..."**

Robertson vs Stewart, 43 K.B. 402 (1926); *Dorion, J.* at p. 403:—

> **"...Celui qui conduit une automobile doit savoir qu'il se sert d'un instrument dangereux, et qui peut donner la mort, et qui la donne trop souvent. C'est comme celui qui se sert d'une arme à feu, il ne doit tirer que lorsqu'il est certain qu'il n'y a personne qui puisse surgir devant lui au moment où il tire. Qu'on ne dise pas que l'automobile**

est faite pour aller vite. Il n'y a aucune nécessité d'aller vite en général. Et s'il est utile de le faire, ce ne doit pas être au détriment de la vie humaine.

"Dans le cas de cette cause Stewart n'allait pas vite, du moins pas plus vite qu'il n'était nécessaire pour dépasser le camion, mais il n'a pas pu arrêter en temps pour éviter l'accident, et il aurait dû prévoir cette éventualité. Je crois que les chauffeurs seraient plus prudents s'ils n'étaient pas protégés par les contrats d'assurance contre leurs propres fautes..."

Dowd vs Brown, 40 R.L. 354 (1934). Held, in part (R.H.) :—

"Une règle élémentaire de prudence veut que tout conducteur d'automobile prenne toutes les précautions raisonnables pour assurer la sécurité publique et avoir, sur sa machine, un contrôle suffisant pour parer à toute éventualité." [12]

Brassard vs Gagné, 34 R.L. 58 (1927). Held, in part (R.H.) :—

"...Le conducteur d'une automobile, voyant une voiture devant lui, surtout le soir, doit diminuer son allure au point de pouvoir arrêter complètement dans un cas imprévu. En effet, les automobilistes doivent être d'une prudence extrême, puisque la loi les présume toujours en faute..."

See also *Forbes vs Savard*, 39 R.L. 58 (1931); *Bernatchez vs Castonguay*, 40 R.J. 273 (1934).

Skidding.

The following passage from pp. 395-396 of *Barron's Canadian Law of Motor Vehicles* is referred to in *Goldsmith vs Bentley* (1937) O.W.N. 280 :—

12. Strong *winds* are a common feature of the climate of Canada, and the action of such winds on a motor vehicle is an element that a driver of ordinary skill and caution must be able to foresee and deal with : — *Hird vs Milne*, (1930) 3 D.L.R. 513 (Man. K.B.)

"...Skidding is often the result of incompetence and inexperience in the driver, whereas adequate skill and care under the same conditions and same places enables cars to be handled safely... What is required is a knowledge of conditions that produce skidding, namely the slant from the crown of the road, the fact that the pavement is wet and moist, the fact that clay roads are slippery after a rainfall. The fact that momentum suddenly checked by sudden and unskilful application of the brakes especially when turning corners. Ignorance in regard to these matters may saddle responsibility for injuries resulting from skidding, upon him who is ignorant..."

In *Hawk vs l'Houmeau*, 29 R.L. 429 (1923) *Martineau J.* held that a person should not drive on a roadway on which he is unable to control his automobile, and went as far as to hold that the driver is responsible for the skidding of his automobile even when he is unable to prevent it: at p. 431:—

"...mais il devient faux d'en conclure que le dérapage est un événement fortuit, survenant en dehors de l'action du conducteur et auquel celui-ci resta absolument étranger. En réalité le dérapage n'a pas pour cause unique le mauvais état du sol; la vitesse de la voiture et la direction qu'on lui imprime sont deux facteurs qui déterminent le dérapage; une voiture au repos ne dérape pas, si gras soit le pavé. Il faut, pour qu'elle dérape, qu'elle avance et qu'elle marche à une certaine vitesse. Aussi le conducteur qui est à même de se rendre compte de l'état de la chaussée et qui sait qu'un dérapage est toujours à craindre à une certaine vitesse lorsque le pavé est glissant, doit prendre les mesures nécessaires pour l'éviter.

"Le dérapage, on le voit, n'a point les caractères d'un événement imprévu qu'on ne peut conjurer, et auquel l'automobiliste reste totalement étranger; dans ces conditions on ne peut l'assimiler à un cas fortuit ou de force majeure.

> **"Je crois humblement que l'on peut aller plus loin et dire qu'alors même que le dérapement n'aurait pu être empêché par le conducteur, il serait encore responsable des conséquences du dérapement. En effet, l'usage d'un véhicule que son conducteur ne peut contrôler en tous temps et sur tous chemins constitue *per se* une imprudence et l'article 1054 doit alors recevoir son application."**

See also *Dupont vs Brière et al.*, 77 C.S. 127. In *Guernon vs Bédard*, 43 R.L. 472 (1936) *Guibault, J.* held a driver at fault for losing control of his automobile in attempting to drive out of the ruts, which had formed on one of the streets in the City of Montreal. He held that the City would also be responsible under such circumstances for failing to maintain the street in a proper condition.

> **See also *Page vs Archibald* (*infra*, p. 101); *Pacific Stages vs Jones* (1928) S.C.R. 92; *Wilde vs Gagnon*, 42 R.L. 309 (1935); *Rothbart vs Rosengarten* 45 R.L. 322.**

Loss of control of an automobile is not always a fault giving rise to recourse at civil law. [13] In *Lieff vs Palmer*, 63 K.B. 278 (1937), *Galipeault, J.* stated, at p. 283:—

> **"Il y a bien des raisons qui peuvent faire perdre à un conducteur d'automobile le contrôle de sa voiture, et dans certains cas, il n'y a même pas de faute entraînant un recours civil."**

> **See also *MacKenzie vs Myers* 57 K.B. 357 (1934) at p. 360; *Kitchen vs McLaren*, C.S. 166865 Dec. 1938 (unrep'd); *Fortuitous event — Force majeure* (*infra* p. 47).**

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13. In the English case of *Wing vs London General Omnibus Co.*, (1909) 2 K.B. 652 *Vaughan Williams* and *Fletcher Moulton, L.JJ.* held that "An accident resulting from the tendency of motor omnibuses, however well constructed and designed, to skid is no evidence of negligence." This holding has been the subject of some criticism in England.

Three persons in front seat of auto.

There is no specific provision of the M.V.A. pro hibiting three people from riding in the front seat of an automobile.[13a] In some cases, however, the Courts have held that the fact of the driver having two people with him in the front seat tends to interfere with the proper control of the automobile and for that reason have held it to amount to negligence. In *Coca Cola Co. vs Mtl. Tramways Co.*, C.S. 75799, *P. Cousineau, J.* (in unreported judgment of March 1932) remarking that there were three persons in the front seat of the truck said:—

> **"Ceci constitue toujours un certain embarras et une gêne pour le chauffeur dans la direction du camion."**

In *Handfield vs Laferrière*, C.C. No. 511, Dec. 1932 (unrep'd) *Stackhouse, J.* said:—

> **"...I must also remark that there were three persons in the front seat of plaintiff's car. Although there is no statutory condition that this is forbidden, I am of the opinion that in view of the fact that the instruments regulating the control of an automobile are so placed that with three people in the front seat the driver is not in complete control of the same; that the operator of the car is greatly interfered with and that when occasion arises where it is necessary for the operator to act expeditiously and in haste, it is quite evident that anything that might interfere with his actions in using the controls is to be soundly condemned."**

However, where the fact of three people being in the front seat is proven to have had no relation to the accident it has been held not to constitute negligence. In *Schonberner vs Barron*, (1927) 3 D.L.R. 708 there were three people in the seat of defendant's Ford Coupé, which was

13a. *Art. 105* of *Montreal By-Law 1319* provides in part that it shall be unlawful to drive a vehicle when there are so many persons therein that the view of the driver in front or on the sides is obstructed and the driver's control over the driving mechanism is interfered with.

being driven at 25 M.P.H. *Ford J.* in the *Alberta Supreme Court* said at p. 709:—

> **"The fact that three people were in the one seat has no relation to the accident. The evidence was introduced doubtless to indicate that by reason of the two defendants with a lady between them occupying the seat and because doubtless they would be conversing, there might have been negligence in not keeping a proper lookout, but I can find nothing, as I have already indicated, to justify such a conclusion."**

Darling vs Emery, 60 C.S. 509 (C.R. 1921). Held, in part (R.H.):—

> **"...The fact of a driver of an automobile having with him, in his machine, two infants of tender years, is not a fault in law even where the verdict of the jury declares that they must have required some of the attention he would otherwise have been able to give to his driving."**

Fortuitous event — Force majeure.

Article 17 C.C. defines a *fortuitous event* as *one which is unforeseen and caused by superior force which it was impossible to resist.* Commenting upon this Article, *Rinfret, J.* said in *Montreal Tramways Co. vs Yervant,* (1936) 3 D.L.R. 241 at p. 244:—

> **"...The burden upon whoever pleads fortuitous event is, therefore, a very heavy one. The event must at once have been 'unforeseen' and it must result from a force 'impossible to resist'."**

In *Tremblay vs Allard,* 47 K.B. 530 (1929) a horse and waggon were left unattended on the highway. The horse took fright, and ran against the plaintiff's automobile, damaging it. It was held that the person responsible for the animal was liable for the resultant damages and that the defence of fortuitous event did not apply:—

At p. 531:—

"Considérant que le cas fortuit est un événement imprévu causé par une force majeure à laquelle il était impossible de résister; et que cet événement peut être, soit un accident de la nature, soit le fait d'une personne ou d'une chose dont on n'a pas à répondre (C.C., Art. 17, par. 24);

"Considérant, cependant, qu'il y a responsabilité, quand cet accident ou ce fait a été précédé ou accompagné d'une faute imputable au propriétaire de l'animal ou à quelqu'un ou à quelque chose dont il doit répondre, et sans laquelle l'accident qui est arrivé eût pu être évité ou prévenu (1).

"(1) C.C. 1072; — Larombière, art. 1382-1383 no. 24, — 4 Aubry et Rau, p. 103; — 18 Laurent, No. 516; — 31 Demolombe, no. 483; — Pothier, Oblig. no. 142."

For a defence of fortuitous event to succeed the defendant must prove one of two things: — (1) he may prove the actual cause of the accident and show that he was in no way responsible for that cause; (2) assuming that he cannot prove the actual cause of the accident, he may prove every possible cause of the accident and that he was not responsible for any one of them: — see *Terrell, The Law of Running Down Cases*, p. 53.

Beauchemin vs Rheault et al., 61 K.B. 127 (1936):

A pair of horses which had been left on the highway, one being hitched to a post, took fright when a nearby automobile backfired and, breaking loose, the horses injured a pedestrian. It was held, unanimously reversing the Superior Court judgment, that this was not a case of fortuitous event and that the owner of the horses was liable: —

"Lorsque les chevaux d'un attelage deviennent nerveux au passage d'une voiture automobile, que le conducteur de cet attelage, constatant, après les avoir gardés quelques instants sous son contrôle, que l'auto avait stoppé en face de sa propre voiture, quitte son poste, bien

que le moteur fût encore en marche et qu'une explosion se produit, provoquant l'emballement des chevaux, le propriétaire de la voiture à traction animale assigné par un piéton blessé à cette occasion ne saurait pour échapper à l'application de l'article 1055 C.C. prétendre que l'événement est dû à l'acte d'un tiers et qu'il y a force majeure."

On the other hand, there is *force majeure* if a normally quiet horse, properly held by the bridle, takes fright on the approach of an electric sweeper and runs onto a sidewalk and breaks a shop window. (*Caron et Frères vs Séguin*, 27 R.L. 26 (C.R. 1920)).

The presumption arising under *S. 53 (2)* M.V.A. is rebutted if *force majeure* is proved, — *Montreal Tramways Co. vs Chouinard*, 71 C.S. 123 (C.C. 1933) : *Archambault, J.* held (R.H.) :—

"Lorsqu'une chose est endommagée par une automobile, le propriétaire du véhicule n'encourt aucune responsabilité, s'il appert que sa voiture a été elle-même violemment heurtée par derrière par une autre voiture: l'accident résulte du fait d'un tiers équivalant à force majeure".

Rioux vs Vary, 39 Q.P.R. 35 (1935). *Stein, J.* held (R.H.) :—

"D'après la doctrine et la jurisprudence, le défendeur 'repousse la présomption de l'art. 53 de la Loi des véhicules automobiles ou de l'art. 1054, parg. 1 C.C. quand il prouve le fait d'un tiers imprévisible et irrésistible équivalant à force majeure'. (71 C.S. 123)".

See *Dundas vs Damphousse*, 71 C.S. 462 (1932), *Loranger, J.* In *Dumas vs Mtl. Tramways Co.*, 71 C.S. 167 (1933). *Loranger, J.* held (R.H.) :—

"Le conducteur d'un autobus qui, pour éviter de frapper une personne âgée qui surgit inopinément en avant du véhicule, exécute une manoeuvre (arrêt brusque) ayant pour résultat d'infliger des blessures à l'un des voya-

geurs, ne commet pas une faute: une demande en réparation du préjudice contre le propriétaire de la voiture n'est pas recevable."

Nadon vs Canada Metal Co. Ltd., 30 R.L. 293 (1924). *Pannoton, J.* held (R.H.) :—

"Le recours de la personne blessée ou du propriétaire de la chose avariée est contre celui qui a été en faute et non pas contre celui dont la voiture a actuellement causé le dommage si ce dernier n'a pas commis de faute."

Pacific Stages Limited vs Jones, (1928) S.C.R. 92. (R.H.) :—

"The appellant's motor 'bus' was being driven down a steep incline on a frosty and foggy morning, the street being in an icy condition, when the driver saw that a street car had stopped in front of him. He tried to stop the 'bus' and in order to avoid a collision ran it sharply to the right over the curb and sidewalk, struck a telephone pole and injured the respondent who was a passenger in the bus. The trial judge held that 'having regard to the conditions, the short range of visibility, the fact that there was a street car line upon the road, and the condition of the pavement, as it was, *or ought to have been known* to the driver, the motor bus ought to have been and might have been kept under such control that it could have been stopped without doing any damage', and he gave judgment in favour of the respondent, which judgment was affirmed by the Court of Appeal.

"*Held* that there was not sufficient evidence to support the finding of the trial judge. Under the circumstances of this case it cannot be reasonably said that the driver knew or ought to have known the icy condition of the pavement, as he had been faced with an unexpected situation such that, had it not existed, no difficulty would have been experienced in negotiating the hill."

Note, however, that the condition of the pavement was quite abnormal and not to have been expected. If the driver had known or ought to have known of the condition,

the case would have gone differently. In *Goldsmith vs Bentley* (1937) O.W.N. 280 the defendant after driving his automobile through a subway and when about to make a turn at a speed of about 20 M.P.H. found himself confronted by a sheet of smooth ice upon the roadway. His automobile skidded and struck the plaintiff's automobile, causing damages. The defendant unsuccessfully pleaded that the accident was inevitable. It was proved that he had driven on that particular part of the roadway three times on the day in question, and the Court of Appeal, affirming the lower Court judgment, held that defendant knew or ought to have known that the roadway was in a dangerous condition, and that under the circumstances a speed of 20 M.P.H. was too fast.

In *Slattery vs Hale,* (1923) 3 D.L.R. 156, (Ont. Supreme Crt.) defendant's driver suddenly and without warning became ill and *lost consciousness* with the result that the car ran onto the sidewalk and killed a pedestrian. The *Fatal Accidents Act* of Ontario gave the right to sue only when the death had been caused by *"the wrongful act, neglect or default . . ." Held,* dismissing plaintiff's appeal, that the duty to operate an automobile with due care was not so absolute as to render the driver liable when his failure arises from something which he had no reason to anticipate and was powerless to prevent. Moreover, the expression "wrongful act, neglect or default" import intention which under the circumstances did not exist. In *Wright vs Hall,* (1930) O.W.N. 260, an accident happened when the defendant driver became unconscious as a result of an *epileptic fit.* It was held that as he had knowledge of previous illnesses and weakness he should have known he was taking the risk of any such sudden attack coming on while driving, and he was held liable.

Where the driver of a motor vehicle collides with another owing to his *going to sleep,* he cannot escape liability on the plea that his act was not that of a conscious volition. That defence is only available where unconsciousness comes on suddenly without warning. Continuing to drive in a drowsy condition is itself negligence and the cause of the accident. *(Lajimodière vs Pritchard & Duff,* (1938) 1 D.L.R. 781 (Man. K.B.)).

In *Tremblay vs Ribaud,* 64 K.B. 68 (1937) it was held (R.H.) :—

> **"The fact that a driver of an automobile had to swerve to the left to avoid a head-on collision with an oncoming truck proceeding illegally at the left of the road, and in this movement came into collision with a bicyclist coming on his right side of the road, does not constitute force majeure and does not exculpate him and release him from the presumption of fault enacted by the Motor Vehicle Act, if it is not shown that the antecedent fault of the driver of the truck left no other course than the one followed by defendant, who was on the contrary at fault, for having not blown his horn, for having turned out unnecessarily far, or perhaps, as can be suggested, for not having come to a halt, if indeed, it is sure that it was impossible for him to pass to the right of the truck. The damages will nevertheless be divided as the victim, the rider of the bicycle, was at fault in not carrying a light which might have warned the defendant of his position on the road."**

Discussing defendant's manœuvres *McDougall, J. (ad hoc)* said (p. 75) :—

> **"Difficult as it may have been for him to meet the emergency thrust upon him by the action of the other automobile, his fault was later than and independent of the fault of the other automobile and it is this subsequent negligence which alone is material to the issue.**
>
> **"The chain of causation between the original wrongful act of the other motor vehicle and the accident which**

> **killed the plaintiff's son appears to me to have been broken by the supervening act or acts of negligence of the defendant" (See the *Singleton Abbey*, 1927 A.C. 16). "In other words, the primary negligent act was done and over; its effect as an operating cause of the casualty was spent, and, being separated from the injury by the intervention of defendant's negligent act, it plays no part in the final conclusion."**

So long as a motorist proves that he was neither negligent nor guilty of improper conduct, he does not need to concern himself with either *force majeure* or *cas fortuit*. *(Barclay, J.* in *Plouffe vs McKenzie*, K.B. 1643, Nov. 30th, 1939 *(unrep'd* to date); *Gasoi vs Guindon*, St. Jerome C.S. 6542 January, 1940 *(unrep'd* to date)).

> **See *"Act of God in the Law of Torts", Canadian Bar Review*, Volume XV, p. 724, Nov. 1937; and see *infra*, p. 225 at seq.**

Agony of collision.

If through the negligence of one party another party is placed in a position of imminent danger, and this latter party in an attempt to avoid an accident does something which later turns out to be wrong, he may be excused for his otherwise wrongful act because it was done in the *"agony of collision"*. In *Cohen vs Burt*, C.S. 150863, March 31st, 1937 (unrep'd) *McDougall, J.* stated as follows:—

> **"There is abundant authority for the statement that the driver of an automobile who observes another vehicle coming towards him on the wrong side of the roadway, cannot be held in fault for adopting the manoeuvre at the last moment of swerving to the left to avoid a collision. In the agony of collision he is even exonerated from blame for an act which would otherwise be culpable, provided always**

that he has done nothing himself to bring about the emergency with which he is faced, and that the imminence of the collision is due wholly to the other automobile." See (P.C.) the "Nor", 2 Asp. M.C. 264; The "Tasmania", 6 Asp. M.C. 517; The "Bywell Castle", 4 Asp. M.C. 207; The "Huntsman", 104 L.T. 466; *Patterson vs Gooderham,* (1928) 1 D.L. R. 131; Smith v. Cowan (1926) 31 O.W.N. 110; Price vs B.C. Motor Transport Ltd. (1931) 3 D.L.R. 548, (1932) 2 D. L.R. 161; *Van Camp v. Anderson,* (1929) 1 D.L.R. 429, (1929) S.C.R. 156; Armand v. Carr, (1926) S.C.R. 575.

For similar ruling see *Martin Transports Ltd. vs Wakefield & Co. Ltd. et al.,* 76 C.S. 176 (1938) and authorities cited in that report; *Glen Falls Ins. Co. vs Guay* 45 R.L. 347 (1939).[14] See, however, *Barr vs Miller,* etc. (1938) 4 D.L.R. 278 (Man.) and distinguish *Tremblay vs Ribaud (supra).*

In *Pigeon vs Ellwood,* 61 C.S. 402 (1922) *Maclennan, J.* pointed out (p. 403) that where a person is placed suddenly in a position of peril without sufficient time to consider all the circumstances, the law does not require of him the same degree of care and caution as it requires of a person who has ample opportunity for the full exercise of his judgment. *Stein, J.* ruled to the same effect in *Sevigny vs Bourdon,* 40 R.L. 125 (1932) at p. 126. Reference should also be made to *Tatisich vs Harding,* (1931) S.C.R. 167; *Ogawa vs Fujiwara,* (1938) S.C.R. 170; *Paget vs Wood,* (1938) 3 W.W.R. 33 (affirmed by S.C.C. Oct. 4th (1938); *Thérien vs City of Mtl.,* 15 C.S. 380 (C.R. affirmed by K.B.); *Coaticook vs Laroche,* 24 K.B. 339; *Pollock, The Law of Torts,* 13th Ed. p. 493; *Salmond, The Law of Torts,* 8th Ed. p. 472.

14. See also *Vouligny et al vs Savard et al,* 77 C.S. 317 (1939) — auto steered further to right in order to avoid collision with car coming in opposite direction at excessive speed and on wrong side of road — landed in ditch — injury to passenger — recourse against driver of other car.

In *Pleau vs Forget et al.*, 60 C.S. 48 (C.R. 1921) the plaintiff, a pedestrian, through his own fault was struck by the defendant's automobile and projected several feet forward. The defendant's driver then became excited and, instead of stopping, drove the car forward, seriously injuring the plaintiff. It was held that although the Courts hold a person free from blame for mistake or lack of judgment when acting under a condition of panic created by the opposite party, this principle could not be applied in the present case as there was no condition of panic which contemplates a general fear of an impending calamity on the part of a number of people similarly situated. Commenting upon the conduct of defendant's driver *Howard, J.* (whose judgment was upheld by the Court of Review) said at p. 49:

> **"...operators of automobiles are in a special category, for from their occupation and the licence which they must obtain in order to follow it, it is presumed that they will be able to conduct themselves properly and with calm judgment in and through the many difficulties and crises which they must necessarily encounter in the traffic on the thoroughfares of a large city. An operator of a machine of such a weight and power as the one in question should not lose his head under such circumstances as proved in this case..."**

Intoxicated driver.

Proof that the driver of an automobile was intoxicated at the time of an accident may be of importance both in establishing negligence and, in certain cases, in relieving an insurance company from liability under a policy. (See *infra* p. 277).

Under the heading *"Offences and Penalties", S. 48 (1)* M.V.A. provides that no person under the influence of

intoxicating liquors or of narcotics shall drive a motor vehicle on the public highway, or have the care or control of same, *even if such motor vehicle is not in motion.* (See also *Criminal Code, S. 285, Ss 4).* However, the civil consequences of driving while under the influence of liquor or narcotics are independent of those enactments and responsibility is engaged by *Article 1053* C.C. *(Riendeau et vir vs Ramsay,* 28 R.J. 322 (1922), *Bruneau, J.* at pp. 326-327; *Giroux vs Wright,* 38 K.B. 466 (1924), at p. 471).

It is clear that a driver may be under the influence of liquor and may be guilty of negligence on that ground, although he is not "drunk" within the ordinary meaning of that word. Under modern conditions a driver must be in full possession of his senses and anything which affects his sense of judgment is to be condemned. In *Whitfield vs General Accident Ass'ce Co. of Canada Ltd.,* 50 K.B. 310 (1931) it was pointed out that intoxication did not always depend upon the quantity of liquor consumed, and that in determining intoxication the individual's condition should be judged rather by his *conduct: Bernier, J.* at p. 312:—

> **"...Il est très possible qu'un verre, ou même plusieurs verres de liqueurs, puissent ne pas produire l'état d'ivresse chez quelques-uns; ils le peuvent chez d'autres; ce n'est pas toujours la quantité de boisson ingurgitée qui produit l'ivresse. Mais l'état d'ivresse peut être constaté par les agissements, par la conduite d'une personne, par des imprudences ou des négligences quasi volontaires, presque inexplicables..."**

Lafontaine, C.J. in the same case, at p. 314:—

> **"Il ne s'agit pas ici toutefois, d'apprécier l'ivresse civile comme cause d'annulation d'un contrat par absence de consentement ni l'ivresse criminelle pouvant excuser une personne commettant un crime dans un état d'in-**

conscience totale... l'automobile est un véhicule dont l'usage est entouré de dangers surtout dans les localités populeuses. Il demande de la part de celui qui conduit une attention soutenue le calme et la sérénité pour exercer à tout instant un jugement sûr..."

See also *Forbes vs Savard*, 39 R.L. 58 (1931) and *Pineau vs Pezzula*, 39 R.L. 131 (1931).

It is well known that the effects of alcohol vary with different individuals, and, while the fact of a driver having consumed a certain quantity of liquor may create a presumption of intoxication, this presumption may be rebutted by evidence to the contrary. In *Bourdon vs Hudson Bay Ins. Co.*, 72 C.S. 146 (1933) at p. 148, *Belleau, J.* remarked as follows:—

"...Il est bien vrai que l'absorption de liqueurs alcooliques pourra créer la présomption que celui qui les a prises était en état d'ébriété, mais cette présomption pourra certainement être repoussée avec succès par une preuve contraire."

Belleau, J. held that in order to determine whether or not a driver was under the influence of alcohol it was necessary to examine the circumstances of each case and the individual's conduct before, at the time, and after the accident. Referring to the *Whitfield* case he defined "intoxication" as follows:—

"C'est ce degré d'insouciance, produite par des liqueurs spiritueuses, qui peut ne pas aller jusqu'à l'ivresse proprement dite, mais qui affecte le discernement, la faculté de détermination, l'esprit de prudence, l'habileté et la maîtrise nécessaire pour la conduite normale d'un véhicule automobile."

In holding Bourdon was not intoxicated *Belleau, J.* stated at p. 151:—

"...Aucun des symptômes qui se rencontrent chez l'homme en boisson, tels que: nervosité, lenteur des mou-

vements, indécision et inconscience, manque de sang-froid, incohérence du langage ne se rencontre chez le demandeur. Au contraire, il réalise à l'instant ce qui est arrivé, saute de son automobile, porte secours au blessé, fait venir un prêtre, lui donne les soins les plus empressés, et pendant ce temps il est calme, son discours est paisible, à tel point que tous les témoins, sans exception, affirment qu'il était normal..."

Bourdon had consumed six "John Collins" over a period of about five hours prior to the accident.

In *French vs Charest,* C.S. 150939, 25th Aug. 1937 (unrep'd) *Rhéaume, J.* held that the fact of a person having consumed some liquor does not necessarily indicate he was driving imprudently:—

"...même, au cas où le défendeur aurait pris quelques liqueurs, rien n'établit que l'accident soit dû au fait du défendeur qui, au moment de l'accident, n'aurait pas conduit son camion selon la loi et les règles de la prudence."

The owner of an automobile is at fault in leaving it *parked* (even for a few moments) *in charge of intoxicated persons,* and he is responsible for an accident caused by his automobile while in charge of one of such persons. (*Giroux vs Wright,* 38 K.B. 466 (1924)).

A *passenger* is negligent in intrusting himself to an intoxicated driver and for that reason may be barred from recovering damages suffered by him as a result of the driver's negligence: see:—

***Dandurand vs Les Héritiers Desjardins et al.,* 44 R.J. 76 (1936); *Courberon vs Gignac,* 70 C.S. 215 (1932); *Kaugh vs Adkins* (1933) O.W.N. 709, 711; *Delaney vs City of Toronto* 64 D.L.R. 122 (1921).**

The late Mr. Justice Martineau suggested that insurance companies wishing to protect themselves against

losses occasioned while drivers were under the influence of liquor — though not necessarily intoxicated — should draft their policies accordingly: (see *Highway Lighthouse Co. Ltd. vs Pearson*: *Pearson vs Halifax Fire Ins. Co.*, 37 R.J. 245 (1931)).

(VI) LOOKOUT — OBSTRUCTION TO VISION

The person in charge of a vehicle is obliged to keep a proper lookout. "Where there is nothing to obstruct the vision and there is a duty to look, it is negligence not to see what is clearly visible". (*Cannon, J. in Swartz Bros. Ltd. et al. vs Wills*, (1935) S.C.R. 628 at p. 634.) "It has been repeatedly said that merely looking in the direction of an approaching car, clearly visible, and failing to observe it, is negligence." (*Middleton, J.A.* in *Carter et al. vs Wilson* (1937) O.W.N. 282).

See also ***Right of Way at Intersection*** (*infra* p. 87); ***Overtaking*** (*infra*, p. 64).

The importance of a constant lookout is apparent by reference to the accompanying table of distances covered by moving vehicles at various rates of speed. For example, a car travelling at 35 M.P.H. will cover a little more than 51 feet per second. Accordingly, if the driver of an automobile travelling at that speed permits his attention to be diverted from the roadway even for three seconds, his car will in that short time travel about 154 feet — ample room for some unforeseen emergency to arise. For that reason, the common practice of drivers turning their heads when talking to passengers is imprudent. So also is the habit of consulting maps or other documents while operating a car in motion.

Feet per second covered by vehicles travelling at different rates of speed

Miles per hour	*Feet per second*	*Miles per hour*	*Feet per second*
1	1.47	32	46.93
2	2.93	33	48.40
3	4.40	34	49.86
4	5.86	35	51.33
5	7.33	36	52.80
6	8.80	37	54.26
7	10.26	38	55.73
8	11.73	39	57.20
9	13.20	40	58.66
10	14.66	41	60.13
11	16.13	42	61.60
12	17.60	43	63.06
13	19.06	44	64.53
14	20.53	45	66.00
15	22.00	46	67.46
16	23.46	47	68.93
17	24.93	48	70.40
18	26.40	49	71.86
19	27.86	50	73.33
20	29.33	51	74.80
21	30.80	52	76.26
22	32.26	53	77.75
23	33.73	54	79.20
24	35.26	55	80.66
25	36.66	56	82.13
26	38.13	57	83.60
27	39.60	58	85.06
28	41.06	59	86.53
29	42.53	60	88.00
30	44.00	61	89.46
31	45.46	62	90.93

63	92.40	69	101.20
64	93.86	70	102.66
65	95.33	75	110.00
66	96.80	80	117.33
67	98.26	85	124.63
68	99.73	90	132.00

When two vehicles are travelling in the same direction the driver of the vehicle behind is generally held to the exercise of a greater degree of caution and to a stricter vigilance than the driver of the vehicle in front, in so far as the avoidance of a collision between them is concerned. In *Liebling vs Tanguay*, 33 K.B. 119 (1921), *Howard, J.*, at p. 121, said:—

> "...The driver of the vehicle in front cannot give due attention to his driving and at the same time keep track of what may be happening behind him, whereas the one in the rear can watch the machine in front and govern his course accordingly. It is upon him, therefore, that the chief responsibility rests to avoid a collision. In that sense the machine in front has what has been styled the 'superior right' or right of way. But that rule applies to protect the driver in front only when he does what he has a right to do and does it in the right way. It does not, for instance, give him the right to suddenly stop or to abruptly turn across or around in the highway without obvious cause or without giving due notice of his intention to do so to the one behind. In a word, it does not give him the right to do the unexpected or the unusual without due notice."

See also ***Carleton vs Bostwick*** 45 R.L. 36 (1938), and *infra*, p. 71 et seq.

Obstruction to vision.

Although *S. 27 (3)* M.V.A. provides that the driver must so replace, direct, obstruct or reduce the glare of the

headlights so as not to dazzle or blind the driver approaching in the opposite direction, a driver who is so blinded is guilty of negligence if, instead of coming to a stop, or at least bringing his automobile under complete control, he continues to drive ahead. In *Sevigny vs Bourdon,* 40 R.L. 125 (1932) *Stein, J.* held, in part (R.H.) :—

> **"Si le conducteur d'une automobile en mouvement ne voit pas suffisamment devant lui, il doit s'arrêter ou, tout au moins, contrôler sa voiture pour éviter tout accident, comme l'exigent le bon sens et la loi.**
>
> **"Ça n'est pas une excuse que de dire que l'on n'a rien vu, quand l'on traverse l'une des principales artères d'une grande ville, le soir, à une allure et dans des circonstances anormales."**

Ouellette vs Filion, 39 R.J. 257 (C.C. 1933). *Archambault, J.* held, in part (R.H.) :—

> **"L'éblouissement dont un conducteur d'automobile peut être victime en conduisant sa voiture, n'est pas force majeure et ne l'exonère pas de sa responsabilité.**
>
> **"Un conducteur d'automobile dont la voiture au moment de l'accident se trouve vis-à-vis l'automobile cause de la collision, et dont les phares à feux aveuglants éblouissent le premier et l'empêchent de voir la victime, est également fautif et doit partager la responsabilité."**

See also *Larose vs Decary,* 76 C.S. 536. In *Leggo vs Shatford,* (1927) 2 D.L.R. 265 it was held that when a driver of a motorcar is blinded by the headlights of an approaching car his duty is to stop, and if he continues moving and causes an accident he is guilty of negligence. In *Ristow vs Wetstein,* (1934) 1 D.L.R. 787 (S.C.C.) it was held (p. 788) :—

> **"A person driving at night must drive at such a speed that he can pull up within his limits of vision; accordingly, on his colliding with anything, he is faced with the dilemma that either he was driving at an undue speed or**

he was not keeping an adequate lookout, unless there is some other factor causative of the collision."

A driver who is no longer able to see by reason of the collection of *frost on the wind-screen* should bring his automobile to a stop. However, "a man is not negligent in driving his car on a rainy evening because *rain* gathers on the windshield, if he can see sufficiently to drive with safety and exercises the care that a reasonably prudent man would exercise under the circumstances". *(Carnat vs Matthews,* (1921) 59 D.L.R. 505). A speed of 15 M.P.H. has been held excessive when the motorist's view was obstructed by *rain. (Palantios vs Vallée,* 44 R.J. 91 (1938)). A driver whose vision is obstructed by *fog* should stop or slow down to a speed at which he is in a position to stop immediately. In *Hibbard vs Plouffe,* 43 R.J. 195 (1937) *Verret, J.* held at p. 198:—

"Considérant que bien que la preuve soit contradictoire quant à la vitesse de l'automobile au moment de l'accident, il résulte du témoignage de Gaétan Favreau qu'il conduisait à une vitesse de quinze à vingt milles à l'heure, et que s'étant aperçu trop tard, à cause du brouillard qui l'empêchait de voir à plus de dix à quinze pieds, que le chemin faisait une courbe, il ne put éviter l'accident;

"Considérant qu'il était du devoir de Gaétan Favreau, à cause du brouillard, soit d'arrêter ou de conduire à une vitesse plus modérée et d'avoir le contrôle de l'automobile de manière à pouvoir arrêter immédiatement, et que cet accident est imputable à sa faute et négligence."

See also *Beeston et al. vs Williams* (1938) 3 D.L.R. 803 (Man. K.B.). *Deneault vs Amann et al.* 68 C.S. 432 (1930).

When the *streets of a city are unlighted or poorly lighted* a driver is obliged to exercise extra caution, — *Crasinsky vs St. Maurice Garage, Inc. et al.,* 74 C.S. 515 (1936), *Mercier, J.* at p. 516:—

"...qu'il est également prouvé que ce soir-là la lumière municipale, destinée à éclairer cette partie de rue, faisait défaut, ce qui compliquait davantage la situation et exigeait de la part de tout automobiliste qui avait à y circuler une plus grande prudence et une plus grande attention..."

In a locality where the speed limit is 8 M.P.H. a speed of not more than 5 or 6 M.P.H. may be imprudent on a dimly lighted street and when the roadway is slippery. *(Mtl. St. Ry. Co. vs Conant,* 14 C.R.C. 305 (K.B. 1912)).

(VII) OVERTAKING

The M.V.A., *S. 36, Ss. 4, Ss 5* and *Ss 6* provide:—

"4. When preparing to pass, the person driving a motor vehicle shall, before bearing to the left, give warning of his intention to do so, and make sure that it is possible to pass without any risk of a collision with a vehicle or an animal coming in an opposite direction. The warning shall be given by means of the sounding device.

"5. No person shall pass when it is not possible to see clearly the portion of the road immediately ahead.

"6. After passing, such person shall not turn his vehicle to the right, before having made sure that this can be done without any danger or inconvenience to the vehicle or the animal which he has passed."

By *S. 38,* M.V.A. it is provided:—

"1. When a motor vehicle overtakes a tram-car which is stationary for the purpose of taking on or discharging passengers, such motor vehicle, unless otherwise ordered by the officer in charge of the traffic at that place, shall not be driven beyond the rearmost part of such tram-car until it shall have started and until all passengers who have alighted shall have reached the side of the street.

> **"2. A motor vehicle meeting or overtaking a tram-car in motion shall be driven so that the tram-car shall be to the left of the person driving the motor vehicle, unless the position of the track makes it impossible to do so or unless the city has, by by-laws, derogated from this act, and has indicated such derogation by a proper sign-board or by a traffic officer."**

As to the signal, see *sounding device (supra* p. 33). Not only should the driver give a signal but "he should watch to see if his signal has been heard, and that way is being made for him to pass. He must not, having given a signal, proceed to pass, supposing he had done all he is required to do, or indifferent as to whether his signal had been heard or not..." (*Barron, Canadian Law of Motor Vehicles,* p. 457).

A driver must not overtake another car until his view ahead is clear. (*Corporation of Township of Brome vs Gleason,* 26 R.J. 113 (1919, K.B.); *Mitchell vs Duke,* 77 C.S. 228 (1939)). In *Pigeon vs Ellwood,* 61 C.S. 402 (1922) it was held (R.H.):—

> **"Lorsque deux autos se suivent, celui qui se trouve en arrière n'a pas le droit de conduire à gauche, et d'augmenter sa vitesse pour dépasser celui qui est en avant, à moins que le chemin ne soit libre de tout obstacle qui puisse l'obstruer."**

If a horse-drawn vehicle preceding an automobile continues to occupy the centre of the roadway notwithstanding the signals of the auto driver, the latter should bring his car under control, slow down and if necessary stop, at the same time repeating the signals until he has sufficient space to pass. If, instead of this, he tries to force a passage and a collision results, he is guilty of imprudence which renders him responsible for the resultant damages. (*Rossignol vs Langelier,* 21 R.J. 231 (1914)). In *Archambault vs Laperle,* 61 C.S. 211 (1922) the driver of

the vehicle in front failed to yield free passage to the vehicle overtaking it from the rear. However, the overtaking vehicle was travelling at an excessive and dangerous speed, and under such circumstances *Archer, J.* held there was common fault.

Grinnell Co. et al. vs Warren, (1937) 1 D.L.R. 705, Supreme Court (R. H.) : —

> **"A motorist swerving and losing control of his car when striking a soft shoulder while attempting to pass another vehicle on the road after exchanging signals to do so, collided with the other car and injured the driver therein. Held that a verdict of the jury finding the driver of the overtaking car negligent in manoeuvring the pass too close to the other car was proper under the evidence and will not be disturbed on review."**
>
> **As to negligence in *passing too close to car* see also *Tully vs Genbey et al. (1938)* 3 D.L.R. 410 (Man. K.B.)**

Page vs Brossard, 26 R.L. 86 (C.R. 1919). Held (R.H.) :—

> **"Le chauffeur d'un autobus qui suit une voiture occupant le milieu de la chaussée, et qui apercevant une plus large espace à sa droite, passe à côté pour prendre le devant, mais qui coupe trop court en avant du cheval et blesse ce dernier, fait une fausse manoeuvre volontaire ou involontaire qui rend responsable de l'accident le propriétaire de l'auto. Il importe peu que le conducteur de la voiture se soit obstiné à garder le milieu du chemin."**

Taillon vs Côté, 24 R.J. 80 (C.C. 1918) (R.H.) :—

> **"Il résulte de la preuve que l'accident dont se plaint le demandeur, et, pour lequel il réclame des dommages du défendeur, est uniquement attribuable au fait que le défendeur qui, en automobile suivait la voiture du demandeur, a méconnu les dispositions de l'art. 1415 Sts. Ref. Prov. de Québec, en passant à la droite au lieu de passer à la gauche de la voiture du demandeur, alors qu'il avait**

un espace plus que suffisant dans le chemin, pour passer, sans accident à la gauche. De plus l'automobile du défendeur n'était muni d'aucune trompe en sorte qu'il n'a averti le demandeur qu'il voulait passer, (Art. 1417 S.R. P.Q.) et après l'accident, il a continué sa route contrairement aux dispositions de l'art. 1321 S.R.P.Q."

Ménard vs Lussier, 50 C.S. 416 (C.R. 1916). Held (R.H.) :—

> **"Bien que, d'après la loi, une personne qui conduit un cheval sur un chemin public et qui est suivi d'un automobile doive, 'aussitôt que cela peut se faire,' gagner à droite, afin de laisser libre passage à gauche, néanmoins, si cette personne ne laisse pas à l'automobile un chemin suffisant et que le chauffeur tente de dépasser la voiture quand même, il le fait à ses risques et périls et est responsable en cas de collision."**

In *Johann vs Ouimette,* 45 R.L. 257 (1939) it was held that the driver of an automobile is at fault in overtaking a horse-drawn vehicle on a bridge at a speed of more than 8 miles per hour. In *Dutil vs Moreman,* 67 K.B. 521 (1939) a motorist was held at fault for overtaking a bicycle on an intersection at a speed of 20 miles per hour. *Hall, J.,* dissented, holding that, under the circumstances, the speed of the automobile had no bearing upon the accident.

Harding vs Edwards et al., (1929) 64 O.L.R. 98, (1931) S.C.R. 167 :—

> **"T., driving her motor-car westerly along the northerly side of a highway, was preceded and followed by many cars. On the southerly side of the highway there was an almost continuous stream of cars passing in the opposite direction. With the intention of passing the car immediately in front of her, she turned southerly out of her line of traffic; and E., who was driving a car in an easterly direction, and was not far from where T. turned out, thought that a head-on collision was probable as a result**

of her conduct. To avoid this, he swerved his car to the south upon the gravel-strip of the road, and so passed her without injury; he did not, however, succeed in regaining his place in the eastbound line of traffic, but swung so far over that he was brought into contact with two cars proceeding westerly and injured them. Actions were brought against E. and T. by the owners of these two cars, and an action was brought by E. against T.:—

> **"Held, by the majority of the Court,[15] affirming the judgment of the trial judge, that the whole series of disasters were due to T.'s turning out to pass the car in front of her, contrary to the Highway Traffic Act., R.S.O. 1927, ch. 251, sec. 35 (10), in that 'the portion of the highway in front of her and to the left of the vehicle to be passed' was not 'safely free from approaching traffic'; and she was liable for all the damages that flowed in sequence from her initial wrongful act."**

Murphy Co. Ltd. vs Archambault, 21 R.J. 434 (C.R.) 1914). (R.H.) :—

> **"Le conducteur d'une automobile qui veut dépasser une voiture sur la même voie, doit attendre le moment et l'endroit convenables, et passer à gauche en conformité de l'article 1415 des S. R. de la Province de Québec de 1909."**

It is negligence for a motorist to attempt to *overtake a tramcar on an intersection* when, by reason of the tramcar, his view of traffic approaching from the left is obstructed.*(Mtl. Tramways Co. et al. vs Campeau,* K.B. 1194 and 1195, 15th June 1937 (unrep'd)).

Cutting in sharply in front of an automobile immediately after passing it constitutes negligence. (*Ogawa vs Fujiwara,* (1938) S.C.R. 170). Thus a motorist is responsible in damages if, after passing another car going in the same direction, he turns too suddenly to his right and

15. *Ont. Supreme Crt., App. Div.*: Judgment affirmed by S.C.C. (1931) S.C.R. 167. (*Tatisich vs Harding,* etc., *supra* p. 54).

forces the other car into the ditch. (*Lévesque vs Desrochers,* 45 R.J. 299 (1939) [16]; see *S. 36 (6)* M.V.A. *supra* p. 64).

As to injury to *pedestrian* by automobile overtaking another automobile, see *Mitchell vs Duke,* 77 C.S. 228 (1939).

Keeping to right.

The M.V.A., *S. 36, Ss 1, Ss 2* and *Ss 3* provide:—

"1. Every person, driving a vehicle or an animal on the public highway, must, whenever possible, keep to the side of the road at his right, and leave at his left as wide a passage as possible and at least one-half of the road when meeting another vehicle or a herd of cattle, or at least eight feet when meeting a pedestrian, a cycle or a stray animal.

"2. Every person driving a vehicle shall bear to the right to meet another vehicle or allow such vehicle to pass the one he is driving, and shall bear to the left when passing another vehicle.

"3. Every person driving a vehicle shall bear to the right when approached by any vehicle or any animal driven or led, and also to permit the passing of any person driving a motor vehicle, for which vehicle the speed allowed by law is greater than that allowed by law for the motor vehicle which he is driving."

Penrose vs Barr, (1927) 4 D.L.R. 407. Held (R.H.):

"The paramount duty of a driver of a motor car approaching another car is to give the approaching driver at least one-half of the road on which to pass, and if he is prevented from moving over to his half of the road by ruts his duty is to stop and give a signal to the approaching driver. If he does not do so under those circumstances he cannot claim as negligence contributory to the cause of the accident the fact that the other driver

16. Judgment affirmed by K.B., Dec. 1939.

expected him to obey the law and give him half the road with the result that he did not stop before a collision was inevitable."

See also *Mason vs Ellis*, (1922) 2 W.W.R. 688.

Where two cars collide in the middle of the road in daylight with a clear view and there are no other circumstances indicating more fault on one side or the other, both drivers are equally liable. *(Funk vs Pinkerton, etc.* B.C. Supreme Court, (1938) 3 D.L.R. 781).

In *Canadian Transfer Co. vs Laframboise,* 21 R.L. 438 (C.R. 1915) the driver of a horse-drawn vehicle was held solely at fault for a collision with an automobile coming from behind because before his vehicle had been overtaken he turned towards the centre of the roadway without signalling, although he knew he was being followed by the automobile. (See *Drolet vs Demers,* 4 I.L.R. 360, *infra* p. 75).

There may of course exist certain conditions which justify a motorist in driving on the left half of the roadway; for example, in *Coppola vs Deguire,* 35 K.B. 339 (1923) it was held, in part (R.H.) :—

"...celui qui conduit sa machine du côté gauche, (*McCarr vs Carreau,* (1914) 46 C.S., 448), (a) parce que la voie du tramway incline à un certain endroit à droite laissant du côté gauche plus d'espace, au point que les voitures passent généralement à gauche de la voie ferrée (*Sawyer v. Giguère,* (1921), 59 C.S. 520), (b) parce qu'il lui fallait passer à gauche pour éviter une voiture et un amoncellement de mâchefer et de pierre accumulé à droite, ne peut être trouvé coupable de négligence de ce chef, s'il frappe un enfant qui s'est élancé imprudemment pour traverser la rue en avant de sa machine et le blesse..."

It should not be held that there is common fault on account of speed if it appears that the determining cause

of a collision on a curve was due to the fact that one of the automobiles was being driven on the wrong side of the road. *(General Casualty of America vs Perusse,* 72 C.S. 552 (1934).

See ***Longpré vs Moranger,*** 28 R.L. 200 (C.R. 1922).

For further cases as to driving on wrong side of roadway see ***Flett vs Sanford,*** (1925) 4 D.L.R. 730 (Alberta Supreme Crt.) ***Gunderson vs Duncan,*** 12 S.L.R. 81; ***Macdonald vs Thomas,*** 41 Man. R. 657; ***Allen vs Lord,*** (1928) 4 D. L. R. 62 (Ont. Supreme Crt.); ***Hrabec vs Lucid*** (1933) 4 D.L.R. 452, (Man. C.A.).

(VIII) TURNING

M.V.A. *Order-in-Council No. 515* provides:—

"The driver of a motor vehicle, when about to slow down, stop or change the direction of his machine, must signal his intention to do so by extending the arm out of the machine, or by means of a device on the vehicle, in such a way that the signal may be seen by persons coming in the rear."

See also local traffic by-laws; e.g. *Montreal By-law 1319, Articles 73* and *74* provide as follows:—

"Article 73 — (a) ***Right turns*** — The driver of a vehicle intending to turn to the right at an intersection or into a lane or driveway shall approach the point of turning in the traffic lane nearest to the right-hand edge or curb of the roadway, and, in turning, shall keep as close as practicable to the right-hand curb or edge of the roadway.

"(b) ***Left turns*** — The driver of a vehicle intending to turn to the left at an intersection shall approach the point of turning in the lane of traffic to the right of and next to the centre of the roadway and, unless otherwise directed by 'turning markers' or a police officer, the driver of a vehicle, before turning to the left at an intersection, shall pass to the right of the centre of such intersection

and shall also yield to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard, and said driver, after having so yielded and given the signal required by law, may make a left turn and other vehicles approaching the intersection from the opposite direction shall yield to the driver making such left turn.

"(c) *Turning markers* — The Director of the Police Department is authorized to place turning markers within or at the entrance to intersections, indicating that traffic turning left shall follow a line of travel other than as directed in paragraph (b) of this article. Whenever turning markers have been placed at an intersection, as above provided, traffic turning left shall follow the line indicated by such markers.

"(d) *Left turn on green signal* — The driver of a vehicle or tramcar intending to turn to the left at an intersection where traffic is controlled by traffic control signals or by a police officer, shall proceed to make such left turn with all due care in order to avoid accidents and only upon the green signal, unless otherwise directed by a police officer."

"Article 74[17] — No driver of a vehicle shall take another direction or cross from one side of a street to the other except at an intersection."

The signal of intention to turn or change direction or stop must be given in such a way that it will be seen from behind and in time to avoid a collision. "It is not sufficient to indicate by signals that a driver is about to do something; a driver is also under duty to ascertain that what he is about to do is a reasonable and safe act under the circumstances." — *Adilman vs Montreal Tramways Co.*, C.S. 23685, 28th Sept. 1928 (unrep'd). In that case an automobile was preceding an autobus, both vehicles travel-

17. *Article 75*, of the same by-law, makes it unlawful for the driver of any vehicle to make a right-hand or a left-hand turn at any street intersection where traffic signs forbidding such turns are erected.

ling west. On arrival at an intersection the auto driver first drove his car towards the north side of the street, and then, after extending his left arm, turned his car to the south when the autobus was about 15 feet behind. The autobus chauffeur was unable to stop in time to avoid a collision with the automobile, and *Bond, J.* held the driver of the automobile solely to blame for the accident.

In *Pollack vs Mtl. Tramways Co.*, C.S. 111838 (unrep'd), June 26th 1934, *Denis J.* held, in part:—

> "*Considering* that the plaintiff's main argument is that the said tramcar hit plaintiff's automobile in the rear but that this circumstance does in no way create fault on the part of the defendant in a case where the accident occurred as in the present case;
>
> "*Considering* that if the defendant's tramcar hit the plaintiff's automobile it was purely and simply because the plaintiff brought his said automobile to a low rate of speed precisely because of his intention to execute the dangerous movement of crossing Park Avenue to his left and that it is this sudden decrease in the speed of plaintiff's automobile that created the emergency responsible for the accident;
>
> "*Considering* that no one who drives ahead of a tramcar ,or of an automobile, or of any other vehicle, has the right to stop suddenly without giving the proper signals because it is quite evident that any such stop takes by surprise the vehicles coming behind and is therefore of a nature of causing a collision without the fault of the driver of any such vehicle coming from behind;
>
> "*Considering* that the evidence is clear and complete that all of a sudden the plaintiff decreased the speed of his automobile to such an extent that the possibility of a collision between the defendant's tramcar and plaintiff's automobile became suddenly imminent."

See also *Corbeil vs Zinman at al.* 45 R.J. 360 (1939); see *contra, Carleton vs Bostwick* 45 R.L. 36 (1938).

Leitch vs Gauthier, 27 R.L. 150 (C.R. 1920). Held (R.H.) :—

> **"The driver of an automobile who crosses diagonally from the north side of a street to the south side, instead of following the rule laid down by art. 1415 R.S. (1909), enacting that any person operating a motor shall keep to the right of the intersection of the centre of public highways when turning to the right or left, is responsible in case of collision."**

Giguère vs Brown, 59 C.S. 369 (1920). *Lane J.* held (R.H.) :—

> **"Une personne qui soudainement passe d'un côté d'une rue à l'autre dans un endroit commercial là où il y a foule, et cela non pas à une traverse de rue, mais entre deux rues transversales, est coupable de négligence et n'a aucun recours si elle est frappée par un automobile conduit avec prudence."**

Gendron vs McLennan, 59 C.S. 364 (1920). *Lafontaine, J.* held, in part (R.H.) :—

> **"Celui qui change subitement la direction de son automobile à angle droit pour prendre une autre rue, doit d'abord modérer la vitesse de sa machine et l'avoir absolument sous son contrôle."**

Hagden vs Brossard et al., C.S. 156693, 29th March 1938 (unrep'd), *Rhéaume, J.* held :—

> **"... Un automobiliste qui veut dévier du chemin qu'il suit et intercepter de ce fait un trafic possible, doit, selon les règles de la plus élémentaire prudence exercer une vigilance constante et spécialement s'assurer avant d'exécuter un virage, qu'aucun danger de collision n'est à craindre;"**

See also *Barer vs Mitchell*, 45 R.L. 252 (1938).

Hale vs Lachambre, 72 C.S. 379 (1934). *Denis J.* held (R.H.) :—

> **"Lorsque le conducteur d'un véhicule automobile circulant dans un boulevard a l'intention de virer à gauche dans une rue transversale, il est soumis aux mêmes obligations que celui qui se présente à une intersection pour traverser ce boulevard: il doit arrêter son véhicule et attendre que tout danger soit disparu avant de s'engager dans l'intersection."**

Denis, J. also held (in the same case, pp. 380-381) that the driver of a vehicle who is following a larger vehicle, such as an autobus, and whose vehicle is, therefore, *hidden from the view of drivers* approaching in the opposite direction, is obliged to exercise special care in turning out into a side street.

> **"...A driver is at fault in attempting to pass another car without sounding his horn; the other driver is also at fault if he makes a sudden swerve to the left without giving a signal. The damages will be divided." (*Drolet vs Demers*, C.S. 34061, Marchand, J., Jan. 15th 1937 — See (1937) 4 I.L.R. 360).**
>
> **In turning corners at an intersection the motorist travelling west should "hug" the northeast corner, if he desires to turn north; and the motorist who is driving south, when he reaches the intersection, should make a wide turn, if it is his intention to proceed east along the road from whence the other had come — See *Collins vs Baughman*, 35 O.W.N. 24.**

Turning in and out of private property.

See local by-laws. *Montreal By-law 1319, Art. 38* provides:—

> **"The driver of a vehicle emerging from a lane, driveway or building shall stop such vehicle immediately before driving on to the sidewalk and shall then set it cautiously in motion and join the flow of traffic, when a suitable opening offers."**

Cunningham & Wells Ltd. vs Mtl. Tramways Co., 69 C.S. 278 (1931). *Archer, J.* held (R.H.):—

> **"No responsibility attaches to the Montreal Tramways for a collision between a tramcar and a lorry where the driver of such vehicle drives it out of a private driveway and attempts to cross the street directly instead of following the line of traffic to the next intersection: the motorman had a right to assume[18] that the carter would observe the rules of a by-law enacting that no driver shall cross from one side of a street to the other, except at an intersection."**

Liebling vs Tanguay, 33 K.B. 119 (1921). Held (R.H.) :—

> **"Le conducteur d'un automobile ou d'un autre véhicule moteur circulant sur un chemin public ne doit pas traverser la voie publique, pour entrer sur une propriété privée, sans signaler son changement de direction aux véhicules qui pourraient le suivre; l'omission de cette mesure de prudence est une faute qui le rend responsable des dommages-intérêts, s'il en résulte collision avec un véhicule-moteur qui le suit."**

Tremblay vs Lavallée, 70 C.S. 52 (1932). Held (R.H.) :—

> **"Le conducteur d'un attelage qui débouche d'un chemin privé ne peut invoquer la priorité de passage par rapport au véhicule automobile qui circule sur la voie publique; s'il s'engage dans la grande route en négligeant de s'assurer que la voie est libre, il est responsable du dommage éprouvé par le propriétaire de l'automobile lorsque d'ailleurs aucune faute n'est imputable à ce dernier."**

Coates vs Parker, (1929) 3 D.L.R. 148 (N.B.). Held (R.H.) :—

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18. "Traffic in the streets would be impossible if the driver of each vehicle did not proceed more or less upon the assumption that the drivers of all the other vehicles will do what it is their duty to do, namely, observe the rules regulating the traffic of the streets." — *Lord Atkinson in Toronto R. Co. vs King* (1908) A.C. 260 at 269 (cited in *Swartz Bros. Ltd vs Wills*, (1935) 3 D.L.R. 277 at 280).

"A motorist driving along a private driveway opening upon a heavily travelled street must do so with great caution particularly where his view of the street is impaired." (See Annotations, 39 D.L.R. 4; (1927) 4 D.L.R. 1; 1 D.L.R. 90, 111).

See also *Guillotte vs Hétu*, 45 R.L. 467 (1939); *Patenaude vs Guinois et al.*, 77 C.S. 572.

U-Turns.

For municipal regulations, see local by-laws; e.g. *Montreal By-law No. 1319, Article 75* provides, in part:—

"...At intersections controlled by light signals or in charge of a police officer, or on a street where two tramway lines meet, hairpin or "U" turns are forbidden."

The driver negotiating a *U-turn* should take all due care to keep a proper lookout and to give a signal of his intention in due time. If the roadway is clear from traffic except for an automobile approaching a long distance off, the driver may proceed to make a U-turn, and if his car is then struck by that automobile the latter's driver is at fault. In *Francœur vs Diamond Taxicab Association Ltd. et al.*, C.S. 154278, 16th Dec. 1936 (unrep'd) a southbound taxicab driven by D. while making a U-turn at an intersection, with the intention of returning north, was struck by an automobile driven by B. driving from west to east across the same intersection. *P. Demers, J.* held B. solely to blame for the accident, for driving at an excessive speed and failing to keep a proper lookout. In dealing with the U-turn the Court held:—

"Considérant même que s'il n'a pas arrêté avant de commencer son mouvement en "U" cela n'aurait rien à faire avec l'accident; qu'il est évident que l'automobile du défendeur B., était alors à une grande distance, puisque D... achevait de tourner lentement lorsque son automobile a été frappé par celui du défendeur B...; que D...

n'a pu signaler dans la courbe de l'U, qu'un instant, ce qui explique que le mouvement n'a pas été vu par B..."

(IX) SPEED

S. 41 M.V.A. provides as follows:—

"No motor vehicle shall be driven on a public highway at a greater speed than is reasonable, considering the width of such highway, and the traffic thereon, nor so as to deteriorate such public highway, nor endanger the life or safety of any person, nor so as to threaten the safety of any property, nor, specifically, at a speed greater than that respectively established in each of the following cases, to wit:

"1. In a curve or steep descent,[19] or at the intersection of roads, or when crossing a bridge, the speed of the motor vehicle shall not exceed eight miles an hour;

"2. Subject to the restrictions made in paragraph 1 of this section, in the case of a commercial vehicle or a delivery car, fitted entirely or in part with non-pneumatic tires, the speed shall not exceed eight miles an hour if the vehicle is loaded, nor ten miles an hour if not loaded;

"3. Subject to the restrictions made in paragraph 1 of this section, in the case of a commercial vehicle or a delivery car, fitted entirely with pneumatic tires, the speed shall not exceed twelve miles an hour if the vehicle is loaded, nor fifteen miles an hour if not loaded;

By *Ss. 4* the speed of autobuses was restricted to 16 M.P.H. This was "changed" by *Order-in-Council No. 714* and the maximum speed allowed for autobuses was fixed at 20 M.P.H. in the limits of a city or town or in any populated section of any other municipality, and at 30 M.P.H. elsewhere.

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19. A curve or steep descent "does not include a slight curve and a small incline of the road." — *Romanycia vs O'Malley*, No. 855 K.B. Nov. 1936 (unrep'd). A driver is responsible if he drives down a slippery hill at a speed of 20 to 30 M.P.H., and when he attempts to stop behind a tramcar, his automobile skids and strikes the tramcar, — *Rothbart vs Rosengarten*, 45 R.L. 322 (1939).

Ss 5 of *S. 41*, M.V.A. provides:

"5. Subject to the restrictions made in paragraph 1 of this section, in the case of a pleasure vehicle, of a farm vehicle, of a service vehicle or of a taxi, the speed shall not exceed twenty miles an hour in the limits of a city or a town, or in any populated section of any other municipality nor shall it exceed thirty miles an hour elsewhere. However, when any of such vehicles meets another of such vehicles in motion, the speed of each of such vehicles shall be reduced to sixteen miles an hour." [20]

See also local By-laws.

It has been held that the rule contained in the first paragraph of *Section 41* M.V.A. should be strictly observed. *(Brassard vs Gagné,* 34 R.L. 58 (1927); *Longpré vs Moranger,* 28 R.L. 200 (C.R. 1922)). Although a statute or by-law may fix a maximum speed limit of 20 M.P.H., this does not mean that automobiles may be driven at that speed regardless of conditions. Every driver must take reasonable and proper precautions to safeguard other persons using the roadway: (see *Gendron vs McLennan,* 59 C.S. 364 (1920)). For example, it has been held to be negligent for a driver of an automobile to drive at a speed of 15 M.P.H. on a street where the traffic is heavy and the roadway slippery. *(Armstrong vs Rubenstein,* 27 R.L. 324 (1921)). In *Ruel vs Crépeault,* 43 K.B. 258 (1926) it was held that in a populated district, where the road was narrow and bordered by houses, and at a time when the daylight was fading, a speed of 12 to 13 M.P.H. was imprudent, even though the law permitted a maximum speed of

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20. This 16 M.P.H. limit was applied in *McKenzie vs Plouffe,* 45 R.L. 128. However that judgment was reversed in appeal, K.B. 1643 Nov. 30, 1939: Barclay, J., referred to the provision as one of those unfortunate laws which, if strictly complied with, would cause a series of disasters.

20 M.P.H. A speed of even 5 or 6 M.P.H. may be imprudent on a dimly lighted and slippery street. *(Montreal Street Railway vs Conant,* 14 C.R.C. 305 (K.B. 1912)).

> See also *Control* (*supra,* p. 41) *and Robertson vs Stewart,* (*supra,* p. 42).

Deneault vs Amann et al., 68 C.S. 432 (1930). Held (R.H.) :—

> "Commet une imprudence qui engage sa responsabilité le chauffeur d'un camion qui, à la chute du jour, sans tenir compte d'un brouillard épais, conduit sa voiture à une vitesse de huit milles à l'heure, dans une avenue divisée par une plate-bande centrale, et sans se conformer aux prescriptions d'un règlement municipale obligeant les véhicules d'y tenir leur droite."

Larouche vs Pednault, 48 K.B. 158 (1929). Held, in part (R.H.) :—

> "...Le conducteur d'une automobile, qui verse sa voiture en contournant l'angle de rues transversales à une vitesse de quinze milles à l'heure, alors que la loi prescrit de réduire la vitesse à huit milles en pareil cas, commet une faute, qui le rend responsable du préjudice éprouvé dans l'accident par un des occupants de la voiture."

In *Sawyer vs Giguere,* 59 C.S. 520 (1921) *Drouin J.* held, in part, that in approaching a sharp angle or a curve or intersection a driver should slow down to 8 M.P.H. In *Hawk vs l'Houmeau,* 29 R.L. 429 (1923), *Martineau, J.* held, in part (R.H.) :—

> "...Il y a imprudence de la part du conducteur d'un auto de ne pas s'assurer à l'intersection de deux rues que le chemin est libre et d'accélérer sa vitesse pour traverser avant une autre automobile venant de la rue transversale. — (V. les notes dans *Gravel vs Borden Farm Products Co.,* (1922), 61 C.S. 231.)"

Emergency vehicles.

See local by-laws. Emergency vehicles include Fire Department apparatus, police patrol waggons, hospital ambulances, and all authorized vehicles on their way to save life or prevent property loss. *Art. 35, Montreal By-law No. 1319* provides:—

> **"The driver of a vehicle shall bring the same to a standstill as close as possible to the curb on his right, on the approach of any public utility or emergency vehicle or other vehicle authorized by the Director of the Police Department, answering a call, and remain there until the same has passed, unless otherwise directed by a police officer. In the case of a tramcar, the motorman shall stop the same as promptly as possible and keep it at a standstill until the said vehicle has passed, unless otherwise directed by a police officer."**
>
> **See *City of Westmount vs Montreal Tramways Co.*, 68 C.S. 484 (1930), *infra*, p. 198.**

Art. 35 of By-law No. 1319, however, does not grant immunity to drivers of emergency vehicles for acts of gross and reckless negligence. In *Lapointe vs Bonnier*, 73 C.S. 373 (1935), *McDougall, J.* held (R.H.):—

> **"Article 31 of By-law 890" (now Article 35 of By-law 1319) "of the City of Montreal providing that the driver of an automobile must stop upon the approach of a fire vehicle does not grant immunity to members of the Fire Brigade for acts of gross and reckless negligence, nor does it abrogate the general principle of law that persons driving motor vehicles must exercise prudence and care. Such by-law can only have application if it is shown that adequate warning of such approach is given. The terms of the law providing that the automobile which has the other to its right must give way to the latter applies to members of the Fire Brigade, and the contention that an automobile of the Fire Brigade has the right of way to cross a street intersection at a very high rate of speed cannot be upheld."**

See also *Tétreault vs City of Montreal*, 58 C.S. 67 (C. R. 1920).

Letourneau vs London and Lancashire Guar. & Acc. Co., 49 K.B. 110 (1930). Held (R.H.):—

"Si les corporations municipales ont le pouvoir de suspendre par règlement les règles ordinaires de la circulation pour faciliter le passage des voitures du service des incendies répondant à une alarme, elles ne peuvent assujétir le public aux dérogations qu'elles édictent qu'à la condition de signaler d'une manière effective le passage imminent de leurs voitures.

"Un automobiliste ne peut être tenu responsable des dommages résultant de la collision de son automobile avec celle du service des incendies, circulant de façon dérogatoire aux règles ordinaires du trafic, et dont il n'a pas connu l'approche."

Wray vs Dechaux Freres, 63 C.S. 300 (1925). Held (R.H.):—

"Les voitures d'ambulance n'ont aucun privilège, qui permette à leur propriétaire ou au chauffeur en charge, de les conduire dans les rues de la Cité de Montréal, à une vitesse exagérée et contraire à la loi générale et aux règlements en existence. Les présomptions et restrictions légales, à l'égard de la responsabilité, s'appliquent à elles, comme à toutes autres voitures automobiles."

Gardiner vs Blanchette, C.S. 147858, *Greenshields, C.J.*, Feb. 25th, 1937 (unrep'd):

Defendant, a constable driving a radio car, crossed an intersection at an excessive speed and against the red light, and struck and damaged the plaintiff's automobile. The constable pleaded that at the time he was chasing an automobile which was being driven in a dangerous manner and that it was his duty under the circumstances to cross, notwithstanding the red light. The Court maintained the action and held in part:—

> **"His excuse that he was chasing a man whom he thought was driving a car in a dangerous way is not substantiated by the proof. When he came to the intersection, instead of stopping, as another car before him was stopped on account of the lights, he turned his car to the south of the safety zone, which was a violation of the traffic law, and proceeded at a fairly rapid rate against the lights."**

The fact of driving a vehicle at an illegal rate of speed does not render the driver legally responsible for an accident unless such speed was the determining or a contributing cause of the accident. On the other hand, *a slow speed does not necessarily absolve the driver from responsibility.*

In *Proulx vs. Mtl. Tramways Co.*, 52 C.S. 6 (C.R. 1917), *Martineau, J.* stated, at p. 7:—

> **"C'est un principe aujourd'hui incontesté, que la vitesse à laquelle peut aller une voiture ou un tramway ne saurait engendrer de responsabilité qu'en tant qu'elle est la cause ou une des causes déterminantes de l'accident. Ainsi, supposons une voiture ou un tramway, allant à une allure excessive, disons même très dangereuse; un passant veut traverser au moment précis où ces véhicules passent; la vitesse à laquelle ils allaient n'est pas la cause de l'accident qui aurait eu lieu alors même qu'elle n'aurait été que de deux milles à l'heure.**
>
> **"Par contre, un autre principe n'est pas non plus discutable, à savoir: que l'allure même la plus modérée, ne saurait dans tous les cas libérer le conducteur..."**

In *Naird vs Thompson*, C.S. 65407, April 1st, 1931 (unrep'd) *Greenshields, A.C.J.* stated as follows:—

> **"I do not believe that the speed at which the defendant's car was proceeding was in any way a determining or contributing cause of the accident. I have already said in cases of this kind, and I repeat, that if a person is in the danger line of an approaching vehicle, and he seeks**

to remove himself from that danger line, and the unlawful speed with which the vehicle approaches does not give the person in danger sufficient time to reach a place of safety, then speed can be said to have been the cause of the accident, and if that speed is unlawful, it might, and probably would engage the responsibility of the owner of the speeding vehicle. On the other hand, if a person is in a place of safety and suddenly moves into the danger line from that place of safety, and is injured by an approaching vehicle, no time being given to the approaching vehicle to stop, speed is not the sole cause or a contributing cause to the accident. A high rate of speed may produce more serious results, but the accident would happen just the same."

Wieland vs Beauregard, 43 R.L. 447 (1937). *Chase-Casgrain, J.* stated, at p. 457:—

"...It is obvious that she was infringing the Motor-Vehicle Act by proceeding at the speed she was, i.e. at 15 to 18 miles an hour as 99% of the automobilists do, but no proof has been adduced to show that the accident was due to her excessive speed and, in the opinion of the Court, the facts are not such as to create a presumption that the speed at which she was going was one of the *causa causans* of the accident. The plaintiff had to establish a relation of cause to effect between this speed and the accident in order to succeed against Mrs. Carter, according to the principle upheld unanimously by the Court of Review in *Becker v. Sauvé*, 19 R. de J. 309 which relied on *Smith v. Baker*, 5 Times Law Rep. 519: 'If there were five hundred acts of negligence and none of them caused the injury to the plaintiff such acts of negligence would not give cause of action'..."

See also *General Casualty of America vs Perusse* 72 C.S. 552 (*supra*, p. 71), where excessive speed on a curve, and *Lapierre vs Howard* (*infra*, p. 102) where excessive speed at an intersection, were held not to have contributed to the respective accidents. Where it is not disputed that a case has been fairly tried before a jury, it is open to the jury to find that defendant's excessive

speed had nothing to do with causing the accident, — *Odlum & Sylvestre vs Walsh*, S.C.C. Jan. 23, 1939 (unrep'd).

(X) PARKING AND BACKING

Order in Council 897 (see *1934, 24 Geo. V, p. XVI*) provides:—

"1. A motor vehicle must not be parked in such a way as to hinder the access to a property, nor near the intersection of two roads, nor in any other place where it would impede traffic;

"2. Parking of motor cars on the paved portion of a highway is prohibited;

"3. A motor vehicle which is stopped for the purpose of taking on gasoline shall not be placed within the limits of any highway;

"4. Any person who is in charge of a motor vehicle which has been parked shall remove it upon being instructed to do so by any officer in charge of traffic."

By *S. 61 (4)* M.V.A. a municipal council may prohibit, restrain or otherwise regulate the parking of vehicles on the public roads of the municipality and their operation, near schools and hospitals. Reference should, therefore, be made to the local traffic by-laws for local regulations as to parking. In Montreal these regulations are contained in Traffic By-law *No. 1319, Articles 48 to 52* inclusive, and *Articles 55, 56, 59, 60, 61* and *62*.

Belair vs Valiquette, 77 C.S. 387 (1939):—

The fact that a party permits his truck to be parked in such a manner as to obstruct the sidewalk, thereby obliging pedestrians to go around it to cross a city street, does not render him responsible for injury to a child pedestrian (struck by a bicycle) in crossing the street. Even assuming the truck owner had infringed a city by-

law, such an accident was not a natural, immediate consequence of such infringement.

Spector vs Taylor, 62 K.B. 41 (1936). Held (R.H.):

"Where the driver of an automobile observes at a short distance in front of him, at night, a truck parked on the right-hand side of a paved highway and, wishing to avoid a collision swerves to the left but, in regaining the right-hand side, collides with a ditch, with the result that a passenger in the automobile sustains various injuries, the owner of the truck should be held responsible. The improper parking of a truck in violation of an Order in Council which prohibits the parking of motor cars on the paved portion of a highway, constitutes a fault."

Houle vs Marcoux, 66 K.B. 577 (1939). Held (R.H.):

"Commet une faute le conducteur d'un camion automobile qui laisse stationner son véhicule, partiellement, sur la partie pavée de la route dans une municipalité où cela est défendu c'est-à-dire dans une municipalité qui n'est ni une cité ni une ville. (Arrêté ministériel 897: préambule des lois de 1934 (24 Geo. V), p. XVI.)

"Est aussi coupable de négligence le conducteur d'un camion automobile qui tamponne l'autre véhicule, alors qu'il se trouvait, la nuit, dans une route droite, horizontale, ayant plus de 25 pieds d'espace libre et quelque peu éclairée par la lampe d'un poste d'essence. Dans ces conditions il y a lieu au partage de la responsabilité."

The M.V.A. contains no provision specifically relating to *backing*. However, reference should be made to the local traffic by-laws; e.g. *Montreal By-law No. 1319, Article 76*, and *Westmount By-law No. 501, Article 69* provide that no driver of any vehicle shall back the same unless such movement can be made in safety and without interfering with the movement of other vehicles. Common prudence requires that a person backing a vehicle should take particular care in doing so. He should first ascertain that the movement can be made in safety and without endan-

gering persons or property. He should keep a careful lookout and give a proper signal of his intention. In *Volume 42, Corpus Juris*, p. 935, the precautions to be taken in such cases are summarized, in part, as follows:—

> **"In backing, the operator should keep a lookout to the rear, so that his movement will not endanger other vehicles or animals drawing them or pedestrians. It is not, however, enough for the operator to look in one direction. Common prudence and regard for the safety of others using the highway require him to look in all directions from which a traveler may be expected to approach, not only before he begins to back, but also while he is in the act of backing. It is also the duty of the operator to give a signal of his intention to back when any reasonable necessity therefor exists..."**

Ferland vs Verrett, *C.S.* 33408, Que., March 8th, 1937, *Prevost, J.*, (see 1937, 4 I.L.R. 360). Held:—

> **The driver of an automobile is responsible for the damages caused through the death of a child whom he ran over while backing his car, when (a) The car was parked at a spot where parking was forbidden by police regulations; (b) It was so parked that he could only get out by backing; (c) The windows of the car were closed and he made no attempt to see if anyone was in the way except by looking through the back window; (d) He did not give any warning of his intention to back the car.**

(XI) RIGHT OF WAY AT INTERSECTION [21]

M.V.A., *S. 36 (7)* provides:—

> **"At bifurcations and at crossings of public highways, the driver of a vehicle on one of the roads shall give**

21. An *Intersection*, as defined in Montreal City *By-law* 1319, is "The area comprised within the prolongation of the lateral curb lines or, if none, then the lateral boundary lines of two or more streets or other public thoroughfares which join one another at an angle, whether or not one of such streets or other public thoroughfares crosses the other."

> **the right of way to the driver of a vehicle coming to his right on the other road. However, the drivers must conform to the regulations in force in a city respecting the right of way of one vehicle over another, or the right of way of a pedestrian over the vehicle, or respecting the direction that vehicles must follow on certain streets, provided, however, that such derogation from this act be, by the city, indicated thereon by a proper signboard or by a traffic officer."**

Some *municipal traffic by-laws* include provisions similar in effect to the first part of *S. 36 (7)* M.V.A.; for example, *St. Lambert By-law No. 189, Section 16.* However, *Montreal By-law No. 1319, Article 83* provides as follows:—

> **"The driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection. When two vehicles enter an intersection at the same time, the driver of the vehicle on the left shall yield to the driver on the right."**

This Montreal by-law came into force in November 1934, and Article 83 followed the terms of Article 87 of the former City By-law *No. 1093,* which came into force in December 1930. Prior to December 1930 Montreal By-law *No. 890, Article 32* gave the right of way to the vehicle coming on the right without any provision in favour of the vehicle first entering the intersection.

The question of right of way at intersections has been the subject of a great deal of jurisprudence, some of which, unfortunately, is conflicting. The situation in that regard is illustrated by the cases cited in this subsection.

Protecting the right.

The duty of the driver of a vehicle as set forth in the first part of *S. 36 (7)* M.V.A. is commonly known as the duty to "protect the (or his) right."

In *Swartz Bros. Ltd. et al. vs Wills,* (1935) 3 D.L.R. 277, (1935) S.C.R. 628, the Supreme Court, in dealing with a statute similar to the first part of *S. 36 (7)* M.V.A., held that a person is entitled to assume that a driver approaching from the left will keep a proper lookout and observe the rule of the road. Commenting upon the terms of the statutory provision in question *Sir Lyman P. Duff, C.J.C.* remarked, at p. 277:—

> **"I can perceive no ambiguity or obscurity in this language. The driver approaching an intercommunicating highway is to keep a lookout for drivers approaching upon the right upon that highway and to make way for them. If everybody does this a collision is not only improbable, it is hardly possible..."**

In *Morton vs Tunstall,* K.B. 829, June 7th, 1935 (unrep'd) appellant's automobile going north to south and respondent's automobile going west to east came into collision at an intersection. *Hall, J.* stated in part as follows:—

> **"...It was the Appellant's duty to protect his right, and when approaching the intersection and especially before he actually entered the intersection, he should have looked out while he still had time to stop.**
>
> **"It is, therefore, clearly established that the Appellant drove into the intersection directly in front of the Respondent's advancing car, and so rendered the collision inevitable...**
>
> **"There remains, however, the question of contributory negligence, and, although the proof does not justify the assumption that the Respondent was driving at a speed of 60 miles an hour; nevertheless, he admits that he was running 30 or 35 miles an hour, which is an excessive speed at the intersection of two thoroughfares.**
>
> **"Nevertheless, in spite of the fact that the Respondent's speed exceeded the legal limit, I am unable to accept**

> **the view that that speed in any way contributed to the accident itself."**

In *Drapeau vs Boivin*, 54 K.B. 133 (1932), *St-Germain J.* (at p. 138) cited and approved the reasons for the judgment of the *Saskatchewan Court of Appeal* in *Kennedy Lumber Co. vs Porter*, (1932, 1 W.W.R. 230) as follows:—

> **",..a collision had occurred at an intersection. On behalf of the defendant it was urged that since his was the car on the right, he had had the right of way and that the accident would not have happened if the driver of the plaintiff's car had respected his right. In answer to this, it was urged on behalf of the plaintiff that his car was within the intersection before the defendant's car reached it, and, therefore, that the statute did not apply. The Court rejected the plaintiff's contention. Turgeon, J. A., who delivered the judgment of the Court, said that in the ordinary case, accidents of this sort could not happen if the driver to the left stopped his car, or reduced his speed, so as to give way to the man on his right and to allow him to cross the dangerous area first. This is what the Legislature intended should happen, and when such an accident occurs, the first question to be answered is why the driver to the left did not give way and keep out of the danger zone. He may, of course, be able to show that, having regard to the distance of the vehicles from the point of possible collision and to the conduct of the other vehicle, and perhaps also to other circumstances, the statutory right of way did not arise. In such a case the man to the right would then be called upon to explain his conduct, and would have to give his version of the circumstances which surround the accident."**

In *Cantin vs Lirette*, 66 C.S. 416 (1928), *Belleau, J.* pointed out that the rule of protecting the right is founded upon a custom generally accepted as a measure of prudence and should be followed at the crossings of all roads, both public and private.

See also *Canadian S.P.C.A. vs Valiquette*, C.S. 161087, *Denis, J.*, June 1st 1937 (unrep'd); *Rubinstein vs Malkin* (1937) 4 D.L.R. 797 (Man. Crt. of Appeal).

The fact that at the moment of the collision the servient vehicle (the vehicle on the left) had *crossed the greater part of the intersection* does not by itself justify the disregard by its driver of the rule of right of way, particularly if this disregard is accompanied by violation of the rules governing circulation of traffic. *(Todasko vs Bourgie,* 71 C.S. 442 (1933) at p. 443.)

The duty of a driver to "protect the right" has been considered so important that it has been held under some circumstances, e.g. where the driver's view to the right is obstructed, that he should first bring his vehicle to a stop before attempting to cross the intersection. For example, in *Drapeau vs Boivin, (supra) Galipeault, J.* at p. 136, stated as follows:—

"...le conducteur doit regarder à sa droite avant de s'engager dans le croisement des chemins: si la vue lui est cachée, il doit user d'une précaution plus grande et arrêter son véhicule, si nécessaire..."

See also *Anderson vs Guardian Ins. Co. of Canada,* 54 K.B. 407 (1933) at p. 409. Again, in *Freefield vs Charron,* C.S. 111750, Oct. 23rd, 1933 (unrep'd) *McDougall, J.* held in part:—

"...the defendant's automobile being the servient car under and in virtue of Section 36 (7) of the Motor Vehicle Act, R.S.Q. (1925) Chapter 35, was bound to give way to the other car, and that defendant acted imprudently in entering said intersection without stopping to assure himself that no car having the right of way over his car was approaching on the right, particularly having regard to his admission that at the said corner he was unable to see for a distance of more than 15 feet up said St. Dominique Street."

McDougall, J. **ruled to the same effect in *Rabinovitch vs Allie*, C.S. 102936, Nov. 6th, 1933 (unrep'd). See also *London & Lanc. Guar. & Acc. Co. vs St. Marie et al.*: *Coulombe vs St. Marie*, C.S. 32783, 32784, Nov 14th, 1936 (unrep'd).**

Right of way rule qualified.

The fact that the driver of a vehicle has the right of way under *S. 36 (7)* M.V.A. does not excuse him for failure to act with prudence and otherwise to comply with the law. In *Todasko vs Bourgie*, 71 C.S. 442 (1933) *Trahan, J.* held (R.H.) :—

> **"Le droit à la priorité de passage n'est pas absolu, il ne dispense pas celui qui peut s'en prévaloir de se conformer à la loi et d'agir avec prudence. Le conducteur d'une automobile dans ce cas, est soumis aux obligations suivantes: 1. annoncer son approche; 2. vérifier que la voie est libre; 3. ralentir et 4. appuyer à droite."**

In *Belanger vs Whitehead*, C.S. 153844, April 8th, 1937 (unrep'd) *Greenshields, C.J.* cited various decisions on the question of right of way and said he was disposed to accept the statement of *Hall, J.* in *Anderson vs Guardian Ins. Co.* (54 K.B. 407 at p. 412) as follows:—

> **"The rule that the person to the right shall have the right-of-way, depends upon whether he exercises his right-of-way in a lawful manner. If he is himself breaking the law in any respect, as, for example, by driving at an excessive rate of speed, his claim to the right-of-way cannot help him."**

In the *Anderson* case (which was concerned with a collision between two automobiles on an intersection) the Appeal Court (K.B.) followed *Drapeau vs Boivin (supra)* to the extent of holding that a motorist should yield the right of way to an automobile coming to his right and before engaging the intersection should assure himself

that the road is clear. A majority of the Court, however, *(Bernier, Hall, Walsh, JJ.)* held that the driver of the automobile on the right was travelling at an excessive speed (35 M.P.H.) and for that reason was as much to blame for the accident as the driver of the servient car. They held, therefore, that there was common fault. *St. Germain, J.* (who cited *Drapeau vs Boivin* and said it was applicable) and *St. Jacques, J.* dissented, and were of the opinion that the driver of the servient automobile was alone responsible.

In *Martineau & Fils Ltée vs Marcil,* K.B. 1214, Feb. 26, 1937 (unrep'd) respondent's automobile, proceeding east to west, and appellant's truck, proceeding north to south, came into collision in the centre of an intersection. The truck was upset, turning over on its side, while respondent's automobile continued on after the collision in a southwesterly direction and came to a stop about 50 feet beyond the intersection against a post. The drivers of both vehicles were held at fault *(Dorion, Bond, Bernier, Hall, JJ. — St. Jacques, J. dissenting). Bond, J.* said in part:—

> **"In the present instance, the truck undoubtedly had the right of way, according to the foregoing rule, and it was the duty of the driver of the automobile, the respondent, to yield that right of way to the driver of the truck. The respondent knew that the corner was a dangerous one, owing to his view to the right being somewhat obstructed... The respondent not only did not see the truck, or make certain that no vehicle was approaching on his right, but recklessly continued crossing the intersection of Thirteenth Avenue, and, indeed, he himself says that he did not see the truck until immediately before the impact.**
>
> **"It must be obvious that he could not have been paying attention, and had not looked to his right — otherwise he must have seen this heavily laden truck.**

> **"There was a clear violation on the part of the respondent of a positive enactment of law, designed to prevent just what occurred in the present instance."**

Bond, J. then cited the *Swartz Bros.*, *Drapeau* and *Anderson* judgments, and said he had no difficulty in reaching the conclusion that respondent was at fault in failing to protect his right. On the other hand, the driver of the truck himself admitted a speed of 15 M.P.H. and other witnesses put it considerably higher, and it was "clear that the truck was being driven at an excessive rate of speed and was not properly under the control of its driver." *St. Jacques, J.* (dissenting) stated in part:—

> **"Il est bien difficile dans les causes de ce genre de fixer des règles absolues et inflexibles... Tout dépend donc de la preuve des circonstances dans lesquelles se produit la collision. Sans doute que, pour me servir des expressions de la Cour suprême, il ne paraît pas y avoir d'ambiguité ou d'obscurité dans le langage de l'article 36 de notre Loi des véhicules automobiles, et le conducteur d'une automobile qui arrive à une intersection de rues est tenu de diriger son attention sur le côté droit de la route, afin de s'assurer si un véhicule ne s'approche pas de l'intersection et de lui céder le pas si, de fait, un tel véhicule en mouvement s'approche de l'intersection. Mais de là à conclure que le juge de la Cour supérieure, qui entend une cause de cette espèce, n'a pas une certaine latitude dans l'appréciation des circonstances révélées par les témoignages, il y a une marge assez considérable."**

In *Schæfer vs Greenspon et al.*, 73 C.S. 298 (1935), *Gelly, J.* held in part (R.H.) :—

> **"Sont responsables solidairement envers le voyageur bénévole de l'une de deux automobiles entrées en collision dans un croisement de routes signalé comme dangereux, les conducteurs de ces voitures dont l'un a eu le tort de ne pas céder le passage à l'autre qui venait à sa droite ni de s'assurer que la voie était libre, et l'autre a commis l'imprudence de s'engager dans l'intersection à**

une vitesse exagérée dépassant la limite légale de huit milles à l'heure..."

See list of authorities at p. 304 of report. See also *McCaskill vs Paquin*, 60 C.S. 162 (C.R. 1921).

The right of way rule has been further qualified by judgments to the effect that it must not be construed as giving a paramount right to all vehicles on the right irrespective of the position of other vehicles, and that it applies only when two vehicles are approaching the intersection so nearly simultaneously, and at such rates of speed, that if both proceeded, each without regard of the other, a collision is reasonably to be apprehended: see:—

***Anderson vs Guardian Ins. Co.*, (ref. *supra*), Hall, J. at p. 410; *Hanley vs Hayes et al.*, (1925) 3 D.L.R. 782; *Alary vs Pageau*, 34 R.L. 220 (C.C. 1928) Stackhouse, J. at p. 222; *Walsh vs Mtl Tramways Co.*, 69 C.S. 274 (1931).**

Rule that first vehicle at crossing has right of way.

As to *Art. 83 of Montreal By-law 1319*, the first part of which provides that the driver approaching an intersection shall yield the right of way to a vehicle which has entered the intersection *(supra* p. 88), it has been held in certain cases that, in the absence of proof that there was any proper signboard or traffic officer to indicate that the provisions of the City by-law as to right of way derogated from those of the Motor Vehicle Act, *Section 36 (7)* M.V.A. must prevail over *Art. 83* of the by-law: see:—

Latter part of S. 36 (7) M.V.A. (*supra*, p. 88); *Bourne vs Levitsky et al*, C.S. 131067, Nov. 23rd, 1934, *Mackinnon*, J. (unrep'd); *Shell Oil Co of Canada Ltd. vs Anley et al.*, 72 C.S. 364 (1934).[22]

22. The judgment was inscribed in appeal but a settlement was effected before the hearing in appeal.

Incidentally the plaintiff in the *Shell Oil Co.* case contended *inter alia* that the defendant should have pleaded and proved *City By-law 1093, Art. 87*.. The Court, however, pointed out that it is provided by *Art. 306* of the Charter of the City of Montreal that the by-laws of the City Council are to be considered as public law and as such must be judicially noted and applied by the Courts without being specially pleaded. *Casgrain, J.* ruled to the same effect in *Palantios vs Vallee,* 44 R.J. 91 (1938). See also *Chastenais vs Mtl Tramways Co.,* 37 R.L. 100 (1931).

In other cases arising from accidents within the limits of the City of Montreal it has been held that the first part of *Art. 83* of *By-law 1319* constitutes an exception to the general rule of right of way and should be given effect. Thus in *Rabinovitch vs Allie,* (ref. *supra* p. 92) *McDougall, J.* referring in his judgment to the general rule of protecting the right stated "...The only exception to this rule is contained in the opening sentence of Art. 87 of By-law 1093..." (That Article was similar to *Art. 83* of the present *By-law 1319).* Again, in *Scholnick vs Ideal Paper Box Co. Ltd. et al.,* 43 R.L. 277 (1936) *McDougall, J.,* after citing *By-law 1319, Art. 83,* stated, in part (at p. 278) :—

"...It accordingly follows that the rule of the road which requires that the driver having the other automobile on his right hand must yield the right of way, is without application to the instant case, since both cars did not reach the intersection at the same time..."

See *Hurteau vs Tulkku,* 74 C.S. 573 (C.C. 1936) Archambault, J. at p. 575.

In *Mauger vs Bourdon,* 43 R.L. 155 (C.C. 1936), *Archambault, J.* referring to *S. 36 (7)* M.V.A. stated, at p. 159 :—

"...Notre article est sensiblement dans les mêmes termes que l'alinéa de l'art. 10 du Code de la route fran-

çaise qui dit: 'Le conducteur est tenu, aux bifurcations et croisées du chemin, de céder le passage au conducteur qui vient sur la voie située à sa droite.'

"Or en France la jurisprudence a appliqué ainsi cet article. 'La règle suivante laquelle à l'intersection de deux rues, le conducteur d'une voiture doit céder le pas à une voiture venant sur sa droite, ne s'applique que lorsque les deux voitures se présentent en même temps au carrefour'.

"Et, ce qui s'applique à notre cas: 'En conséquence, lorsqu'une voiture, ayant presque complètement dépassé le croisement, a été heurtée à sa roue droite arrière par une voiture venue de la droite, la responsabilité de la collision incombe au conducteur de cette dernière' (Paris, 24 avril 1926; Rec. assur., 1926, 239). Gardenat et Ricci, De la responsabilité civile, p. 677.

"Le jugement *Drapeau v. Boivin* ne déroge peut-être pas à cette solution de la jurisprudence française. Dans la pratique il faut bien que ce 'présenter en même temps' signifie se *présenter presqu'en même temps*, et être à proximité, selon l'expression du juge Galipeault parlant pour la majorité de la cour, (54 B.R. 136) n'est-ce pas se présenter presqu'en même temps; il est assez difficile souvent de dire lequel est arrivé le premier, et alors la présomption joue en faveur de celui qui se présente à droite.

"Le règlement no 1319 de la Cité de Montréal, a entendu ainsi cette disposition dans l'application qu'il en a faite par son article 83..."

Notwithstanding *S. 36 (7)* M.V.A. and certain municipal by-laws to the same effect, the principle that the vehicle which has already entered an intersection should be given the right of way over a vehicle approaching the intersection has been accepted by one school of jurisprudence as being applicable throughout the Province of Quebec. In *Lafond vs Kerhulu Ltée,* 36 R.L. 24 (1929) *Surveyer J.* cited *Gravel vs Borden's Farm Products Co.,* 61 C.S. 231 and stated in part:—

> **"Considérant que lorsqu'une voiture arrive la première dans l'intersection, elle a priorité sur l'autre, quelles que soient les dispositions statutaires ou règlementaires qui donnent priorité à l'autre..."**

In *Gravel vs Borden's Farm Products Co.*, 61 C.S. 231 (1922) *Rinfret, J.* said, at p. 233:

> **"Considérant que le droit de préséance n'est évidemment mis en jeu que lorsque les deux voitures arrivent en même temps. Il ne peut exister lorsque l'une des deux voitures est déjà engagée dans l'intersection des rues, car, alors, elle a nécessairement la priorité sur l'autre qui ne fait qu'arriver à l'intersection."**

> **See also *Lortie vs Simard*, 36 R.L. 79 (1929) Surveyer, J. at p. 82; *Gilman vs L'Heureux*, C.S. 132599, Dec. 28th, 1935 (unrep'd).**

In *Woods vs Wise*, C.S. 153921, May 28th, 1937 (unrep'd) *P. Cousineau, J.* held, in part:—

> **"Le droit de passage à une intersection n'existe plus quand un autre automobile s'est engagé le premier dans l'intersection et qu'il a déjà parcouru les trois quarts et la plus élémentaire prudence exige que le véhicule venant à droite laisse le droit de passage à celui qui est déjà considérablement engagé dans l'intersection."**

It is evident from the authorities already cited that the jurisprudence is by no means uniform as to the extent to which the rule of "protecting the right" should be applied. It is clear, however, that the *driver of the servient vehicle is not obliged to wait for an unreasonable length of time for traffic coming to his right.* To hold otherwise would be to misconstrue *S. 36 (7)* M.V.A., and would result in unnecessary congestion and delay of traffic. In *National Breweries Ltd. et al. vs Daoust*, No. 1120, K.B. Oct. 25th, 1935 (apparently unrep'd) *Sir Mathias Tellier, C.J.* stated in part:—

"Le demandeur descendait la rue St-Laurent, du nord au sud, ou plus exactement du nord-ouest au sud-est; lorsqu'il fut rendu à la rue Bernard, cette rue était libre devant lui, et personne, à sa droite, ne se montrait, si ce n'est à bonne distance; les conditions étaient telles qu'il pouvait, sans manquer à aucune règle, se mettre à la traverser; il s'y engagea donc à vitesse règlementaire; il en avait déjà traversé près des trois quarts, lorsque le défendeur, dans son camion, venant de l'ouest, ou plus exactement du sud-ouest, à une allure vraiment immodérée, atteignit l'intersection, s'y engagea sans ralentir, vint croiser sa route, accrocha de l'arrière de son camion l'avant de l'automobile, et fut ainsi cause des dommages réclamés par l'action et accordés par le jugement dont est appel."

See also Hall, J. in *Anderson vs Guardian Ins. Co.* (*supra*, pp. 91, 92).[23]

Stop signs at intersections.

S. 41 (b) M.V.A. provides:—

"The Minister of Roads may place a suitable sign near an intersection or bifurcation of two public roads outside of cities and towns, and every driver of a motor vehicle driving along a road where such sign is placed, must bring such motor vehicle to a stop for a moment near such intersection or bifurcation."

See also local traffic by-laws; e.g. *Montreal By-law No. 1319, Articles 81* and *82* provide:—

81. "At every boulevard, street or other public thoroughfare intersection where there exists a stop signal, every driver of a vehicle shall temporarily come to a standstill at the building line before crossing or turning into an intersecting street."

82. "The driver of any vehicle who has come to a full stop, as provided by article 81, as well as all drivers of vehicles on a boulevard, shall be subject to the general rule prescribed by this by-law as to the right of way at intersections."

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23. In *Sauvé vs Ouellet*, C.S. 176948, Jan. 1940 (*unrep'd* to date) plaintiff's automobile was proceeding eastwards along a lane which intersected a highway. Before crossing said highway plaintiff's driver

A person driving an automobile along a boulevard is entitled to assume that the driver of a vehicle who intends to cross the boulevard will first come to a stop and look to his right as required by law. *(Piché vs Scott,* 37 R.L. 400 (1931)).

Beaudry vs Beaulac, 72 C.S. 10 (1934). Held (R.H.):

"Une affiche portant les mots: Arrêt-Stop, installée par le ministre de la voirie dans un chemin public, oblige l'automobiliste d'arrêter son véhicule. Si un accident se produit par suite d'une violation de cet ordre, le contrevenant doit réparation du préjudice causé."

At p. 11:—

"...l'article 41b de la loi des véhicules automobiles, 22 Geo. V, c. 27, domine l'article 36, paragraphe 1, et dans tous les cas, peu importe qu'une automobile vienne à sa gauche ou à sa droite, l'automobile doit arrêter avant de s'engager sur l'autre chemin quand il y a une enseigne indiquant d'arrêter: arrêt-stop."

Gregoire vs Rouillard, 43 R.L. 222 (1937). Held (R.H.):—

"Il y a faute commune, à la suite d'un accident d'automobile, dans les circonstances suivantes: une voiture est conduite à une grande vitesse sur un boulevard, sur une partie peu éclairée et l'autre voiture file à très vive allure sur une rue transversale et néglige de faire, à l'intersection du boulevard, l'arrêt prévu par les règlements."

Leather vs McDonald, C.S. 124797, Dec. 12th, 1934, *Casgrain, J.* (unrep'd):—

Plaintiff's and defendant's respective automobiles collided at an intersection. The defendant had failed to stop in compliance with a stop sign, and plaintiff was driving at an excessive and dangerous rate of speed and failed to notice defendant's automobile until the moment of the impact. *Held* — both parties to blame, the propor-

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brought the automobile to a stop, and, seeing no traffic approaching on his right (south), proceeded to cross, without sounding the klaxon, at a speed of 15 m.p.h. When the auto was entering the lane on the

tion of responsibility attributable to each being one-fourth to defendant, three-fourths to plaintiff.

Pagé vs Archibald, C.S. 135938, March 3rd, 1936, *McDougall, J.* (unrep'd) :—

A truck southbound at 15 M.P.H. and an automobile eastbound on a boulevard at 30 M.P.H. came into collision at an intersection, the result of which was to cause damage to a third vehicle, the driver of which was in no way responsible for the mishap. The latter sued the persons responsible for the operation of both truck and automobile for damages to his car. The truck driver had failed to come to a stop in accordance with a Stop Sign and failed to "protect the right". There was no Stop Sign applicable to the driver of the automobile, but he was held jointly and severally liable with the driver of the truck on the ground that he was driving too fast in view of the slippery condition of the roadway, and had failed to keep his automobile under proper control.

In *Norton vs Perreault*, K.B. No. 707, Feb. 1st, 1935, *Dorion, Rivard, Letourneau, Hall, St. Jacques, JJ.* (unrep'd), plaintiff's taxi, northbound on a boulevard at not less than 20 M.P.H., and defendant's automobile, westbound on a cross-street at considerably more than 8 M.P.H., came into collision at an intersection. Plaintiff had seen the defendant's automobile coming to his right but, because he assumed the automobile would be stopped in accordance with the stop sign at the boulevard, he continued on. The Superior Court held the defendant alone responsible. This judgment was upset in appeal (K.B.) where it was held that both parties were equally at fault. *St. Jacques, J.* in referring to the plaintiff stated in part :—

"Il a vu l'autre automobile allant déboucher de la rue Williams, c'est-à-dire à sa droite, il n'a pas modéré sa vitesse, ni freiné suffisamment, parce qu'il croyait que le défendeur observerait les règlements et arrêterait son

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east side of the highway it was struck towards the rear by defendant's truck proceeding northwards on the highway at 20 m.p.h. *Curran, J.* (referring to the *Anderson* case, *supra* p. 92) held that while plaintiff's

> **automobile avant d'entreprendre de traverser la rue McCord. Ayant vu le défendeur, il avait le devoir de 'protéger sa droite', dans le sens qu'on donne ordinairement à cette expression. Ce n'est pas parce qu'il circulait sur un boulevard qu'il cessait d'avoir le devoir de chercher à éviter un accident possible, lorsqu'il réalisait que le défendeur ne paraissait pas se rendre compte de l'existence du boulevard."**

The defendant was also held at fault for driving too fast, failing to keep a proper lookout, and failing to come to a stop in accordance with the stop sign. In the same case *Letourneau, J.* remarked in his Notes, in part, as follows:—

> **"Aucune de ces prescriptions qui concernent la circulation, soit qu'on les tienne de l'autorité municipale ou provinciale, ne joue d'une façon absolue et exclusive; elles sont plutôt faites pour aider et elles s'ajoutent les unes aux autres, présupposant que le chauffeur ne se départira pas pour cela des règles de prudence et de vigilance ordinaires, en égard aux circonstances."**

In *Lapierre vs Howard et al.*, C.S. 160472. Oct. 12th, 1937, (unrep'd), plaintiff driving her car east to west collided with an automobile driven by one of the defendants from north to south at an intersection. Plaintiff had failed to stop at the stop sign, and defendant's automobile was exceeding the 8 M.P.H. limit. *Casgrain, J.* held that the *causa causans* of the accident was the fault of the plaintiff in failing to stop before crossing the intersection, and that defendant's excessive speed was not a determining cause of the accident:—

> **"...vu le fait que la demanderesse n'a pas arrêté son automobile à l'intersection, tel qu'elle était obligée de le faire, elle était évidemment en faute et comme si elle n'avait pas commis cette faute, l'accident ne se serait pas produit, il faut donc en venir à la conclusion que cette faute a été la *causa causans* de l'accident... le Tribunal est**

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driver may have been imprudent in not sounding the klaxon and in driving at 15 m.p.h., such neglect to give a signal and such excess of speed were not contributing causes of the accident. In maintaining

convaincu que même si le défendeur Samuel avait réduit sa vitesse à 8 milles à l'heure, la collision se serait tout de même produite, de sorte que sa vitesse n'a pas été une des causes déterminantes de la collision..."

Ferguson vs Pettipas, 1939, 1 D.L.R. 295 (N.S. Supreme Crt.) Held (R.H.):—

"Where a stop sign is 12 or 15 ft. from the intersecting thoroughfare, the place to stop and look is at the entrance to the thoroughfare and not at the spot where the sign is placed. In a collision between two cars arriving at the intersection at practically the same time, the driver merely looking when at the stop sign but not looking afterwards is guilty of negligence and solely to blame, as the other driver had the right to expect the yield of right of way. (Hall, J. dissenting, held the unlawful speed of the other car as the proximate cause of the accident)."

However, in cases such as *Ferguson vs Pettipas* due consideration must be given to the distance from the intersection of the vehicle on the boulevard at the moment the vehicle on the cross street reaches the corner. For example, in *Zakaib vs Mtl. Tramways Co. et al.*, K.B. No. 1485, 29th April, 1939 (affirmed by S.C.C. *unrep'd* to date) the facts, briefly, were as follows:—

A tramcar, southbound on a cross street, came to a stop several feet north of a boulevard. The motorman then looked to the east, and, after assuring himself that there was no traffic approaching within a distance of approximately 266', he proceeded to cross the intersection without again looking to the east (his left). While crossing the intersection the tramcar was struck by an automobile proceeding westward on the boulevard at a high rate of speed. It was established that when the tramcar reached the line of the northern curb of the boulevard the automobile had still a distance of at least 266' to travel before reaching the track. The Court of K.B. (reversing Superior Court, Letourneau and St. Jacques JJ. dissenting) decided that the

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the action he held that defendant had failed to exercise his right of way in a lawful manner, and that the accident was due to the excessive speed of the truck.

> accident was not due to any fault of the motorman. It was held that even had the motorman looked a second time to the east "while he might have seen the automobile approaching, nevertheless, it was not so near as to justify the assumption that the possibility of danger was reasonably apparent", or to have aroused in his mind "any reasonable grounds of apprehension."

Holding that the test of negligence is the *possibility of danger emerging*, the judgment cited *Royal Trust Co. vs Toronto Transportation Commission* (1935) S.C.R. 671 (see footnote to p. 10 *supra*). An appeal by the plaintiff to the Supreme Court was unanimously dismissed on 1st November, 1939.

Traffic lights.

See local Traffic By-laws (e.g. *Montreal No. 1319, Art. 10*). In *Warden King Ltd. vs Mtl. Tramways Co.*, C.S. 159032, Oct. 18th, 1937 *(unrep'd)*, *Gibsone, J.* stated in part:—

> "...the disregard of the traffic light signals, or the omission to observe and comply with the directions given by those signals, is of its nature a fault at law, and would give rise to civil responsibility for the consequences of such disregard or omission... It appears from the evidence that the change of light from red to green for, say, the North-South traffic is simultaneous with the change of light from green to red for the other (the East-West) traffic, and it must be concluded from this that a motor-car being driven with the green light is entitled to continue until the light changes to red; thus it may proceed to cross an intersection while its traffic light is green; also it must be concluded that when a motor-car has entered an intersection (to cross it) with the green light in its favour, it is entitled to cross the intersection although the green light turn to red after it has entered it; and it must follow that where a motor-car has entered an intersection on the green light and the green changes to red after it has entered it, the crossing traffic — which

has become entitled to enter that intersection by reason of a simultaneous change of its lights — is obliged before proceeding through the intersection to use the diligence necessary to avoid the traffic already crossing at right angles to it; ..."

The fact of a driver complying with the traffic lights does not dispense with his duty to observe the law in other respects. In *Bédard vs Ranger,* 36 R.L. 397 (1930) *Mercier, J.* held (R.H.) :—

"L'installation par une municipalité de signaux lumineux automatiques aux intersections de rues ne peut pas avoir pour effet d'exonérer de toute responsabilité les piétons ou les conducteurs de véhicules qui traversent une intersection sans prendre toutes les précautions exigées par la loi ou la prudence.

"Le fait pour un conducteur de véhicule moteur de suivre les indications données par ces signaux automatiques ne fait pas disparaître les règles établies par le code civil (art. 1053) ni la présomption créée par le statut provincial concernant les véhicules automobiles."

As to *pedestrians* and *traffic lights* see *infra* p. 163.

Extra-Provincial Decisions.

The following are among the more important decisions rendered in other Canadian Provinces dealing with the question of right of way at intersections:—

Downey vs Hyslop, (1930) 4 D.L.R. 578; *Sands vs Greer,* (1930) 3 D.L.R. 67; *Watt vs Reid,* (1930) 2 D.L.R. 215; *Burns & Co. vs Carlton Hotel,* (1928) 2 D.L.R. 845; *Lloyd vs Hannafin,* (1931) 2 D.L.R. 1000; *Paul vs Dines,* (1929) 3 D.L.R. 617; *Nash vs Victoria,* 27 B.C.R. 487; *Rahal vs Burnett,* 45 B.C.R. 122; *Chisholm vs Aird,* 43 B.C.R. 354; *Michaotnski vs Carr,* 26 O.W.N. 97; *Radio Taxicab vs Averback,* (1928) 1 W.W.R. 685; *Leckie vs Fee and Curtis,* 38 O.W.N. 81; *Haines vs Williams,* 47 B.C.R.

69; *Hall vs Tinck,* 45 B.C.R. 540; *Harris vs Smith,* (N.B.) 5 M.P.R. 378; *McLeod and McLeod vs Consterdine,* (1934) 1 W.W.R. 19; *Franklin vs Geddes,* (1935) 2 D.L.R. 720; *Groh vs Ritter,* (1935) 4 D.L.R. 243; *R. vs Jackson,* (1937) 1 D.L.R. 32; *Crowell vs Williams,* (1937) 2 D.L.R. 619, *Heck vs Braun et al.,* (1938) 2 D.L.R. 716; *Easte vs Ying,* (1938) 3 D.L.R. 804 (Man. K.B.); *Manitoba Motor Transit vs McGregor,* (1939) 3 D.L.R. 419 (Man. C.A.).

SECTION 4

PRESUMPTION OF FAULT UNDER SECTION 53 (2), MOTOR VEHICLE ACT

S. 53 (2) M.V.A. provides that *whenever loss or damage is sustained by any person by reason of a motor vehicle on a public highway, the burden of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of such motor vehicle shall be upon such owner or driver.* By *S. 2 (19)* M.V.A. the words *public highway* mean *any part of a bridge, road, street, place, square or other ground open to public vehicular traffic.*

The presumption of fault created by this statutory provision is an important exception to the general rule that the burden of proof is upon the plaintiff to prove fault or negligence on the part of the defendant. The presumption operates against the owner or driver of a *motorcycle* in the same way as the owner or driver of an automobile. *(Dussault vs City of Montreal,* 39 K.B. 139 (1925) ; *Hale vs Lachambre,* 72 C.S. 379 (1934)). It does not operate against the owner or driver of an ordinary *bicycle.* On the contrary, if such a bicycle is struck by a motor vehicle, the presumption operates against the person responsible for the operation of the motor vehicle. *(Gohier vs Vannier,* 62 C.S. 6 (1923) ; *Roy vs Piette,* 45 R.L. 57 (1938) ; *Tremblay vs Ribaud,* 64 K.B. 68 (1937) ; *Dutil vs Moreman,* 67 K.B. 521 (1939)). But if the evidence shows that the

bicycle brought about the accident, it has been held that the presumption has no application, — *Lalande vs Lauzon*, 29 R.L. 349 (K.B. 1923), *Greenshields, J.* at p. 350:—

> **"I have grave doubts as to whether the bicycle driven, as the proof shows it was, did not itself bring about the collision and cause all the damages resulting therefrom. If that be correct, the presumption created by the Statute has no existence in law against appellant."**
>
> **See also (in same case) *Rivard, J.* at p. 351, and dissenting judgment of *Hall, J. in Dutil vs Moreman* (*supra*).**

The presumption should be strictly construed: — *Gohier vs Vannier, (supra).* Held (R.H.):—

> **"La présomption... doit être interprétée restrictivement, et ne s'applique que dans le cas de dommages causés dans des collisions entre un automobile et une voiture ou bicyclette ou un piéton, ou pour dommages à la propriété, et non à une collision entre deux voitures tirées par des chevaux causée par le fait du conducteur de l'une de ces dernières voitures en cherchant à éviter un automobile qui se dirige sur elle."**

Dealing with the application and effect of *S. 53 (2)* M.V.A. *Greenshields, J.* said in *Nish Yashan vs Burton et al.*, 37 R.L. 115 (1930) at p. 118:—

> **"...I have said on other occasions, and I repeat: that a person injured on a highway by a motor, claiming damages, alleges that the defendant was the owner, and, or the driver of the motor on that highway which collided and injured him, from which he suffered damages, he has made a complete case and it is not required to allege fault or negligence on the part of the defendant. If he proves the ownership of the vehicle; that it was on the highway, and that it struck him and caused him damage, I would give a judgment in an *ex parte* or default case on that proof alone..."**

At p. 119:—

> **"A defendant must affirmatively establish to the satisfaction of the Court, that he could not avoid the accident; that it was the result of force majeure, cas fortuit, or was due exclusively to the fault of the victim."**
>
> **See also *Martin vs Edmison*, 65 C.S. 300 (1927), *Bruneau, J.* at p. 301.**

In the case of a collision between two automobiles causing injury to a pedestrian, the presumption has been held to operate against both drivers. *(Dupont vs Remillard et al.*, 66 C.S. 130 (1927)). It applies where the injury is to the property as well as to the person of the plaintiff. In *Farrese vs Desrochers*, 43 R.L. 96 (C.C. 1936) a collision occurred between an automobile and a horse drawn vehicle: it was held (R.H.):—

> **"En droit, dans le cas de collision entre automobile et véhicule hippomobile, la présomption de l'article 53 de la loi des véhicules automobiles joue contre le propriétaire de l'automobile ou celui qui la pilote, qu'il s'agisse d'un dommage aux biens de la victime ou d'un dommage corporel."**

The presumption does not apply in favour of a passenger in an automobile; it "applies only in the case of a person injured while travelling upon a highway and does not apply in favour of a passenger in an automobile which is driven by the owner's servant" — *Perusse vs Stafford*, (1928) S.C.R. 416. (See *Larouche vs Pednault*, 48 K.B. 158 (1930); *Cross vs Dollouf*, 73 C.S. 199 (1935); *Beaudry vs Duval*, 37 R.L. 36 (1930)). Nor does the presumption apply in the case of a collision between two moving automobiles which results in damages to both cars.[1] *(Moreau*

1. However, in *Carleton vs Bostwick*, 45 R.L. 36 (C.S. 1938) Verret, J., held that when an automobile is struck in the rear by another automobile following it, the presumption of fault lies against the

vs Rodrigue, 29 K.B. 300 (1920), see *Lamothe C.J.* at p. 301). It does apply, however, in the case of a collision between a moving and a stationary automobile. *(Crasinsky vs St. Maurice Garage Inc. et al.*, 74 C.S. 515 (1936); *Picard vs Nardello*, 30 R.L. 470 (1924)).

In *Lemenu vs Lacoste et al*, 36 R.L. 131 (1930) it was held that the driver of a motorcycle who, on account of the engine stopping, was obliged to get off his machine and push it along the roadway, should be considered a pedestrian within the meaning of the Motor Vehicle law, and, in the event of a collision between the motorcycle and an automobile, the person responsible for the latter should be presumed in fault.

> For application of presumption see also ***Liability for Injury to Pedestrian (infra,*** p. 161); ***Morano et al. vs Lett*** (1929) 4 D.L.R. 314 and 982; ***Sawyer vs Giguere,*** 59 C.S. 520 (1921); ***Booth vs Hudon,*** 21 R.J. 273 (C.C. 1914); ***Lemieux vs Dubois,*** 23 R.J. 106 (1916); ***Denis vs Deshaies,*** 25 R.L. 462 (1919); ***Dussault vs Chartrand,*** 54 C.S. 488 (1918).

Extent of presumption.

A provision of law similar in effect to *S. 53 (2)* M.V.A. *(S. 62* of the *Manitoba Motor Vehicle Act, C.A.M., 1924, C. 131)* received the careful consideration of the Judicial Committee of the Privy Council in *Winnipeg Electric Co. vs Geel*, (1932) A.C. 690, (1932) 4 D.L.R. 51. *Lord Wright* in delivering the judgment of their Lordships stated the law as follows:—

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driver of the second automobile. And in *Varin vs Rivest*, 45 R.J. 102 (C.C. 1939) it was held that the presumption applied in the case of a collision between two moving automobiles when only one of the automobiles was damaged (see reference to Mazeaud at p. 113 of Report).

At pp. 55-56:—

"... Apart from the section, a plaintiff claiming damages for personal injury in a running-down case would have to prove that he was injured, that his injury was due to the defendant's fault and the fact and extent of his loss and damage; hence, unless he succeeded in establishing all these matters, he must fail. In virtue, however, of the statute he need only establish the first and the third elements, i.e., that he was injured by the defendant and the extent of his damages; as to the second, the onus is removed from his shoulders and if he establishes the two matters in respect of which the onus still remains on him, he may close his case because it is then for the defendant to establish to the reasonable satisfaction of the jury, that the loss, damage or injury did not arise through the negligence or improper conduct of himself or his servants. This the defendant may do in various ways, as for instance, by satisfactory proof of a latent defect, or by proof that the plaintiff was the author of his own injury; for example, by placing himself in the way of the defendant's vehicle in such a manner that the defendant could not reasonably avoid the impact, or by proof that the circumstances were such that neither party was to blame because neither party could avoid the other. But the onus which the section places on the defendant is not in law a shifting or transitory onus: it cannot be displaced merely by the defendant giving some evidence that he was not negligent, if that evidence however credible is not sufficient reasonably to satisfy the jury that he was not negligent: the burden remains on the defendant until the very end of the case, when the question must be determined whether or not the defendant has sufficiently shown that he did not in fact cause the accident by his negligence. If, on the whole of the evidence, the defendant establishes this to the satisfaction of the jury, he will be entitled to judgment; if however the issue is left in doubt or the evidence is balanced and even, the defendant will be held liable in virtue of the statutory onus, whereas in that event but for the statute the plaintiff would fail, because but for the statute the onus would be on him. *A fortiori* the defendant will

be held liable, if the evidence actually establishes his negligence. No doubt the question of onus need not be considered, if at the end of the case the tribunal can come to a clear conclusion one way or the other, but it must remain to the end the determining factor unless the issue of negligence is cleared up beyond doubt to the satisfaction of the jury."

The *Judicial Committee* (in the same judgment) disagreed with the opinion of *Harvey, C.J.* in the Alberta case of *Carnat vs Matthews,* (1921) 59 D.L.R. 505, 506, but found that the law was correctly stated by *Turgeon, J.A.* in a case under similar legislation in Saskatchewan, viz. *Stanley vs Nat'l. Fruit Co.* (1930) 2 D.L.R. 106 at pp. 109-110 (revd. on the evidence (1931) 1 D.L.R. 306) as follows:—

"Section 43 of the Act places the onus of proof upon the defendants. This means that the defendants must lose if no evidence of the circumstances of the accident is given at all, or if the evidence leaves the Court in a state of real doubt as to negligence or no negligence, or is so evenly balanced that the Court can come to no sure conclusion as to which of the parties to the accident is to blame. But if evidence for and against is given upon the points in question, the rule in favour of the preponderance of evidence should be applied as in ordinary civil cases, and the statutory onus will cease to be a factor in the case if the Court can come to a definite conclusion one way or the other, after hearing and weighing the whole of the testimony. Nor does this statutory onus increase the degree of diligence required in the owner or driver of a motor vehicle. His duty to others remains the same, notwithstanding the shifting of the burden of proof..."

See *Canadian Westinghouse Co. vs C. P. R.* (1925) 4 D.L.R. 745 (Supreme Court), Duff, J. at p. 749; *McMillan vs Murray* (1935) 4 D.L.R. 666 (Supreme Court); *Hill vs Schofield Bros. Ltd. et al.,* C.S. 154756, Feb. 3rd, 1937 (*unrep'd*); *Low vs C. P. Express Co.,* 77 C.S. 31 (1938).

In *Dambro vs Bertrand,* 66 C.S. 99 (1927) *Duclos, J.* referring to *S. 53 (2)* M.V.A. stated, in part (at p. 100) :—

> "... beyond shifting the burden of proof, the act does not declare anything to be negligence, that would not otherwise be negligence; and the evidence in this case being quite sufficient to show how the accident was caused, the defendant has discharged this onus of proof . . ."

In *Schonberner vs Barron,* (1927) 3 D.L.R. 708 the *Alberta Supreme Court* held (R.H.) :—

> "Where a Court is able on all the evidence to come to a determinate conclusion that an accident did not occur through the negligence of the driver of a motor car, the onus section in the appropriate motor vehicles statute cannot be applied to determine the action in favour of the other party to the action."

> See also ***McCallum vs Hooper,*** 67 C.S. 139 (1929), J. Archambault, J. at p. 140.

A motorist may rebut the presumption by showing that he was neither negligent nor guilty of improper conduct. It is not necessary that there should be *force majeure* or *cas fortuit.* Thus in *Plouffe vs McKenzie,* K.B. 1643, 30th Nov. 1939 *(unrep'd* to date) *Letourneau, J.,* stated:

> "A mon avis les Appelants se sont disculpés de la présomption de faute que l'article 53 de la Loi des Véhicules-Automobiles faisait poser sur eux. Il n'était nullement nécessaire pour cela d'un cas fortuit ou de la force majeure; il leur suffisait d'établir que l'accident n'est pas dû à la négligence ou à la conduite répréhensible de la personne qui conduit ce véhicule moteur."

See also *Gasoi vs Guindon,* St. Jerome C.S. 6542, January, 1940 *(unrep'd* to date) ; *Millette vs C.P. Express Co.,* C.S. 124160, June, 1934, *Guibault, J.*

SECTION 5

RESPONSIBILITY FOR "THINGS"

Article 1054 C.C. provides, *inter alia*, that a person is responsible not only for the damage caused by his own fault, but also for that caused by *things which he has under his care*, the responsibility attaching, however, *only when the person subject to it fails to establish that he was unable to prevent the act which has caused the damage.* This provision has no application when the damage caused by the "thing" e.g. an automobile, has been brought about by the intervention of some human agency. Thus in *Perusse vs Stafford*, (1928) S.C.R. 416, *Anglin, C.J.C.* stated at p. 418:—

> **"...it is contended that fault is presumed against the defendant under article 1054 of the Civil Code, because the injury was caused by a thing under her care. Our view is that that provision has no application to a case where, as here, the real cause of the accident is the intervention of some human agency — the question whether such human agency — that of the driver in this case — is at fault being a question of fact. Damage is not caused by a thing which is in the control of the defendant within the meaning of art. 1054 C.C. where it is really due to some fault in the operation or handling of the thing by the person in control of it."**

Again, in *Mtl. Tramways Co. vs Frontenac Breweries*, 33 K.B. 160 (1922), *Howard, J.* referring to *Art. 1054* C.C. stated, at p. 164:—

> **"...This Court of appeals has repeatedly ruled... that that article applies only when the occurrence is due**

to the thing in question doing something which it was not intended to do, or when something out of the common occurs in respect of it and thereby damage is caused; in such case there is a presumption under Art. 1054 C.C., that the owner of the thing thus causing the damage is responsible for the accident. But there is no such presumption to use the words of the Hon. Mr. Justice Anglin in a recent case of *Curley v. Latreille,* (60 S.C.R. 140) when the occurrence is ascribable to the conduct of the person by whom it (the thing) is put in motion, controlled or directed."

See also, — *Charland vs Boucher,* 36 K.B. 100 (1924); *Mtl. Tramways Co. vs Lapointe,* 31 K.B. 374 (1920); *Curley vs Latreille,* 60 S.C.R. 131 (1919); *News Pulp & Paper Co. vs McMillan,* 31 K.B. 117 (1920); *Menard vs Que. R. L. & P. Co.,* 46 K.B. 1 (1928); *D'Amour vs Renaud,* 37 K.B. 333 (1924); *Mtl. Tramways Co. vs Mullin et al.,* 35 K.B. 392 (1923); *Collier vs Mtl. Tramways Co.,* 27 R.L. 117 (C.R. 1920); *Charest vs Mtl. Tramways Co.,* 60 C.S. 43 (1921); *Wilson vs C. P. R.,* 75 C.S. 510 (1937).

By the Privy Council judgment in *City of Montreal vs Watt & Scott Ltd.,* (1922) 2 A.C. 555 it was decided that the words "unable to prevent the damage complained of" mean *unable by reasonable means.* (See *Que. L. H. & P. Co. vs Vandry,* (1920) A.C. 662 (P.C.)).

Res Ipsa Loquitur.

Under the common law doctrine of *res ipsa loquitur* the mere happening of an accident may be sufficient to raise a presumption of negligence which the defendant must rebut if he can. This is the case, for example, where the thing that caused the damage was so exclusively under the defendant's control that it is hardly credible that any harm could have come from it without his default. The principle of *res ipsa loquitur* is often referred to in our Courts when dealing with the responsibility for things under article 1054 C.C. and may conveniently be dis-

cussed in this section. In *Carmiel vs Plotnick*, 73 C.S. 517 (1935) *McDougall, J.* held (R.H.) :—

> "In an automobile accident where it is proven that the rear left wheel of an automobile suddenly becomes detached and comes hurtling across the highway, striking the plaintiff's automobile, the impact forcing the latter vehicle into a ditch, the defendant, who seeks to avoid liability under article 1054 C.C. by invoking the exculpatory provision of the article, asserting that it was impossible for him to foresee or prevent the accident, must first show precisely how the accident came about and having done this, he may then argue that the facts show that he was unable to prevent the occurence; otherwise, the action should be maintained."

At p. 520 :—

> "In the absence of precise proof as to how such wheel became detached, the defendant has not dispelled or rebutted the prima facie case of liability which the law imposes upon him. The doctrine of *res ipsa loquitur*, the common law equivalent of the liability of article 1054 C.C., thus bears heavily against the defendant and constitutes an insuperable obstacle to the exculpatory defence which he urges." See *City of Montreal vs Lesage*, 1923, Can. S.C.R. 355, particularly per Brodeur, J., at pp. 359 and 360; per Anglin, C. J. at p. 357, and Mignault, J., at pp. 362 and 363.

McDougall, J., (in the same judgment) referred to a leading English case — *Britannia Hygienic Laundry Co. vs Thornycroft & Co.*, (1926) 95 L.J. K.B. 237 in which *Scrutton, L.J.*, at p. 241, stated, in part :—

> "The doctrine of *'res ipsa loquitur'*, as I understand it, is this: where you have a subject-matter entirely under the control of one party and something happens while it is under the control of that party, which would not in the ordinary course of things happen without negligence, you may presume negligence from the mere fact that it happens, because such a thing could not happen

> **without negligence. There is the case where a cask tumbled out of the door of a warehouse on to a passer-by, and it was said against the defendant; you are in sole control of this warehouse and in the ordinary course of things casks do not tumble out of warehouses on to the heads of passers-by unless somebody has been careless. If nothing else is proved... *'res ipsa loquitur'*..."**

In *United Motor Service Inc. vs Hutson et al.*, (1937) 1 D.L.R. 737 (Supreme Court) *Sir Lyman Duff, C.J.C.*, pointed out (at p. 738) that while the phrase *res ipsa loquitur* was comprehensively applied to cases differing widely in their essential characteristics, it is most frequently applied where the principle stated in *Scott vs London & St. Katherine Docks Co.*, 3 H. & C. 596 at p. 601 comes into play. He cited the principle as expounded in that case as follows:—

> **"There must be reasonable evidence of negligence. But where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.**
>
> **"Broadly speaking, in such cases, where the defendant produces an explanation equally consistent with negligence and with no negligence, the burden of establishing negligence still remains with the plaintiff."**

After referring to part of *Lord Halsbury's* judgment in *Wakelin vs London & S.W.R. Co.*, (1886) 12 A.C. 41 at pp. 44, 45 the learned Chief Justice stated at p. 739:—

> **"The phrase *res ipsa loquitur* is, however, used in connection with another class of cases where, by force of a specific rule of law, if certain facts are established then the defendant is liable unless he proves that the occurrence out of which the damage has arisen falls within the**

category of inevitable accident. One of these cases is that in which a ship in motion has run into a ship at anchor."

Amongst other cases cited in the same judgment was *Winnipeg Electric Co. vs Geel* (1932) 4 D.L.R. 51.

In *Long et al vs McLoughlin et al.,* (1926) 3 D.L.R. 918 (N.B. Supreme Court) it was held that the doctrine of *res ipsa loquitur* applies to an accident caused by a *motor vehicle leaving the road* where there is no apparent cause of the accident. In *Howells vs Wilson,* K.B. 1072 June 1936 (see *infra* p. 326) *Hall, J.* remarked that the accident in question was a typical example of *res ipsa loquitur.*

In *Hird vs Milne,* (1930) 3 D.L.R. 513 (Man. K.B.) it was held, in part (R.H.) :—

"...The maxim *res ipsa loquitur* will apply in an action against an alleged negligent motorist, where the defence has eliminated the question of defects in the motor car, where there was no disturbing traffic on the road, and where the circumstances surrounding the accident were under the control of the driver of the car, or were such as the driver should have adjusted herself to. While a plaintiff might lose his right to invoke the maxim, if he relied on some specific act of negligence which failed of proof, he does not lose his right to invoke it by giving evidence of some incidental circumstances tending to show negligence by the defendant."

See also *C. P. R. vs Pyne* (1919) 48 D.L.R. 243 (Privy Council) Duff, J. at p. 244; *Currie vs Sandwich & Windsor Ry. Co.,* 19 C.R.C. 210 and reporter's notes on pp. 213 and 214; The Canadian Bar Review, May 1937, Vol. 15 p. 381; Annotation in (1929) 1 D.L.R. 1.

SECTION 6

RESPONSIBILITY FOR DRIVER — DOCTRINE OF CONTROL

It does not follow because you are the owner of a motor vehicle that you are necessarily responsible for the negligence of some other person temporarily in charge of your vehicle. Under *Article 1054* C.C. masters and employers are responsible for damage caused by their servants and workmen *in the performance of the work for which they are employed.* Provided, therefore, he has used proper care in selecting his employee and has exercised reasonable supervision, the employer is not responsible for negligent acts committed by such employee e.g. a chauffeur, when acting outside the scope of the duties for which he was engaged. Nor, under our jurisprudence, is the owner responsible for the negligence of some one to whom he lends his motor vehicle provided the vehicle is in proper condition, and the borrower is an experienced driver and is not driving for, or as *préposé* of the owner at the time.

In attempting to collect damages resulting from an automobile accident the owner of the vehicle is sometimes wrongly sued, either alone, or with others. It is advisable before instituting action to ascertain, if possible, just what legal relationship, if any, existed between the driver and the owner. In cases of doubt the driver may be sued and the owner may be sued later and joined as defendant, if the circumstances warrant it. An examination of the

defendant driver on *Discovery*[1] is usually helpful in deciding whether or not the owner's responsibility is involved.

Difficulties not infrequently arise in determining responsibility in the case of an accident happening while a motor vehicle is temporarily in charge of some third party's employee. According to a well established rule of law, an employer, in whose general service a man is, is not responsible for torts which such man may commit after the control of the employer has been, for the time being, displaced by the power of control of another master into whose temporary service the man has passed by being lent or subcontracted. In such a case the temporary employer *(patron momentané)* and not the regular employer *(patron habituel)* is responsible. Application of this rule may sometimes result in holding the owner of a vehicle responsible for the negligence of some one else's employee, because, at the time, the latter was following out the owner's instructions and was, therefore, temporarily removed from the control of his regular employer.

As will be seen from several conflicting judgments cited in this section, the question whether or not, at the time the negligent act was committed, the employee was *in the performance of the work for which he was employed,*[2] is often a vexed one.[3] It has been stated, as a general rule, that the damage *(le fait dommageable)* must be something done in the execution of the servant's functions as servant, or in the performance of his work as servant. If the thing

1. Under art. 286 C.P.

2. The responsibility of a principal for the acts of his servant or agent is frequently referred to by the phrase *Respondeat Superior.*

3. In the recent case of *Lockhart vs Stinson & C. P. R.* (1940) 1 D.L.R. 23, three judges of the Ontario Court of Appeal gave different explanations of the basis of the rule, *respondeat superior* (see editorial note on p. 24 of report).

done belongs to the kind of work which the servant is employed to perform, or the class of things falling within the execution of his functions, then responsibility rests upon the employer. Whether that is so or not is in substance a question of fact, the answer to which involves an accurate appreciation of the facts in their relation to the rule. *(The Governor & Co. of Gentlemen Adventurers of England vs Vaillancourt,* (1923) S.C.R. 414, 416).

In appreciating the facts it must be remembered that mere *disobedience* by an employee of orders given by his master does not relieve the employer from responsibility for damages resulting from the employee's fault, (e.g. *Prain vs Bronfman et al., infra* p. 125; *McIsaac vs Hall, infra* p. 123). "There are prohibitions which limit the sphere of employment, and prohibitions which only deal with conduct within the sphere of employment. A transgression of a prohibition of the latter class leaves the sphere of employment where it was, and consequently will not prevent recovery and compensation. A transgression of the former class carries with it the result that the man has gone outside the sphere." *(Lord Dunedin, in Plump vs Cobden Flour Mills Co.,* (1914) A.C. 62 at p. 67). An important distinction must therefore be drawn between a negligent act committed by an employee in the abuse of his functions *(abus des fonctions),* and one committed while doing something outside the scope of his functions: in the former case the employer is responsible: (see *Baudry-Lacantinerie & Barde, Traité de Droit Civil,* Vol. 15, No. 2914; *Sainctelette, Responsabilité des Propriétaires et Conducteurs d'Automobiles,* No. 189, p. 217). It should be noted, however, that the functions of an agent or *préposé* invested with a *special mandate* (e.g. A., not a regular employee, who is requested by B. to drive the latter's car from one point to another, and nowhere else) are consi-

derably more restricted than those of a regular employee, and that failure by such a person to execute his orders may relieve the principal from responsibility for the former's negligence while disobeying specific instructions. *(Moreau vs Labelle,* (1933) S.C.R. 201 at p. 215).

The past few years have seen some far-reaching decisions on the question of responsibility of automobile dealers for the negligence of their commission salesmen while driving cars entrusted to them by the dealers with full discretion as to their use. Thus in *Jarry et al. vs Pelletier,* (see *infra* p. 128) the Supreme Court held the employer responsible although, at the time of the accident, the salesman was on an errand for a person to whom he had sold a car not belonging to the employer, but to a third party. On the basis that a car salesman is always a salesman, seeking on every possible occasion an opportunity to sell his employer's goods, the principle in the *Jarry* case was recently extended to cover the case of an automobile salesman who was involved in an accident while driving his employer's car on a personal visit to friends on a Sunday afternoon. *(Casavant vs Garage Touchette Ltée et al.,* 77 C.S. 578 (1939)). On the other hand in *Massicotte vs Massicotte et al.,* C.S. 160657 28th Sept. 1938 *(unrep'd* to date) *Casgrain J.* held that the manager of the used car department of Jarry Automobile Ltée was not in the execution of his functions in driving a car belonging to his employer on a Sunday visit to friends in the country. The *Casavant* case is now in appeal. The judgment in the *Massicotte* action was also inscribed in appeal, but was settled before the hearing.

It is hardly necessary to add that in cases where the employer is responsible for the negligent act of his employee under the terms of *Art. 1054* C.C., a party thereby suffering damages has a joint and several claim for such damages against the employer and employee.

Cases illustrating general rule.

In *Curley vs Latreille*, 60 S.C.R. 131 (1920) respondent's chauffeur while using his master's automobile for purposes of his own in violation of instructions, and driving the car in a negligent manner, killed the appellant's son. There was no evidence of want of care on the respondent's part in engaging the chauffeur, and some evidence was adduced that the master had exercised reasonable supervision. It was held *(Brodeur, J.* dissenting) that the respondent was not liable because at the time of the accident the chauffeur was not "in the performance of the work for which he was employed". See also:—

> ***Clermont Motors Ltd. vs Joly*, 45 K.B. 265 (1928); *O'Donnell vs Savaria et al.*, 38 R.J. 81 (1932); *Cox et al. vs Hall*, 39 K.B. 231 (1925); *Richard vs Garneau et al.*, C.S. 34246, Jan. 28th, 1937 (unrep'd) (see (1937) 4 I.L.R. 360); *Pinsonneault vs Nantel et al.*, 74 C.S. 252 (1936); *Blais vs Davis and Lawrence Co. Ltd.*, 52 K.B. 410 (1932); *Bright Co. vs Kerr*, (1939) S.C.R. 63 (*infra*, p. 131).**

In *Fink vs Herer et al.*, 72 C.S. 509 (1934) *Mackinnon, J.* held that the owner of a motor vehicle is not responsible for injuries suffered by a passenger who had been invited by a servant, driver of the vehicle, without the owner's knowledge. However, in *McIsaac vs Hall*, 77 C.S. 220 (1938) *McDougall, J.*, referring to *Moreau vs Labelle*, (1933) S.C.R. 201, 210, etc., held as follows (R.H.):—

> **"It is no defence to an action in damages arising out of an automobile accident for the defendant merely to show that his employee who caused the accident had disobeyed orders in allowing the victim to ride as a passenger. Such disobedience was an abuse of his functions but the employee was nevertheless engaged in the performance of the work for which he was employed and his employer is consequently liable."**

Picard vs Nardello, 30 R.L. 470 (1924). *Rinfret, J.* held, in part (R.H.):—

> **"...Une personne qui conduit l'automobile d'une autre, est présumée le faire avec l'autorisation de cette autre. Un employé ou un chauffeur, dans les mêmes circonstances, doit être tenu pour être dans l'exécution de ses fonctions; et si le propriétaire désire établir le contraire, il faut qu'il commence par l'affirmer dans sa plaidoirie écrite."**

Wilde vs Gagnon, 42 R.L. 309 (1935). Held, in part (R.H.) :—

> **"...Celui qui va au garage chercher l'automobile d'une autre personne avec la permission même tacite ou la simple tolérance de cette dernière, dans le but de ramener l'automobile à son propriétaire, doit être considéré comme le préposé de ce dernier, dans l'exécution de ses fonctions."**

In *Grimaldi vs Restaldi*, 54 K.B. 197 (1933) it was held that when a person asks a doctor to call at his house to render professional services and for that purpose puts his car and chauffeur at the doctor's disposal, at the same time authorizing the doctor to make some prior calls, the chauffeur, through whose fault an accident happens, remains the préposé of the owner of the car and the owner is, therefore, responsible for the resulting damages.

Plouffe vs James Shearer Co. Ltd., 64 C.S. 489 (1926). *P. Demers, J.* held (R.H.) :—

> **"Le chauffeur d'une automobile qui en allant, selon son habitude, chercher sa buanderie avec la voiture de son maître, blesse des passants, engage la responsabilité de ce maître à l'égard des victimes."**

Cloutier vs Savard, 36 K.B. 73 (1923). Held (R.H.) :

> **"Un chauffeur d'automobile reçoit l'ordre de son maître de laver sa voiture dans le garage où elle se trouve, et de la laisser là. Se méprenant sur les instructions qu'il a reçues, le chauffeur, après avoir lavé**

> **l'automobile, la conduit à la résidence de son maître, et sur sa route, par imprudence, cause un accident.**
>
> **"Dans l'espèce, la Cour a jugé que le chauffeur était dans l'exercice de ses fonctions, et elle a tenu le patron responsable du quasi-délit de son employé."**

Prain vs Bronfman et al., 69 C.S. 187 (1931). *Greenshields, J.* (now C.J.) held (R.H.) :—

> **"The fact that a person employed by his master to drive a car, with instructions to take it to the garage when the work is completed for the day, and who in disobedience drives the car somewhere else, before storing it, and an accident happens through his fault, does not free the master from liability."** [4]

On the other hand, a truck driver, while using his employer's truck after closing hours to drive to a dance, is not in the performance of the work for which he was employed, and the owner will not be liable for damages due to his negligence at such time. *(Brown vs Bercovitch,* 44 R.L.311).

Poplis vs Chaput, 53 C.S. 440 (C.R. 1917). Held, in part (R.H.) :—

> **"Celui qui emprunte et se sert d'un automobile, qui est conduit par le chauffeur du prêteur, mais qui est sous le contrôle de l'emprunteur, est responsable d'un accident qui arrive pendant que ce chauffeur est en charge de la machine..."**

Moreau vs Labelle, (1933) S.C.R. 201.

> **The appellant was receiving guests at dinner, at his home, on New Year's eve. One C. had been invited with his wife, but she had been unable to come as she found the distance too great for walking. The appellant then offered to C. the use of his automobile to go and get her. C. took the car, but stopped on his way. One R.M., nephew of the appellant but not his employee as chauffeur or**

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4. In *Vachon vs Lallemand et al.* C.S. 181896, Jan. 1940 (*unrep'd* to date) *Fortier, J.*, cited *Barron, Canadian Law of Motor Vehicles* at p. 514 as follows:

"A distinction is made between the act of a chauffeur who takes the owner's car, without his consent, or against his orders, and is

otherwise, happened to pass on the street where the car was parked, and, seeing nobody in charge, thought fit to notify his uncle by telephone. The appellant then gave the following instructions to his nephew: "Take my automobile and bring it back here immediately and don't go anywhere else." The nephew took the car, but, instead of bringing it back immediately to his uncle's home, he left the direct route towards it and drove off to a neighbouring town with friends. After having left them there, he started his return trip alone; and, on his way back, he overtook a sleigh driven by the respondent, hit it from the rear and upset all the passengers including the respondent's minor daughter, who had to be extricated from under the sleigh and suffered serious injuries. The accident occurred before R.M. had reached the intersection of the road which would have been the direct road between the place where the appellant's car was parked and the latter's home. The respondent's action in damages was maintained for $4,000 by the trial judge, which judgment was affirmed by the appellate court.

"*Held*, reversing the judgment of the Court of King's Bench (Q.R. 52 K.B. 183), that the appellant was not liable, for, at the time of the accident, the appellant's nephew was not 'in the performance of the work' which had been entrusted to him. (Art. 1054 C.C.).

"In interpreting the meaning of the last paragraph of article 1054 C.C., it would be an error in law to assimilate to an offence committed by a servant or workman 'in the performance of the work for which they are employed', a similar offence committed 'during the period' of that work. ***Plump vs Cobden***, (1914) A.C. 62 ref."

See cases cited in the ***Moreau-Labelle*** report and comments on the various decisions.

Mtl. Tramways Co. vs Anglo-Scottish Ins. Co., K.B. No. 806, 30th Oct. 1935 *(unrep'd)*.

The motorman of a stationary tramcar who gives a signal to proceed across the road to the driver of an auto-

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therefore a trespasser *ab initio*, and the act of a chauffeur who has taken the car on the order of the owner, and instead of returning it to the garage where it was kept, he uses the car for purposes of his own,

mobile approaching from a side street is not acting within the performance of the duties for which he is employed. If, as a result of the motorman's signal, the automobile driver proceeds across the road without paying attention to other traffic, the Tramways Company is not responsible if his automobile is struck by a tramcar approaching from the opposite direction to the one which is stationary.

Following the same rule, a municipal corporation is not responsible for damages caused by one of its police officers when, although in charge of an automobile belonging to the corporation, he is not acting within the scope of his duties for the city or corporation, e.g. when he is acting as a peace officer under the authority of the Criminal Code. *(St-Pierre vs City of Three Rivers,* 61 K.B. 439 (1935)).

Lapointe vs Sanguinet, 39 R.L. 257 (1933). *Surveyer, J.* held, in part (R.H.) :—

"... Quand le gérant d'une compagnie prête son automobile à un employé pour les affaires de la compagnie, c'est cette dernière, et non le gérant, qui est commettant de l'employé et partant responsable des dommages qu'il peut causer."

Hall vs Johnson, 66 K.B. 81 (1938). Held (R.H.) :—

"Where an employee, while using an automobile for combined business and pleasure, permits a friend accompanying him (such friend not being a licensed driver) to drive the automobile and an accident occurs through the fault of such driver, the employer is responsible."

Lafontaine vs Christin, 25 R.L. 110 (C.R. 1918). Held (R.H.) :—

"La responsabilité du propriétaire d'un automobile, qui en a donné possession à un chauffeur, continue jusqu'à ce que cette possession cesse par le retour de la machine à son propriétaire.

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and while so using it, he negligently injures another. In the first case, the owner is not responsible. In the second case he is..."

"Le membre d'une société commerciale à laquelle un automobile appartient, et qui se fait conduire par un de ses employés en dehors de la ville, sans la participation de son associé, est personnellement responsable d'un accident qui arrive par la faute du chauffeur."

Dery vs Blanchard, 63 C.S. 495 (1925). Held (R.H.):

"Le camionneur, qui moyennant un prix stipulé pour chaque jour, déménage des meubles à la demande d'un entrepreneur de transports qui n'a sur lui aucune surveillance n'est qu'un sous-entrepreneur, nullement le préposé de l'entrepreneur principal. Celui-ci n'est en conséquence aucunement responsable des fautes de ce sous-entrepreneur."

Wright vs Jeffrey et al., (1937) 1 D.L.R. 227 (Ont. C.A.). Held, in part (R.H.):—

"A firm employing a travelling salesman on commissions and exercising control over his territory is liable for his negligence in driving a car in the course of his work; such employee does not stand in the relation of an independent contractor."

Casavant vs Garage Touchette Ltée et al., 77 C.S. 578 (1939). Held (R.H.):—

"Celui qui vend des automobiles à commission, qui utilise la voiture du patron avec faculté de s'en servir à son gré, qui recherche toutes les occasions de conclure des ventes suivant le hasard des rencontres, devient le préposé du patron, même quand il se sert du véhicule pour ses fins personnelles; il engage la responsabilité de celui-ci lorsque, par son imprudence dans la conduite de la voiture, il cause un préjudice à un tiers." (In appeal to K.B.).

Jarry & Jarry vs Pelletier (1938) S.C.R. 296 (R.H.):

"The appellants are automobile dealers in both new and second-hand cars, and, some time prior to the accident, employed by verbal contract one Beauchamp on commission as salesman. In order to facilitate the exe-

cution of his work, the appellants allowed Beauchamp to have possession of one of their cars, with full discretion as to its use, though the latter was to pay for the gas and oil. Some time prior to the date of the accident, Beauchamp caused an announcement to be inscribed in a newspaper advertising a motor car for sale, and, in answer to this, one Théberge communicated with Beauchamp. The latter tried to interest Théberge in the purchase of one of the cars belonging to his employers, the appellants, but Théberge refused to buy, expressing his desire to have a car from a private individual. Then Beauchamp remembered that one Désormeaux had a second-hand car for sale; and, after some negotiations, that car was sold through Beauchamp to Théberge. The morning following the sale Beauchamp drove Théberge in the appellants' car to the provincial licence bureau in order to obtain a licence for the operation of the car; and they were driving back to Désormeaux's house to put on the new plates on the car when the accident occurred. Beauchamp had to apply the brakes of the car to reduce its speed; the street was slippery, and this caused the car to skid up over the sidewalk and to strike the respondent, thus causing him serious injuries. The appellants' ground of appeal was that their employee at the time of the accident was not acting in the performance of the work for which he had been employed by them.

"Held that, according to the facts and the circumstances of the case, the appellants are liable. The appellants' car was, for the purposes of their business, entrusted by the appellants, owners of the car, to their employee Beauchamp as their servant; but the latter was invested with full discretion as to the use of it. In the exercise of that discretion, Beauchamp acted as agent and servant of the owners, the appellants. In other words, Beauchamp was in the exercise of his functions as servant."

See *Cannon J.* at p. 302 of report.

The question of control in cases of this kind again occupied the attention of the Supreme Court of Canada

in *Dallas vs Home Oil Distributors Ltd.*, (1938) S.C.R. 244 [5]. To contrast the *Dallas* case with the *Jarry* case we quote the *Canadian Bar Review, Dec. 1938, Vol. 16 No. 10*, page 813, as follows:—

> "In the Dallas Case the salesman drove his own car in carrying out his duties of selling his employer's products, while in the Jarry Case he was supplied with a car which he was to sell. H. was employed to sell defendant company's products in New Westminster district. The company's office was in Vancouver where H reported during the week, and generally he phoned daily. His hours were from 8.30 a.m. to 5 p.m., and the company did not, as a rule, ask its salesman to work after hours. H used his own car, but his employers paid for his license and for necessary repairs, and supplied him with gasoline and oil. A message was left for H at the company's office informing him that certain lectures were to be given in the evening of named days and 'that you are expected to attend.' The evidence was that attendance was desirable but not compulsory. H drove to Vancouver to attend a lecture and on his way home, after 9 p.m., became involved in an accident. The Supreme Court of Canada affirmed the judgment of the British Columbia Court Court of Appeal, exonerating the company from liability. Hudson J., speaking for the Court, used the following language:
>
> "'In our opinion, the question we have to consider is whether or not H was on his master's business at the moment of the accident. He had gone to the lecture on his master's invitation and, at least to some extent, for his master's benefit. The area of his business was some miles away and he had to return there in order to resume his work, but his home was also in the area of his business. It was a place of residence of his own choice, not that of his master. After leaving the meeting his day's work was done; he was free to do as he pleased and free to go home without any further control or direction from his master as to the route, mode of transportation or otherwise. His only obligation was to be at

5. Leave to appeal to Privy Council *in forma pauperis* refused.

work in New Westminster the next morning at 8.30 a.m. Under these circumstances we cannot hold that H was under any control of his masters so as to render them liable for his negligence...'

"His Lordship's inquiry as to whether H was 'on his master's business', and his conclusion that it could not be held that H was 'under any control of his masters' appear to suggest that the test of 'control' is merely a conclusion or an *ex post facto* explanation based on a delimitation of the 'scope of employment' or the acts which the Court includes as risks assumed by the employer in hiring another as his servant."

In *Hoar vs Wallace*, (1938) 4 D.L.R. 774, (1938) O.W.N. 41 the *Dallas* case was followed by a majority of the *Ontario Court of Appeal* which held that an employer is not liable for the negligent driving of an employee where the employee is not under the employer's control or direction as to route, mode of transportation, or otherwise.

Bright & Co. Ltd. vs Kerr, (1939) S.C.R. 63 (R.H.):

"Appellant was a company licensed to manufacture and sell wine throughout Ontario, and had a retail store on Yonge St., Toronto. Its deliveries up to 4 o'clock p.m. were made by a certain delivery service. In the evening one S. would telephone inquiring if there were parcels to deliver, and if so would call for them and make delivery (within the time prescribed by regulations under the Liquor Control Act), collecting payment and securing signatures to orders and receipts. He was paid a stipulated sum per parcel, payment being made weekly. While delivering parcels as aforesaid, the motorcycle which he was driving struck K. who died as the result. The question on this appeal was appellant's liability for damages by reason of the accident (in an action brought under the Ontario Fatal Accidents Act). At the trial, which was had with a jury, the trial judge, on motion at close of plaintiff's case, dismissed the action as against appellant. The Court of Appeal for Ontario (Middleton J. A. dissenting) ((1937) O.R. 205) set aside said dismissal and ordered a new trial

between plaintiff and appellant, confined to the question of liability of appellant and assessment of damages. Appellant appealed to this Court.

"Held: Appeal allowed and judgment at trial restored. (*Duff, C. J.* and *Davis, J.* dissenting).

"Per Crocket J.: This was a clear case of casual or collateral negligence on the part of a private carrier for hire. In the operation of the motorcycle, S. was not appellant's servant within the meaning of the rule which makes a master liable for the acts of a servant in the performance of his duty as such — he was not subject to appellant's control or direction, he was entirely his own master; his negligence, therefore, cannot properly be attributed to appellant. Also, neither the agreement under which S. was entrusted with the custody of the wine for delivery, nor any of the regulations made under the Liquor Control Act imposed any responsibility upon appellant for the injury of third persons by the negligent operation of the motorcycle. It is only upon the basis of appellant's employment of S. to make this particular delivery by means of a motorcycle in itself involving such danger to third persons that the accident might reasonably have been foreseen that appellant could properly be fixed with responsibility for K.'s death. In that case appellant's responsibility would really rest upon its own direct negligence in employing S. to make the delivery by that means rather than upon the so-called doctrine of vicarious responsibility (City of Saint John v. Donald, (1926) S.C.R. 371, at 383-4); it cannot be said that the delivery of parcels on occasion by means of a hired motorcycle is inherently dangerous."

Reference should also be made to *Kerwin J.* (at p. 72 et seq.) and to the dissenting judgments of *Duff C.J.* and *Davis J.* At p. 69 *Duff C.J.* stated in part:—

"*Respondeat superior* is a rule which does not rest upon any notion of imputed guilt or fault."

And at p. 70:—

"The principal having the power of choice has selected the agent to perform in his place a class or classes of acts, and, to adapt the language of Henn Collins M.R. in Hamlyn v. Houston (1903, 1 K.B. 81, at pp. 85-86), it is not unjust that he who has selected him and will have the benefit of his services if efficiently performed should bear the risk of his negligence in 'matters incidental to the doing of the acts, the performance of which has been entrusted to him'."

In *Dandurand vs Les Héritiers Desjardins et al.*, 44 R.J. 76 (1936) *Casgrain, J.* held in part:—

"Le marchand d'automobiles n'est pas responsable de son employé, vendeur à commission, quand celui-ci n'est pas dans l'exercice de ses fonctions, à savoir: quand l'employé se sert de l'automobile, soit pour donner une démonstration de la voiture elle-même à tout acheteur possible, et aussi pour aller voir et amener les clients en perspective à l'établissement du vendeur; et cela, même quand l'employé a le droit de se servir de l'automobile pour son propre usage, quand il le désire.

"Une entente comme celle-là entre un marchand d'automobiles et un vendeur à commission semble comprendre le prêt d'un automobile, et dans le cas d'un prêt, si la personne à qui l'automobile est prêtée, est fiable et compétente, il n'y a évidemment pas de responsabilité de la part du propriétaire..."

Banque Provinciale du Canada vs Ricciardi, 58 K.B. 531 (1935). Held (R.H.):—

"Where a Bank gives certain instructions to use tramways for the conveying of money from a branch to the head office, but it appears that the messenger, was with the knowledge and approval of the officers of the branch, in the habit of using and driving for such transport an automobile borrowed from his father, the Bank is responsible for the consequences of an accident due to the messenger's negligence while on his way back to the branch office: the messenger was in the performance of the work for which he was employed." (Affirmed by S.C.C.)

Lockhart vs Stinson & C.P.R., (1940) 1 D.L.R. 23. Held, in part (R.H.) :—

> **"A handyman employed by a railway company negligently caused injuries to plaintiff whilst conveying to its destination in his own uninsured car a key made by him for company property. The company provided its own means of transportation for employees and had by published notices expressly forbidden the use by employees of their own uninsured cars on company business. Held, the company was not vicariously liable for their servant's negligence; he was not acting within the scope of his employment (McTague J. A. contra)."**

Motor vehicle in charge of borrower or lessee.

A person who lends or leases his automobile in good condition to a competent driver commits no fault, and will not be held responsible for damages caused by the automobile when it is not under his control, and when he acted prudently in lending or leasing it for purposes with which he was not connected :—

> ***Emond vs Legare Automobile of St. Jerome Ltd.*, 65 C.S. 402 (1927); *Tilden Drive Yourself vs Lepine*, 51 K.B. 49 (1931). See also *Decklebaum vs Lapointe*, 70 C.S. 90 (1932); *Morency vs Couture*, 68 C.S. 284 (1929); *Bindon vs Eberth*, 52 K.B. 481 (1932).**[6]

On the other hand if the owner lends his automobile to an inexperienced driver, and an accident happens through the fault of that driver, the owner is jointly and severally responsible with the driver for the resultant damages. *(Lebeau vs Colas et al.*, 51 C.S. 335 (1917)).

> **See also *Silvensky vs Shapiro*, 39 R.L. 322 (1933); *Mitchell vs Turner et al* C.S. 159540 Jan. 1939, *Forest J.* (unrep'd) (owner negligent in lending automobile with defective brakes); *Rozinsky vs Lambert et al.*, 77 C.S. 93 (negligence in lending auto to person known to drink im-**

6. In *Boissy vs Montpetit et al.*, 77 C.S. 517 (1939) plaintiff's minor son was injured by female defendant's automobile, driven at the time by her minor brother to whom she had lent it for purposes of his own. Before taking action plaintiff's attorney wrote to defendant

moderately); *Lanthier vs Archambault et al.*, 45 R.J. 344 (1939).

In *O'Connor vs Wray*, 46 K.B. 199 (1929) *Greenshields, J.* stated, at p. 202:—

"...If a person lends a defective or dangerous thing to another, and the use of the thing by the borrower causes damage to a third person, the owner would be responsible towards the third person if when the contract of loan was made he was aware of the defects and the danger. In like manner, if an owner lends his thing to another to be used by that other, who to the knowledge of the lender, by habits or conduct, is not fit to be entrusted with the use of his thing, which if not properly used, through lack of either knowledge or skill, is liable to cause damage and damage is caused to a third person by the improper use or abuse of the thing, the owner is responsible. The owner is not responsible solely because he is the owner, but because he has been guilty of a fault in entering into a contract with a person whom he knows and has reason to believe, might, through his negligence, want of skill or, even, imprudence, damage another."

In the same case in the *Supreme Court* (1930) S.C.R. 231 it was held per *Newcombe, Rinfret, Lamont and Smith JJ., Anglin, C.J.C., dissenting*, in part as follows (R.H.):

"Article 53 (1) of the Quebec Motor Vehicle Act, R.S. Q., 1925, c. 35, respecting the liability of the owner of a motor vehicle, now reads: '53 (1) The owner of a motor vehicle shall be held responsible for any violation of this Act committed with such motor vehicle or of any regulation made thereunder by the Lieutenant-Governor in Council.' But a similar clause, when enacted by the Revised Statutes of Quebec, 1909, Art. 1406, contained at the end the following words 'and shall be responsible for all accidents or damages caused by his motor vehicle upon a highway or public square. These words disappeared when the article was replaced by the amending Act, Chapter 19, of 1912. By the article as formerly enacted, the liability which is imposed to compensate for acci-

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requesting her to state whether or not her brother was using the car on her instructions and for her benefit, and added: "Your silence will be interpreted as an admission." Defendant did not reply. *Casgrain, J.*

dents or damages, as distinguished from that incurred for any violation of the statute or regulations, was founded upon the concluding sentence. Of these two clauses the first did not expressly, or with any degree of certainty, declare liability for damages; the second did. The charging clause having been repealed, there remains no provision upon which to hold that the owner is bound to compensate when he has committed no fault. Moreover, this interpretation is made conclusive by the implication of subsection 2 of article 53, which establishes the materiality of negligence or improper conduct by the owner. Anglin C.J.C. contra."

In *Leblanc vs Bourque*, 43 R.L. 469 (1936) *White, J.*, held that there was no negligence in lending an automobile to an experienced driver even though the latter possessed no *driving license*. A driving license is not proof of competence, and it has been held that before lending his automobile to another the owner should make careful enquiries regarding the character of the borrower, and that if he fails to make enquiries in that regard the driver should be considered the lender's préposé. *(Avery vs Archambault et al.*, 76 C.S. 200 (1938)).

In *Guertin et al. vs Pouliot*, 70 C.S. 331 (1932) *Denis, J.* held that the owner of an automobile who, during the course of a trip, hands over the control of the car to his fellow passenger, is responsible for an accident caused by the fault of the latter — the fellow passenger being the owner's préposé under the circumstances. (See *Hall vs Johnson*, 66 K.B. 81 (1938) *supra* p. 127).

Murray vs Greenberg, 76 C.S. 336 (1938) :—

A. who was going on a trip to Europe lent his car to B., a competent driver. B. in turn lent the auto to C. (also a competent driver) without A's permission. C. while in charge of the automobile allowed a Mrs. D. to drive it, and while doing so she struck the plaintiff. The plaintiff sued B. alleging that whether B. was a depositary or

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dismissed the action against female defendant on the ground that her brother was a competent driver to whom the car had been loaned for

borrower he alone could make use of the car and was not permitted to dispose of his charge or lend it to another. In either case it was contended he had infringed his contract with A. and had committed an illegal act which rendered him responsible for the damages.

***Held* — that although B. had infringed his contract with A., he was responsible therefor to A. alone; that the owner or possessor of an automobile cannot be held responsible for an accident caused by a person not being some one under his control, or in the execution of his duties or some pupil or apprentice; that the responsibility of a depositary of an automobile towards a third person is not any greater than that of the owner of an automobile towards a third person.**

See authorities cited in report.

Marcus vs Browman, 27 R.L. 256 (1921) held (R.H.):

"If an automobile is taken out of its garage without the permission nor the knowledge of its proprietor, this latter cannot be held responsible for the damages caused by the machine. Even if the driver had obtained permission express or implied from him, he could only, however, be made liable for the acts of the chauffeur, if he had loaned his car to a person without experience."

See also *Gervais vs Moffatt*, 33 R.J. 13 (1926), and *infra*, p. 187.

Motor vehicle in charge of someone else's employee.

The principle of *patron habituel* and *patron momentané* has already been referred to (*supra* p. 120). In this connection the essential elements of employment were set forth by *Howard, J.*, in *Lambert vs Blanchette*, 40 K.B. 370 (1925) at pp. 377, 378 as follows:—

"...the relation of master and servant, or of employer and employee, rises only out of a contract by which the latter leases his services to the former, upon such terms and conditions as the parties may see fit to make.

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his own use, but held that as her failure to reply to the attorney's letter had resulted in unnecessary expense, she was not entitled to costs. *Co.*, (1925) S.C.R. 202.

> **"The employer — and this is an especially important factor — must retain the power not only of supervising the work generally but also of controlling it both as to the method or means of doing it and the time or times at which it shall be done.**
>
> **"Another factor, which, though not conclusive, is at least indicative of the true relationship between the employer and the workman, is the manner in which the services are to be paid for, that is, whether by the time occupied or for a lump sum, or for a sum proportionate to the amount of work done.**
>
> **"Still another factor is whether the employer furnishes in whole or in part the tools or other equipment for doing the work, or whether the workman furnishes his own equipment.**
>
> **"In addition to these, we should, in my opinion, consider whether the workman is bound by the contract to perform the work himself or whether he is free to employ someone else to do it in part. In the latter case, he is almost certainly an independent contractor."**

In *Bain vs Central Vermont Ry.* (1921) 2 A.C. 412, in which the Judicial Committee of the Privy Council affirmed judgment of the Supreme Court (58 S.C.R. 433), *Lord Dunedin* quoted and approved the statement of *Cross, J.*, (who rendered the judgment of the majority in the King's Bench) as follows:—

> **"...it is well established that the master, in whose general service a man is, is not responsible for the tortious act of the man if the control of the master has been, for the time being, displaced by the power of control of another master into whose temporary service the man has passed by being lent (even gratuitously) or sub-contracted. In such a case, it is the 'patron momentané' and not the 'patron habituel' who is responsible..."**

Later in the judgment *Lord Dunedin* remarked:—

"...Payment is not everything; it is a circumstance pointing to who is the employer, but the real test is control, and at the moment of the accident the control of Frost was in the Grand Trunk."

In the *Supreme Court* in the *Bain* case *Brodeur, J.* pointed out, at p. 440:—

"The liability stipulated by our Code in Article 1054 C.C. against the employer rests upon the right of the latter to supervise and direct the work (Sirey 1900-1-56)".

See *Gest vs Berghauser*, 25 K.B. 200 (1915); *Ongrady vs Montreal Jockey Club*, 74 C.S. 349 (1936); *Que. Workmen's Compensation Commission vs Donaldson Lines Ltd.*, 74 C.S. 100.

Travellers Ins. Co. vs Dubé, 52 K.B. 269 (1931). Held (R.H.):—

"Le propriétaire d'une automobile n'est pas responsable du dommage résultant d'une collision de sa voiture avec une autre, alors que son automobile est conduite par un garagiste à qui il l'avait confiée pour être réparée."

See *Rivard J.* at p. 271, and references made to *Hodge vs DeGuire*, 37 K.B. 230 and *Mtl. L. H. & P. Co. vs Quinlan Robertson Ltd.*, 44 K.B. 230.[7]

Wolfovitch vs Cummings, 61 C.S. 499 (1923). Held (R.H.):—

"The owner of an automobile is not responsible in damages for a collision, if, the day before the accident, his chauffeur had delivered his machine in a paint shop for repairs, so that, on the day of the collision, it was not under his control or that of his chauffeur, provided the car was not taken out with his knowledge, consent and authority"

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7. The judgment in the *Quinlan* case was reversed by the S.C.C., but on another point.

Automobile Owners Ass'n. vs Backer, 66 C.S. 559 (1928). Held (R.H.) :—

> "Where the owner of an automobile has made an agreement with the proprietor of a garage,. by which the latter was bound to take care of the car and to deliver it at his residence on demand, the owner is not liable for an accident happening in the course of the delivery, when the automobile is under the control of an employee of the garage."

Bond, J. at p. 562 :—

> "If it be necessary to define the exact nature of the contract, I should consider it a lease of work (as distinguished from the hire of personal services) entered into with an independent contractor, as defined in the case of ***Montreal Light Heat & Power Company v. Quinlan & Robertson,*** (44 K.B. 230), and the quotation contained therein from the remarks of Mr. Justice Howard in the case of ***Lambert v. Blanchet,***. (40 K.B. 379)".

Bond J.'s judgment in the ***Backer*** case was affirmed in appeal ((1929) 47 K.B. 36), (***Tellier*** and ***Howard, JJ.*** dissenting).

Campbell vs Sewell, 46 K.B. 171 (1928). Held (R.H.) :

> "Le propriétaire d'un garage est responsable des dommages causés à l'automobile d'un client, par la faute de son employé, alors que celui-ci conduisait l'automobile du garage à la résidence du client, suivant les instructions du gérant du garage."

McCabe vs Allan et al., 39 C.S. 29 (C.R. 1910). Held (R.H.) :—

> "Two essential conditions must exist to make the owner of a thing liable, as such, for damages from an injury, 1st, the injury must have been caused by the thing, and, 2nd, the thing must have been in his care at the time. Hence, when the owner of an automobile sends it for repairs to a company that carries on the business, and the company, after doing the work, sends out the

machine, in the care of one of its own chauffeurs, to test it, and an accident occurs through the fault of the chauffeur, the owner is not liable for the consequences. The fact that his own chauffeur was in the automobile at the time is immaterial."

Mount Royal Rubber Co. vs Marcotte, 61 C.S. 174 (1922). Held (R.H.):—

"Le maître qui a un charretier à son emploi n'est pas responsable de la faute et de la négligence de cet employé vis-à-vis d'un tiers, qui a retenu ses services, soit à titre de prêt ou de sous-contrat, pour transporter un objet qui a été volé dans la voiture de ce charretier. Ce tiers devient alors temporairement le 'patron momentané' de ce dernier et c'est lui qui est responsable de la perte et non le 'patron habituel'."

Berger et al. vs Gotfredson-Joyce Corp. Ltd., 30 R.L. 479 (1924). Held, in part:—

"...Le propriétaire d'une automobile est responsable des dommages causés pendant qu'elle est prêtée pour fins de démonstration à l'acheteur en perspective, car alors le chauffeur de ce dernier est moins le sien que celui du vendeur."

In *Cannon vs Donnacona Paper Co. Ltd.*, 75 C.S. 349 (1937) it was held that the owner of an automobile is responsible for damage done by the chauffeur supplied by a garage to drive the car for the owner's purposes. (The Superior Court judgment in this case was reversed in appeal, *63 K.B. 525*, but on another point). See also *Finescen vs Senecal*, C.S. 159694 *Duclos, J.*, May 30th, 1938, *(unrep'd)*. In *Morrison vs Winterburn et al.*, 36 R.J. 112 (1930) *Mercier, J.*, held:—

"Le propriétaire d'un camion automobile demeure le patron habituel de son chauffeur, même dans le cas d'un louage de services intervenu entre ce propriétaire et une autre personne pour le transport de matériaux; celle-ci

ne devient pas le patron momentané de ce dernier, lequel demeure toujours sous le contrôle absolu de la personne qui l'emploie et qui lui paie son salaire."

Motor vehicle in charge of son.

If the owner's son is twenty-one years or more of age there would appear to be no reason for putting the owner in any different legal position than if his motor vehicle were in the hands of a friend. In other words, the general rule already set forth should apply. Moreover, it has been held on good authority that the same rule applies even when the vehicle is in charge of a minor son, although the jurisprudence on this latter point appears somewhat contradictory. In the case of a minor it is to be noted that *Article 1054* C.C. provides that the father, or after his decease, the mother is responsible for the damage caused by their minor children, the responsibility attaching, however, only when the father or mother, as the case may be, fails to establish that he or she was unable to prevent the act which caused the damage.

The following are amongst the leading cases concerned with the owner's responsibility when his motor vehicle is in charge of a son:—

Webster vs St. Pierre, 32 K.B. 388 (1921). Held, in part (R.H.):—

"Though it is true that a father is responsible for damages caused by a delict committed by his minor son, it does not follow that he is responsible for a liability imposed by law upon his son, e.g. by The Quebec Motor Vehicles Act, (R.S.Q., art. 1406), which creates against the owner of an automobile a presumption of liability for the damage done by his car, such presumption being extended to the registered owner, whether the real owner or not."

In *Chartier vs Savignac et al.*, 72 C.S. 171 (1934) *Denis, J.* held (R.H.) :—

> **"Dans une action en dommages-intérêts occasionnés par la faute d'un enfant mineur en charge d'une automobile, il ne suffit pas au père de cet enfant, pour échapper à la responsabilité édictée par l'article 1054 du Code Civil d'établir qu'au moment même de l'acte dommageable il s'est trouvé dans l'impossibilité matérielle de l'empêcher, mais il lui faut en outre alléguer et prouver qu'il avait donné à son fils une bonne éducation et de bons exemples et qu'il avait exercé sur lui une surveillance convenable."**

As to *education of children*, see *Carty vs Board of Protestant School Commrs. of the City of Sherbrooke et al.*, 32 R.J. 157 (1926) ; *Dubman vs Rostoker*, 77 C.S. 461 (1939). In *Lapointe vs Leresque*, 76 C.S. 418 (1938) *Pratte, J.* held (R.H.) :—

> **"Dans l'appréciation de la manière dont les parents s'acquittent de leur obligation d'éducation et de surveillance vis-à-vis leurs enfants, il doit être tenu compte du caractère et des penchants de chaque enfant, un enfant désobéissant et d'un caractère difficile devant être l'objet d'une surveillance plus étroite que celui qui est sage et obéissant.**
>
> **"Le père ne saurait échapper à la responsabilité du dommage causé par son fils mineur qui conduisait son automobile en rapportant la preuve qu'il avait averti le garagiste de ne pas laisser sortir sa voiture sans une autorisation de sa part ou celle de son épouse, mais sans spécifier de quelle manière ou en faveur de qui cette autorisation devait être donnée. S'il a interdit à son fils de conduire l'automobile et s'il est au courant d'actes de désobéissance à cet égard, il doit prendre les mesures nécessaires pour l'empêcher d'user de subterfuges pour obtenir la possession du véhicule; il doit défendre expressément au garagiste de remettre l'automobile à son fils."**

Hébert vs Fabi, 71 C.S. 346 (1933) ; *White, J.* held :—

"The owner of an automobile who permits his minor son (eighteen years of age), who lives with him and works for him, to use the car for a pleasure trip, rebuts the presumption decreed by articles 1054 C.C. and 53 of Chapter 35 R.S.Q., if he establishes that the son had a license and was a careful driver."

Belanger vs Whitehead, C.S. 153844, April 8th, 1937, *(unrep'd):*

Plaintiff sued defendant for damages arising from an automobile accident when defendant's automobile was in charge of his minor son (aged 19). It was proved that the son was a competent driver and that he was driving the car for his own use at the time of the accident, the father having lent it to him. Dismissing the action, *Greenshields, C. J.* stated, in part:-

"I am unable to make any distinction between the loan of a car to a minor son, a competent driver, and a stranger who possesses equal competence. Under the circumstances and facts proven the Court is unable to find any responsibility on the part of the defendant, the owner of the car; his responsibility was not engaged towards the plaintiff: ...at the time of the accident the principal defendant's car was being driven by his son, with whom the principal defendant had made an engagement or contract of loan, and to whom the principal defendant had delivered the possession of his car to be used, not for any purpose of the principal defendant but exclusively for the purposes of the person to whom he gave possession of the car: ...the young man to whom the principal defendant gave possession of his car was a competent, careful and skilful driver, and the principal defendant committed no act of negligence in giving the possession of his car to his son, and the principal defendant's responsibility was not engaged, and the principal plaintiff's action against him is unfounded in law;"

See *Asselin vs Jarry,* 40 R.J. 478 (1933). In *Cyr vs Lamarche,* 75 C.S. 203 (1937). *Trahan, J.* held (R.H.):—

"Un propriétaire qui autorise son préposé (dans l'espèce son fils) à se servir de son automobile pour accomplir un acte étranger à ses fonctions, en délègue *ipso facto* la garde juridique à ce préposé et doit, en conséquence, être exonéré de toute responsabilité tant comme commettant que comme gardien juridique, pour le préjudice causé par l'automobile pendant qu'elle est sous le contrôle et la garde du préposé."

Sigouin vs Thibodeau et al., 70 C.S. 128 (1932). *P. Demers, J.* held (R.H.) :—

"Le propriétaire d'un automobile qui avait permis à son fils majeur demeurant avec lui de se servir du véhicule pour se promener avec des amis n'est pas tenu de réparer le préjudice causé à la suite d'une collision lorsqu'il appert que le fils était un chauffeur expérimenté et muni d'un permis de conduire: il n'y a lieu d'appliquer ni l'article 1053 ni l'article 1054 du Code civil."

In *Dulude vs St. Pierre*, C.S. 142853 Nov. 27, 1936, *Duranleau, J. (unrep'd)*, plaintiff's automobile was struck by defendant's automobile when the latter was in charge of defendant's minor son to whom he had lent it. It was proved that the son was accustomed to drive very fast and was, therefore, not a prudent driver, and the father, accordingly, could not successfully plead the exception under *Article 1054* C.C. and was held liable. (See also *Couillard vs Chenard et al.*, 69 C.S. 268 (1931)).

Hibbard vs Plouffe and Plouffe vs Favreau, 43 R.J. 195 (1937). *Verret, J.* held (R.H.) :—

"Le père qui consent à ce qu'un permis de chauffeur soit accordé à son fils mineur, assume comme conséquence les risques qui sont inhérents à la conduite d'une automobile.

"Une fois cette autorisation donnée, le père ne peut repousser la responsabilité que lui impose la loi, en invoquant la bonne éducation donnée à son enfant, et le fait qu'il n'était pas présent lors de l'accident."

Lemieux vs Coté, 69 C.S. 397 (1931). *Sir François Lemieux, C.J.* held (R.H.) :—

> **"Le propriétaire d'un automobile qui permet à son fils majeur, habituellement à son emploi et demeurant chez lui, de se servir de sa voiture sans aucune restriction, est responsable de la faute commise par son fils dans la conduite de sa voiture et des dommages qui en résultent."**

Levesque vs Marin, 74 C.S. 155 (1935). *Langlais, J.* held (R.H.) :—

> **"Le père qui laisse son fils mineur prendre l'habitude de conduire son automobile en sa présence et souvent seul et qui l'a ainsi dirigé vers la probabilité de faits dommageables, ne peut prétendre qu'il lui a donné à ce point de vue une bonne éducation et qu'il n'a pu empêcher le fait dommageable et il doit être tenu en tel cas responsable des dommages causés par son fils, en conduisant son automobile."**

Villeneuve vs Kennedy, 71 C.S. 175 (1932). Held (R.H.) :—

> **"Le père de famille qui conserve le contrôle et la garde d'un automobile lui appartenant, mais qui en laisse l'usage habituel à son fils, est responsable solidairement avec ce dernier des dommages causés par le fils dans la conduite de la voiture".**

Dansereau vs Ross, 39 R.J. 282 (1933). *Surveyer, J.* held (R.H.) :—

> **"Le père est responsable du dommage causé par son enfant mineur habitant avec lui, à moins qu'il ne prouve qu'il n'a pu empêcher le fait qui donne lieu à cette responsabilité légale. Cette preuve ne résulte pas de l'absence, reconnue légitime, du père; en effet le père pourrait, soit préventivement, soit pendant son absence, prendre des mesures qui auraient empêché l'enfant d'accomplir le fait dommageable.**

"Lorsque le père a autorisé le fait à l'occasion duquel le dommage a été causé, il en est responsable, bien que le fait fût en soi irrépréhensible, et qu'il n'y ait pas eu de sa part imprudence à l'autoriser."

Myre vs White, 57 K.B. 557 (1934). Held (R.H.) :—

"Doit être accueillie une demande en dommages-intérêts dirigée contre le père d'un fils mineur qui a blessé un piéton en faisant usage d'une bicyclette achetée par le père pour l'agrément de son fils: l'autorisation donnée par le père de circuler à bicyclette dans les rues publiques implique comme conséquence l'acceptation des risques qui y sont inhérents."

At p. 562 *St. Germain, J.* cited *Dalloz Répertoire pratique, Vol. 10, Responsabilité civile, no. 736* as follows:—

"Jugé que le père est responsable par cela seul que c'est d'un acte autorisé par lui que procède le dommage causé par son enfant, bien que cet acte fût normal et non répréhensible, comme, par exemple, le fait de chasser au fusil, ou de circuler à bicyclette ou en automobile, l'autorisation donnée par le père à ces exercices impliquant comme conséquence nécessaire l'acceptation des risques qui y sont inhérents. (Sirey, 1914. 2. 223)."

Comer vs Kowaluk et al., (1938) 4 D.L.R. 181 (Ont. C.A.). Held, in part (R.H.) :—

"Where a father purchases a car in his own name, finances and insures it, which he turns over to his minor son to be used by the latter in the taxi business, but the father retains title to the vehicle, held that the father having dominion over and control of the car, it was he and not the son who was the 'owner' within the meaning of the Highway Traffic Act and liable for an accident arising from negligent operation."

Corbeil vs Zinman et al., 45 R.J. 360 (1939) :

The son (a competent and licensed driver), without instructions from his father, brought the latter's auto-

mobile to a garage in order that a defect in the brakes might be remedied. The garage had been habitually used by the father for repairs and service to his car, the account for the brake adjustment was chargeable to him, and he admitted that if he had known of the defect he would have had it remedied, and that the adjustment was to his advantage. While testing the automobile, with the garage mechanic standing on the running board, the son (who was driving) suddenly (and without suggestion or instruction from the mechanic) applied the brakes, bringing about a collision with plaintiff's bicycle which was travelling behind the automobile. ***Mackinnon, J.***, held that the father was responsible for his son's negligence, the latter being his father's ***préposé*** under the circumstances.

Motor vehicle in charge of husband or wife.

Beaulieu vs Dame Roy et al., 58 K.B. 220 (1934). Held, *reversing Superior Court*, (R.H.) :—

"Where an automobile belonging to a wife is in charge of the husband in virtue of a general mandate or permission and an accident happens while the husband was proceeding, with his wife's knowledge and acquiescence to call for certain friends of both, the wife is jointly and severally responsible with her husband for the damages resulting from a collision in which the husband and the plaintiff are held equally at fault; the husband was the representative of his wife and at the moment of the accident, in the exercise of his functions."

Hall, J. stated, at p. 223 :

"It is true that he (the husband) was temporarily beyond her physical control but the relationship between principal and agent is not in any way governed by the question of physical control."

In *Pleau vs Forget et al.*, 60 C.S. 48 (C.R. 1921) it was held that a wife is not responsible for damages caused by her husband while driving an automobile belonging to her. In *Silvensky vs Shapiro*, 39 R.L. 322 (1933) it was

held that the husband who during the course of an automobile trip permitted his wife to drive, thereby accepted her as his *préposé*, at least for the purposes of the trip.

See also *Slaunwhite vs Smith*, (1938) 2 D.L.R. 463 (N.S. Supreme Crt.) which held that a wife, who permits her husband to use her car in his business, is not responsible for the negligence of a third person driving the car while returning from a week-end trip to his home, the latter not being her agent or servant or using the car with her consent.

SECTION 7

RESPONSIBILITY FOR INJURY TO PASSENGER

The driver of an automobile is obliged to exercise the care of a *"bon père de famille"* for the safety of his passengers, and he is responsible for damages suffered by a passenger — gratuitous[1] or otherwise — in an accident caused by even a slight fault on his part.

In *Garfinkle vs Eliasoph*, 51 K.B. 34 (1931). *Letourneau, J.* stated, in part, at p. 36:—

> **"...Or, vis-à-vis son passager, même à titre purement bénévole, un propriétaire d'automobile, conduisant lui-même, doit répondre au même titre que d'une fausse manœuvre de sa part,[2] d'une défectuosité de son automobile si, comme dans l'espèce, la relation de causalité ne laisse aucun doute... Sous les articles 1053 et 1054 de notre Code civil, il ne peut être ainsi distingué entre la faute grossière et la faute légère, si celle-ci tout aussi bien que celle-là a pu donner lieu à un accident; la faute légère sera dans ce cas, tout autant que la faute lourde, génératrice de responsabilité."**
>
> **See *Martin A.C.J. in Gauthier vs Pesant et al.*, 64 C.S. 47 (1925); *Archer, J. in Guilbault vs Arcand*, 68 C.S. 42 (1930).**

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1. It is to be hoped that this liability towards *gratuitous* passengers may soon be removed by legislation enacting a suitable *guest law:* (see *infra* p. 253 and p. 326).

2. As to *sudden change of direction* — responsibility of truck driver for injury to assistants, see *Joyce vs St. Georges*, 44 R.L. 283 (1938).

In *Parent & British Colonial Fire Ins. Co. vs Garneau, etc.*, 54 K.B. 335 (1932) *Dorion, J.* referring to a driver's responsibility towards gratuitous passengers stated, at p. 341 :—

> **"Cette responsabilité résulte, ou bien d'un quasi-délit (1053 C.C.), et alors elle est encourue pour la faute la plus légère (*levissima culpa*), ou bien d'un contrat et alors elle n'existe que si le contrevenant n'a pas accompli ses obligations avec les soins d'un bon père de famille (*levis culpa*) C.C. 1064. Cette question est traitée au long dans l'ouvrage de M. Rutsaert: *Le fondement de la responsabilité civile extra-contractuelle* (page 248 et s.)...**
>
> **"Il me paraît hors de doute qu'il y a contrat entre le chauffeur bénévole et celui qu'il transporte, il y a *duorum consensus in idem placitum.* Quelle différence y a-t-il entre le contrat de louage de services et le contrat de prestation de services gratuits? La même que celle qui existe entre la vente et la donation. L'un est contrat à titre onéreux et l'autre, un contrat à titre gratuit. Dans les deux cas les obligations du débiteur sont celles du bon père de famille et ses responsabilités, celles qui résultent de la faute légère."**
>
> **See also *Armand vs Carr,* (1926) S.C.R. 575 at p. 581.**

The driver of an automobile, however, is *not an insurer of the safety of his passengers; nor does the legal presumption arising from S. 53 (2)* M.V.A. *apply in the passenger's favour.* The passenger must prove some fault or negligence before he can recover from the driver or person responsible for the driving of the automobile.

> **See *Perusse vs Stafford,* (1928) S.C.R. 416; *MacIntyre vs Binder et al.,* 76 C.S. 6 (1937); *Cross vs Dollouf,* 73 C.S. 199 (1935); *Larouche vs Pednault,* 48 K.B. 158 (1930); *Beaudry vs Duval,* 37 R.L. 36 (1931); *Silvensky vs Shapiro,* 39 R.L. 322 (1933).**

In certain cases the burden of proof may be shifted from the passenger to the driver. Thus in *Fink vs Herer et al.*, 72 C.S. 509 (1934) it was held, in part (R.H.) :—

> **"...Once he (the passenger) has established that a blow-out occurred on a tire that had been driven from 15000 to 16000 miles on a car which was being driven over forty miles an hour on a road in an icy condition, whereby a dangerous situation was created and the car had started to wabble and shiver, then the burden of proof is shifted to the driver to show that what happened subsequently was the fault of the passenger."**
>
> **See also *supra*, p. 115, *res ipsa loquitur*.**

In *Dubé vs Mtl. Tramways Co.*, 68 C.S. 16 (1929) *Martineau, J.* applied the presumption arising under *S. 53 (2)* M.V.A. in the case of injury to a passenger in a bus, which had slowed up for the purpose of allowing the passenger to alight, but accelerated speed while the passenger was still on the step and before he had time to get off.

When two motor vehicles collide through the common fault of both drivers and a passenger travelling in one of the vehicles is thereby injured, such a passenger has a joint and several claim against both drivers, and, provided he himself is innocent of any relevant fault or negligence, he is entitled to recover the full amount of his damages from either one of the drivers, notwithstanding the fact that one of them may have been more at fault than the other.

> **See *Art. 1106 C.C.* and *Joint and Several Responsibility* (*infra*, p. 314); *Gauthier vs Pesant et al.*, 64 C.S. 47 (1926); *Couillard vs Chenard et al.*, 69 C.S. 268 (1931); *Schaefer vs Greenspon et al*, 73 C.S. 298 (1935) and authorities at p. 304; *Langevin vs Beauchamp*, 44 K.B. 569 (1928).**

Negligence of passenger.

If the passenger himself is guilty of negligence he may be precluded from recovering damages. (See also

infra p. 201). For instance, it is negligence for a passenger to entrust himself to the care of a driver whom he knows to be intoxicated and, who is, therefore, incapable of driving safely, and if an accident then happens as a result of the driver's negligence it has been held that the passenger cannot recover: he assumed the risk and took his chance, and so is barred from recovery. (See *Dandurand vs Les Héritiers Desjardins et al.*, 44 R.J. 76 (1936); *Courberon vs Gignac*, 70 C.S. 215 (1932)).

In *Whitfield vs Gen. Acc. Ass'ce Co.*, 50 K.B. 310, *Bernier, J.* stated, at p. 311:—

> "... Supposons que le demandeur eût été assis à côté d'un chauffeur en état d'ébriété et que délibérément il l'eût laissé conduire en cet état, pourrait-on prétendre en cas d'un accident à la voiture que le demandeur ne serait pas lui-même responsable de l'accident? Si ce chauffeur était directement responsable de l'accident, vu son état d'ébriété, ne peut-on dire que le demandeur aurait été de connivence avec lui et partant, également responsable? Il me semble que l'affirmative s'impose..."

> See also *Kough vs Adkins* (1933) O.W.N., 709 at p. 711; *Delaney vs City of Toronto*, 64 D.L.R. 122; Berry, Law of Automobiles, Vol. 5, Nos. 180, 181.

In *Gauley vs C.P.R. Co.; Birkett vs C.P.R. Co.*, (1930) 65 O.L.R. 477, (S.C. App. Div.). *Latchford, C.J.* citing an American case, stated in part, at p. 481:—

> "It is no less the duty of the passenger, where he has the opportunity to do so, than of the driver, to learn of danger and avoid it if practicable."

Smythe vs Campbell, (1930) 65 O.L.R. 597 (App. Div.):

> C. was driving his car with plaintiff seated beside him, and, in rounding a sharp curve at high speed the car went off the highway killing C. and injuring the plaint-

iff. In plaintiff's action against C's executrix the jury found that the accident was caused by C's negligence, but that the plaintiff was guilty of contributory negligence because "he should have checked up on the driver's speed." *Held*, on defendant's appeal, that the principle of *volenti non fit injuria* was not applicable; although the plaintiff knew from experience that C. was a fast driver he also knew that C. had always driven him carefully, and had no reason to anticipate that fast driving on that occasion would result in an accident. "Assuming that the speed was dangerous and that the plaintiff knew it and that, consequently, the plaintiff placed himself in a dangerous position, that is not enough — sciens is not volens." (Riddell, J. A.) On plaintiff's *cross-appeal* it was held by a majority that there was no evidence to sustain the jury's finding that the plaintiff was guilty of negligence contributing to the injury. The *Gauley vs C. P. R.* and *Birkett vs C. P. R.* cases were distinguished.

Kerr vs Stephen, (1930) 1 W.W.R. 896 (B.C., S.C.):

Plaintiff, while a member of a family party on a motorcar outing, was injured as the result of her brother's negligence in driving the car, which was owned by her step-father, and sued her brother for damages. The plaintiff did not drive a car at all and trusted solely to her brother to do the driving. *Held*, that it could not be said that the plaintiff was in any way in control of the car and, therefore, identified with her brother's negligence (*G. T. R. v. Dixon*, 47 O.L.R. 115, distinguished; *Hammer and Luthmer v. Hammer and Luthmer*, (1929) 2 W.W.R. 130, held almost undistinguishable).

Dixon vs Grand Trunk Ry Co., (1920) 47 O.L.R. 115 (App. Div.):

Plaintiff and four other men wishing to go for an auto drive arranged that one of them S. should procure the car, which he did, by hiring it from a garage. S. was the only one of the party who could drive a car, and he drove it through the city streets with plaintiff and the other three men in it. The car collided with the def-

endant's train at a level crossing, and plaintiff who was injured took action for damages. The jury found the railway company primarily at fault, but also found that the accident could have been avoided "by proper care of those in charge of the auto." *Held*, that S. in driving the car was acting as the agent or servant of his companions; the five men in the car were the persons having the control of it; and the plaintiff being one of them was, therefore, guilty of contributory negligence. The rule as to non-identification of passenger with driver was held not applicable. (*Mills vs Armstrong*, The Bernina (1888) 13 A.C. 1 distinguished).

Milligan et al. vs Crown Life Ins. Co., (1938) 1 D.L.R. 210 (P.E.I. Supreme Ct.). Held, in part (R.H.):—

"Partners using a partnership car for a pleasure trip and not in connection with the partnership business are not engaged in a joint adventure as will render the partner riding as passenger jointly responsible for the negligence of the partner driving the car and a participant in the violation of law by the other."

Galibert vs Vaillancourt, 53 C.S. 521 (1915). Held:—

A person who, knowing that a chauffeur has taken his employer's car without permission, accepts the chauffeur's invitation to go for a ride becomes the chauffeur's accomplice and as such is responsible for damages sustained by the automobile in an accident.

Common Carriers.

The principles referred to on p. 150 et seq. apply generally to common carriers of passengers. Reference should also be made to *Tramways* (*infra* p. 200). *A public carrier is not an insurer of its passengers' safety and is not liable for injury to a passenger in the absence of some fault or negligence. (Mtl. Tramways Co. vs Pistchick*, 41 K.B. 324 (1926); *C.P.R. vs Pyne*, 48 D.L.R. 243 (P.C.

1919), see *Duff, J.* at p. 244; *Mills vs C.P. Steamships,* 65 C.S. 148 (1926)).

There is an important distinction between the obligations arising from the carriage of persons and those arising from the carriage of goods. The carrier's position in the latter case is set forth in *Article 1675* C.C. as follows:—

> **"They are liable for the loss or damage of things entrusted to them, unless they can prove that such loss or damage was caused by a fortuitous event or irresistible force, or has arisen from a defect in the thing itself."**

At one time there was some confusion as to whether or not that presumption applied also to the carriage of persons. The better opinion is that it has no such application, and the following are amongst the leading cases on this point:—

Mtl. Tramways Co. vs Pistchick, 41 K.B. 324 (1926). Held (R.H.):—

> **"The presumption enacted by Article 1675 of the Civil Code as to the responsibility of a carrier regarding things given into his care does not apply to persons, and the necessity to proving fault on the part of the carrier rests upon the passenger who suffers damages while in the care of the latter."**

Duval vs De Gagnon et vir., 48 K.B. 202 (1929). Held (R.H.):—

> **"Carriers of passengers are not insurers of the safety of the passengers whom they carry. They are not liable for accidents resulting in damages to passengers where no fault is charged against them."**

Greenshields, J. at p. 205:—

> **"I do not hesitate to express the opinion that the Articles of our Code, 1672 and following, relating to common carriers of goods have no application to the carrier of persons..."**

Legaré vs Mtl. Tramways Co., 61 C.S. 291 (1923). Held, in part (R.H.) :—

> **"L'article 1675 C.C., qui rend les voituriers 'responsables de la perte et des avaries des choses qui leur sont confiées à moins qu'il ne prouvent que la perte ou les avaries ont été causés par cas fortuit ou force majeure', est une loi qui ne s'applique pas aux personnes."**

MacIntyre vs Binder et al., 76 C.S. 6 (1937). Held, in part (R.H.) :—

> **"Where the victim of a motor car accident is a paying passenger in a taxi, and the defendant (driver of the car) might be considered as a public carrier, article 1675 C.C. does not oblige the defendant to prove irresistible force or fortuitous event in order to free himself from responsibility. But in view of article 1053 C.C., the defendant is responsible if the accident is due to his fault or negligence, however slight it may have been..."**

A common carrier for hire is legally *obliged prudently and safely to convey its passengers to their destinations.* At such points as it allows its passengers to get on or off it must provide a reasonably safe place for the purpose. *(Blakely vs Mtl. Tramways Co.*, 20 D.L.R. 643 (C.R. 1914)). And where a tramcar stops at a point a little past a platform intended for disembarkation of passengers, it has been held to be the duty of the conductor to warn the passengers of the danger. (*Mtl. Street Ry. Co. vs Chevandier*, 24 K.B. 48 (1915). See also *Williams vs Toronto & York Radial Ry. Co.*, 48 D.L.R. 346 (1919)). In *Brunsterman vs Winnipeg Electric Ry. Co.*, 59 D.L.R. 240 (1921) the street railway company was held not liable when a passenger, in alighting, stepped on a small stone and was injured. It was held that the stopping place was otherwise a safe and proper place for passengers to alight, and that

there was no negligence on the part of the motorman not to have noticed the stone.

Winnipeg Electric Co. vs Roadhouse, 45 C.R.C. 229 (Supreme Court 1936). Held (R.H.) :—

> **"A carrier by motor bus is not required to provide a safe landing place but if there is an obvious one he should use it and where a bus could have been driven to and alongside this safe landing place but instead stopped some distance out on the unsafe roadway and a passenger fell while alighting there is negligence."**
>
> **See jurisprudence cited in 44 C.R.C. 59.**

Kuczeryk vs Toronto Transportation Comm., 46 C.R.C. 274 (Supreme Court 1937). Held (R.H.) :—

> **"There is a duty on a street railway not to place a passenger in danger at the moment of alighting or immediately thereafter. Hence where a motorman operating a one man car passed the usual stopping place at the street where a passenger intended to alight and at her signal suddenly stopped the car to permit her to alight, after which she was struck by a passing automobile which she saw coming, the street railway will be held liable, the jury having negatived negligence on the part of the driver of the automobile and of the passenger."**

See *Evans vs Lalonde et al.* (47 C.S. 374) where a passenger and automobile driver were both held at fault, and *Chartrand vs D'Aoust Frenette Auto Ltd.,* (1933) 4 D.L.R. 813 (C.S.) where it was held that a passenger was solely to blame, in *getting off a streetcar while it was moving* [3]. In the latter case it was held that the auto driver had rebutted the presumption of fault against him.

DeCourcey vs London Street R., (1932) O.L.R. 226 (C.A.). Held (R.H.) :—

3. See also *Vdovjak vs Mtl. Tramways Co.,* (unrep'd) *infra,* p. 203 n.

"The driver of a motor bus owes a duty to his passengers not to drive so close to a vehicle ahead, that, in any emergency created by driver of that vehicle, he will have to apply his brakes so violently that a passenger is thrown from a seat in the bus and injured.

"Also while a carrier is not an insurer of his passengers' safety, he owes a duty to his passengers to provide seats so protected that they cannot be injured by being thrown therefrom upon an emergency application of the brakes." [4]

Warren vs Gray Goose Stage Ltd., (1938) 1 D.L.R. 104, (1938) S.C.R. 52. Held, in part (R.H.):—

"Failure to make proper inspection of a bus operated as a common carrier is negligence for which the carrier is liable for injury to a passenger caused by a break in the steering apparatus occurring in the course of operation; whether there was such negligence and want of proper inspection in a question for the jury to determine under the evidence, and they are not necessarily bound by the testimony of the defendant that such inspection was in fact made."

In *Elliott vs Toronto Transportation Comm.*, 32 C.R.C. 200 (1926) plaintiff fell while boarding a car, and the jury found that an opening in the steps might have been improved for greater safety. *Held*, that the jury's

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4. See *Dumas vs Mtl. Tramways Co.*, 71 C.S. 167 (*supra* p. 49).

The fact that in a tramcar of the class commonly known as "*one man cars*", a single employee does the work allotted in the older types of cars to a motorman and a conductor, forms no basis of liability on the part of a tramway company in the absence of definite proof of relevant fault or negligence. Thus, in *M.T.C. vs St. Louis*, K.B. 875, 22nd Dec. 1936 (unrep'd), the trial judge had held, *inter alia*, that the fact of permitting a tramcar to be in charge of a single employee constituted negligence *per se*, and for that and other reasons the company was held responsible for the accident. Unanimously reversing that decision, the Court of K.B. found no relation of cause and effect between the one man car and the accident, and dismissed the action.

finding did not warrant a judgment in plaintiff's favour as a master is not bound at once to adopt the latest improvements and appliances *(Toronto Power Co. vs Pashwan,* (1915) A.C. 734, 738), and that the same principle applied to a carrier of passengers.

For cases of *falling while getting on and off tramcars* see *infra* p. 202 et seq.

See *S. 44* M.V.A. for special rules regarding *autobuses,* and local by-laws for regulations governing operation of taxicabs, autobuses, etc.

SECTION 8

RESPONSIBILITY FOR INJURY TO PEDESTRIAN

Reference should be made to *Control* (*supra* p. 41), *Lookout* (p. 59), *Speed* (p. 78), *Sounding Device*, and *Brakes* (pp. 33, 35).

The presumption under *S. 53 (2)* M.V.A. operates against the motorist in case of injury to a pedestrian on a public highway. [1] For the meaning and extent of that presumption see *supra* p. 107 et seq. The presumption applies whether the pedestrian is an adult or a child. However, drivers are obliged to exercise special care for the safety of children on the streets, and facts which might entitle a defendant to set up contributory negligence in an adult may not succeed in the case of a child because the same rules are not applicable. [2]

S. 36 (1) M.V.A. provides that every person driving a vehicle when meeting a pedestrian shall pass the pedestrian at a distance of not less than 8 feet; (see *Grenier vs Landreville*, 65 C.S. 249 (1927); *Ménard vs Lussier*, 50 C.S. 416 (C.R. 1916)). [3] Reference should be made to local

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1. See, for meaning of words "*public highway*", *supra* p. 107.

2. See *Mayer vs Prince Albert*, (1926) 4 D.L.R. 1072 (Sask. C.A.) and *infra* p. 169 et seq.

3. In *Beaulne vs Chalifoux*, C.S. 165303, 20th March, 1939, (unrep'd to date), *Casgrain, J.* stated that it was clear that in a city like Montreal it would be impossible for the driver of an automobile to leave eight feet between his vehicle and every person standing on the sidewalk or the edge of the sidewalk.

traffic by-laws. In so far as Montreal is concerned the following articles of *By-law 1319* are important:—

"*Article 17.*— The driver of any vehicle shall yield the right of way to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk, at an intersection.

"Whenever any vehicle has stopped at a marked crosswalk or at any intersection to enable a pedestrian to cross the roadway, it shall be unlawful for the driver of any vehicle approaching from the rear to overtake and pass such stopped vehicle.

"*Article 18.*— Pedestrians must cross streets only at crosswalks or at the other places especially designated for such purpose by the Director of the Police Department and where drivers are required by law to reduce speed."

By *Articles 14* and *15* the Director of the Police Department is authorized to establish and maintain crosswalks and safety zones at such places as he may deem necessary for the protection of pedestrians.

"*Article 19.*— Pedestrians shall move, whenever practicable, upon the right half of crosswalks.

"*Article 20.*— It shall be unlawful for any person to stand in a roadway for the purpose of soliciting a ride from the driver of any private vehicle.

"*Article 21.*— It shall be unlawful for any person to stand on any sidewalk or on any public thoroughfare or at any parking place whatever, for the purpose of soliciting the privilege of watching or guarding any vehicle, or of offering his services to clean, wipe or polish a vehicle, without a special permit from the Director of the Police Department.

"*Article 22.*— It shall be unlawful for any person alighting from a tramcar to pass immediately in front of such standing tramcar, unless otherwise directed by a police officer or a traffic control signal; any such person, in the absence of a safety zone, shall walk straight to the side-

walk on the right side of the street and then cross the roadway at the nearest crosswalk only after the tramcar has departed.

"In any case, it shall be unlawful for a pedestrian to cross the street at the rear of a standing tramcar.

"*Article 23.* — Every pedestrian waiting for a tramcar shall remain on the sidewalk until the same is at a distance of fifty (50) feet from the stopping place.

"*Article 28.* — It shall be unlawful for any person to board or alight from any tramcar or vehicle while such tramcar or vehicle is in motion.

"*Article 90.* — It shall be unlawful for any person to board a vehicle or a tramcar or to attach himself thereto with a view of stealing a ride."

Traffic lights.

Pedestrians, as well as drivers of vehicles, are governed by the city traffic lights. (See local by-laws, e.g. *Montreal By-law 1319, art. 10).* In *Sankey vs Leduc Automobiles Ltd.,* 45 R.J. 92 (1938), *Forest, J.* held that a pedestrian, who has started to cross a street at an intersection on the green light, is entitled to continue to cross, without running, notwithstanding the fact that the light changes to red before he reaches the other side, and motorists proceeding at right angles must yield him the right of way until he reaches the sidewalk.

Pedestrians' rights on highway.

In *Nish Yashan, es-qual. vs Burton et al.,* 37 R.L. 115 (1930), *Greenshields, J.* stated, at p. 123:—

"...The vehicle, dangerous or otherwise, has no right to the streets superior to the pedestrian. The latter may at all times make use of the highway, and every part thereof, unless restrained or controlled by municipal or domestic

legislation. Subject to such restrictions as local or municipal law may impose, our Courts will recognize the right of all wayfarers or pedestrians to make free and peaceful use of the City streets..."

Gagnon vs Robitaille et al., 16 R.L. 235 (1909). Held in part (R.H.):—

"Pedestrians and drivers of vehicles have equal rights upon the roadbed of a street or highway, when the conditions are equal; both must use prudence and care in the exercise of their respective rights upon the highway..."

See also *Legault vs Kander*, 24 R.J. 143 (1918); *McIntosh vs Cedilot*, C.S. 125407, *Mercier J.* 1st April 1935 (unrep'd); *Low vs C.P. Express Co.*, 77 C.S. 31 (1938), 44 R.J. 514.

Dussault vs City of Montreal, 39 K.B. 139 (1925). Held (R.H.):—

"Le fait pour un piéton de traverser une rue, ailleurs qu'à l'encoignure, ne fait pas nécessairement peser sur lui une présomption de faute. D'autre part le fardeau de la preuve que l'accident, survenu à ce piéton du fait qu'une motocyclette l'a alors frappé, n'est pas du à la négligence ou conduite repréhensible du propriétaire de la motocyclette, repose sur celui-ci."

See authorities cited by *Rivard, J.*

Becker vs Goodman, 51 K.B. 159 (1931). Held (R.H.), *(Lafontaine C.J., Tellier, Bond, Galipeault JJ.; Hall, J. dissenting)*:—

"Where in an action in damages instituted by a pedestrian against the owner of a motor truck, it appears that the driver saw the plaintiff crossing a street in front of him, and contented himself with merely blowing his horn when he could easily have stopped, the employer is responsible for the damages suffered by the victim.

"Under the circumstances the contention that the driver had the right of way between street intersections

and that, the moment he sounded his horn, the plaintiff was supposed to stop, cannot be accepted."

Bond, J. at p. 162:—

"...It is submitted that under the circumstances Desjardins (the chauffeur) was fully justified in his contention that being between two street intersections and proceeding at a moderate speed, he was not bound to do more than sound his horn as a warning to respondent, and that he had a right to assume that the latter would thereupon act in the usual and normal manner, and so as to allow the truck to pass. This proposition of law, it cannot be too strongly emphazised, is entirely erroneous. The use of the streets belongs to foot-passengers as well as to truck proprietors or other drivers of vehicles, and those using the streets must do so in a manner such as not to cause injury to others using them."

Seneeal et al. vs Mayer, 58 K.B. 22 (1934). Held (R.H.), *(Letourneau, Hall, Bond, JJ.; Rivard* and *Galipeault, JJ. dissenting)*:—

"Where a woman (the respondent) proceeding north on a street (Montreal) crosses a street intersection, not from corner to corner but somewhat diagonally, and the driver of a truck moving westward, proceeding at ten to twelve miles an hour at a distance of three or four feet from the curb, having seen the respondent about fifteen feet in front of him and about three feet from the curb, sounds his horn instead of veering to the left or reducing his speed if not stopping, with the result that the respondent being terrified by the sound of the horn, took a step back and was struck and knocked down, the responsibility for the damages sustained will be divided in the proportion of one fourth against the respondent and three fourths against the driver and his employer."

Joleaud vs Fortier, 37 R.L. 210 (1930). Held, in part (R.H.):—

"Ne constituent pas faute commune, même chez un adulte et surtout chez un enfant, le fait pour ces derniers

de s'engager sur la voie publique sans voir une automobile qui circule en contravention avec les règlements du traffic, et, après l'avoir vu, de faire de faux mouvements sous l'empire de la peur."

Doré vs Durieux, 67 K.B. 214 (1939). Held, in part (R.H.) :—

"A pedestrian is entitled to cross a street at an intersection when all vehicles are stationary. The driver of an automobile should not start his car without warning pedestrians and assuring himself that nobody would cross the street. It matters little whether a traffic officer is on duty or not because the driver is obliged to exercise care in all circumstances."

See also ***Sevigny vs Bourdon,*** **40 R.L. 125 (1932).**

Negligence of pedestrian.

In *Armstrong vs Rubenstein,* 27 R.L. 324 (1921), *Archer, J.* held that although pedestrians may cross the streets at other places than the ordinary crossing, in doing so they must take special care. (See also *Hudon vs Jacques,* 61 C.S. 344 (1923)). In *Kolimeir vs Mtl. Tramways Co.,* 64 C.S. 409 (1926) it was held that a pedestrian who crosses diagonally a street on which tramways run does it at his own risk and peril.

Vezina vs Motors Specialty Co., 70 C.S. 337 (1932). Held (R.H.) :—

"Un piéton qui traverse une rue de la cité de Montréal entre deux intersections ne saurait réclamer de dommages-intérêts, à raison de blessures subies en se heurtant à une bicyclette, si aucune faute n'est imputable au bicycliste."

Tremblay vs Roy, 70 C.S. 403 (1931). Held :—

"Le piéton qui prend sur lui de traverser une rue à un endroit autre que l'intersection, commet une impru-

> **dence dont il doit être tenu compte par le tribunal pour lui attribuer une part de responsabilité, s'il est frappé sur la chaussée par une automobile circulant à une allure répréhensible."**

At p. 405 of the report reference was made to *Berry, Law of Automobiles, 5th Ed., No. 330, Note 87* as follows:

> **"A pedestrian must exercise continued vigilance while crossing a street."**

In *Coté vs Cooper*, 36 R.L. 453 (1930) *Stein, J.* held, in part, that the rule established for railway crossings — "STOP-LOOK-LISTEN" should also be followed by a person who leaves a sidewalk to cross a street on which automobiles are being driven. (See *Bernatchez vs Castonguay*, 40 R.J. 273 (1934)[4]; *Hasewich vs Grapentine*, (1938) 1 D.L.R. 626). In *Lemieux vs Paquin*, 42 R.L. 81 (1935) it was held that it is an unpardonable fault for an elderly person to cross a frequented street without looking to see if his way is clear.

Lalonde vs Lymburner, 23 R.L. 238 (C.R. 1916). Held, in part (R.H.) :—

> **"Le piéton qui, au lieu d'attendre qu'une rue soit libre pour passer d'un de ses côtés à l'autre la traverse en courant, la nuit, au devant d'un tramway, et est frappé, de l'autre côté du tramway, par un automobile, est coupable de négligence et de faute commune."**

Dandurand vs Samas, C.S. 176947, *Gibsone, J.*, 12th May 1938 *(unrep'd)*:

> **Plaintiff, a priest robed in black, while crossing a street diagonally (SW. to NE), between intersections, was struck by defendant's truck going north at 15 M.P.H. Owing to darkness and a badly lighted street defendant's chauffeur saw plaintiff for the first time when he was only 10 feet away. Plaintiff, on seeing the truck at 25 feet distance, first hurried forward and then stepped back and was struck.**

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4. In *Hruby vs Desjardins*, C.S. 174279, Jan. 1940 (*unrep'd* to date) the plaintiff (a pedestrian) was struck by defendant's automobile while crossing a street. *Curran, J.*, held the plaintiff partly responsible

Gibsone, J. held the accident was due solely to plaintiff's imprudence and dismissed the action.

Richer vs Weinrauch, C.S. 180616, 23 Oct. 1939 *(unrep'd)*:

> Defendant was driving his automobile alongside a moving tramcar which obscured his vision to the left. Suddenly, and at a place other than an intersection, plaintiff (a pedestrian) emerged from in front of said tramcar and came in contact with defendant's automobile. Defendant was driving at a reasonable speed and, although he swerved his car to the right, was unable to avoid the impact in the short distance and in the space of time at his disposal. *McDougall, J.*, in dismissing the action, stated, in part:—
>
> "The law does not expect the driver of an automobile to do the impossible in an emergency not of his creation, and which has been brought about by the acts of a pedestrian suddenly emerging in the path of his motor vehicle."

Que. R.L. & P. Co. vs Rhéaume, 57 K.B. 505 (1934) dealt with an *intoxicated pedestrian*. Held (R.H.):—

> "Lorsqu'un piéton, sous l'influence des liqueurs enivrantes, vient se jeter en avant d'un tramway en marche sous lequel il est entraîné, il ne peut imputer aucune faute au wattman lorsque ce dernier, ayant à prendre une décision rapide et agissant de son mieux, fait reculer le tramway pour dégager la victime de sa position périlleuse: cette manœuvre était celle que raisonnablement devait être exécutée et qui aurait été tentée par le plus grand nombre de personnes, dans les circonstances."

In *Chartrand vs D'Aoust Frenette Auto Ltd.*, (1933) 4 D.L.R. 813, (see *supra* p. 158), *Surveyer, J.* cited *Barron's Canadian Law of Motor Vehicles*, p. 478, as follows:

> "Great as the statutory protection is, in behalf of passengers, they must not take obvious and unnecessary risks, relying on the driver of a car under conditions of danger which they themselves create."

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for the accident "in carrying a bottle of milk and a crow-bar across a public road on the bias, and that his attention was riveted upon the articles he was so carrying and which prevented him from avoiding traffic that could possibly cause him injuries."

See also *Barron's Supplement*, p. 712; *Wilson vs Rebotoy*, (1930) 1 D.L.R. 273, 64 O.L.R. 458; *Seiden vs Pinkerton*, (1926) 31 O.W.N. 325; *Evans vs Lalonde et al.*, 47 C.S. 374 (1915).

Lemieux vs Mtl. Tramways Co., 37 R.L. 123 (1929). Held, in part (R.H.) :—

"Constitue une négligence grave lui enlevant tout recours contre la compagnie, le fait pour un passager qui descend d'un tramway de traverser la rue en arrière de ce tramway et de s'exposer ainsi à se faire frapper par un autre tramway venant en sens inverse."

See also *infra* p. 206 et seq.

A pedestrian struck by a *horse-drawn* vehicle cannot, of course, invoke the presumption under *S. 53 (2)* M.V.A. against the person responsible for such a vehicle, nor is that presumption applicable where a pedestrian is struck by a *tramcar*. (See *infra* p. 206).

For a case in which the principle of *"agony of collision"* was unsuccessfully invoked in a pedestrian accident, see *Pleau vs Forget et al.*, (*supra* p. 55).

In *Gadbois vs Forest*, 42 R.J. 395 (1936) it was held that a pedestrian who walks on the left side of the roadway acts with prudence; in that position he is able to see all vehicles coming in the opposite direction and avoids the danger of being struck from behind. For cases of injury to a pedestrian *trespasser* see *infra* p. 208.

Children.

As stated above, the driver of an automobile is obliged to take special precautions to safeguard children on the streets. *(Chaussé vs J.J. Joubert & Co. Ltd.*, 65 C.S. 144 (1926)). And where children are playing on the street in a thickly populated part of the city it is the duty of

an automobile driver to have his car under such control that he can stop "within a very short distance" in order to avoid an accident. (*Vincent vs Ashby*, 74 C.S. 347 (1936); *Perrault vs Huncault*, 44 R.L. 127 (1937)).

Mtl. Tramways Co. et al. vs Turgeon, 26 K.B. 496 (1917). Held, in part (R.H.):—

> "Les personnes qui se servent des rues publiques pour leur industrie, par exemple, une compagnie de tramways ou une corporation municipale y faisant des travaux, sont tenues à une stricte responsabilité vis-à-vis des enfants qui parcourent ses rues, et sont obligées de prendre les plus grandes précautions pour ne pas les exposer à aucun danger."

Ruel vs Crépault, 43 K.B. 258 (1926). Held, in part (R.H.):—

> Dans un endroit populeux, où la rue est étroite et bordée de maisons, le fait qu'un enfant se précipite soudainement dans la rue pour la traverser devant un automobile en mouvement, ne constitue pas un cas fortuit."
>
> See also ***Bernatchez vs Castonguay*, 40 R.J. 273 (1934).**

St-Amant vs Ostiguy and Flibotte, 43 R.J. 275 (1937). Held, in part (R.H.):—

> "Quand l'accidenté est un enfant, et que l'accident arrive dans le voisinage d'une école, le conducteur de l'automobile doit agir avec plus de prudence. S'il agit au contraire, il doit en porter la responsabilité.
>
> "L'automobiliste n'est tout de même pas responsable de la légèreté de l'enfant, parce que les piétons et les automobilistes ont des droits égaux à la rue, les premiers n'étant pas plus dispensés que les autres à être prudents."

Stebbe vs Laird, (1938) 1 D.L.R. 240 (Man. K.B.). Held (R.H.):—

> "It is negligence to attempt to pass within a foot or so of a child walking on the highway without first having

> **warned her. A motorist driving past a public park where he could see children walking on the highway is liable for the death of a child struck by the side of his car, whether the accident was caused by the child unknowingly stepping into the side of the car, or by the defendant, having swerved at the last moment, missing her with the front of the car but striking her with the side. Even if the child was negligent by stepping into the path of the car without looking, the defendant had the last opportunity of avoiding the accident and was guilty of ultimate negligence."**

In *Poulin vs Savard*, 40 R.J. 357 (1934) *Stein, J.* held that the fact of a child sliding on a sleigh from his parents' house onto the roadway, and being thereupon struck by a truck, did not constitute "fortuitous event."

Laterreur vs Cité de Montréal, 72 C.S. 180 (1934). *Guibault, J.* held in part (R.H.) :—

> **"...La présence d'un enfant sur la chaussée d'une rue de la Cité de Montréal est une éventualité susceptible de se produire à tout instant et en prévision de laquelle un chauffeur prudent doit toujours avoir sa voiture sous contrôle sans jamais pouvoir se permettre aucune distraction. La Cité de Montréal est responsable des suites d'un accident survenu à un enfant de six ans qui a été blessé par un camion d'arrosage sans qu'il y ait lieu d'appliquer le principe de la faute commune au cas où quelque imprudence pourrait être reprochée à la victime."**

But there are obviously *limits to a driver's responsibility* in cases of this kind. For example, where a young boy rushes out from behind a tramcar directly in front of an approaching automobile, which is being driven in a legal and proper manner, the driver cannot be held responsible for striking the child if he did everything possible under the circumstances to avoid an accident; see:—

McCallum vs Hooper, 67 C.S. 139 (1929); ***Henderson vs Rosen,*** 76 C.S. 1 (1937)[5] where a child, five years of age, ran out from behind a closed truck; ***Ross vs Reopel,*** (1938) S.C.R. 171 — boy crossing street after alighting from rear door of, and going behind auto; ***Robillard vs Hébert,*** 45 R.L. 469 (1939) — child injured by horse drawn vehicle proceeding slowly on right side of roadway, driver held not responsible.

See, however, ***Desroches vs St. Jean,*** 44 K.B. 562 (1928) in which the driver was held partly responsible where a child started to run across the roadway at an intersection from behind another vehicle which obstructed the driver's view. See also authorities cited in that report, and ***Boucher vs Audette et al.,*** 77 C.S. 376 (1939).[6]

Gouin vs Barrière, 75 C.S. 132 (1937). Held (R.H.):

"Lorsqu'un enfant, pour traverser une rue, fait irruption derrière une automobile stationnaire alors qu'il ne reste qu'un espace de 5 pieds entre cette voiture et une autre automobile s'avançant en sens inverse, cette irruption rapide et imprévisible de l'enfant, heurté par cette automobile, est la cause déterminante de l'accident. On ne saurait reprocher au propriétaire de cette voiture de l'avoir conduite à une allure exagérée, car l'accident se fût produit, même si le défendeur n'eût conduit son véhicule qu'à une vitesse de 10 milles à l'heure."

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5. In the *Henderson* case a Petition in Revocation of judgment was granted on the ground of new evidence, and at a new trial the action was maintained. However, the principle above set forth is nevertheless sound. In *Beaulne vs Chalifoux*, C.S. 165303, 20th March, 1939, (unrep'd to date), defendant, driving his car west (between intersections) noticed a child standing still in front of a parked auto on the north side of the street. Suddenly the child started to run across the road and came in contact with the right side of defendant's car. On hearing the impact defendant applied the brakes which he had not applied previously, as there was no apparent danger. *Casgrain, J.* held that while the child (aged 4) was too young to be considered legally at fault, the defendant could not be held responsible for the accident, and the action was dismissed.

6. See also *Marquis vs Prévost et al.*, 45 R.J. 494 (1939), — truck being driven at 25 m.p.h. near intersection of lane where children were playing — child running out of lane and across road — common fault.

Henry Morgan & Co. Ltd. vs Bloomfield, 55 K.B. 452 (1933). Held (R.H.) :—

> **"Where a delivery truck proceeds at a speed of ten or twelve miles an hour and the chauffeur observes at a distance of fifty to seventy-five feet two children quietly standing on the sidewalk, a little girl seven years of age holding by the hand her small brother four years of age, it cannot be held that the chauffeur should have anticipated that one of the children might suddenly dash from the sidewalk to the roadway when the truck was in the very act of passing and when the front part of the vehicle had already passed. The chauffeur, in the circumstances, was not guilty of negligence in having failed to sound his horn when he saw the children standing on the sidewalk."**

Giguère vs Roy, 42 R.L. 128 (1935). Held (R.H.) :—

> **"Un enfant, effrayé par un chien, court dans la rue, se jette sur une automobile qui passe et se fait tuer: le propriétaire de l'automobile n'est pas responsable.**
>
> **"Ce n'est pas là un fait ordinaire auquel un chauffeur d'automobile doit s'attendre."**
>
> **See also *Couture vs Proulx et vir.*, 40 R.J. 400 (1934).**

In Borg vs Mtl. Tramways Co. (C.S. 141880, 1st Feb. 1936, *unrep'd) Casgrain, J.* held that there was no fault on the part of the motorman when two children started to run across the street at a time when another tramcar was approaching in another direction, making it impossible for the motorman to see the children until his tramcar was about 25 feet away from them. (See also *Beaubien vs Mtl. Tramways Co., infra* p. 206).

Becker vs Sauvé, 19 R.J. 309 (C.R. 1913). Held (R.H.) :—

> **"The sole cause of the accident in this case, was due to the boy's own act of imprudence by attempting suddenly to cross the road in front of defendant's motor car, at**

a time when the latter absolutely could not be stopped, and without having taken the ordinary precaution of looking before so doing.

"Under the circumstances of the case the speed of the motor car, at the time of the accident, cannot be taken into consideration, as it was in no way the cause of such accident."

Nantel vs Hotte, 33 R.L. 148 (1927). Held, in part (R.H.) :—

"Le propriétaire d'une automobile, qui conduit avec prudence et à une vitesse modérée, n'est pas responsable des dommages causés, s'il frappe un enfant âgé de 10 ans qui se précipite soudainement du trottoir dans la rue, à un endroit autre que l'angle de la rue."

See also *Morin vs Lacasse*, 69 C.S. 280 (1931).

Responsibility of parents.

Hoodelman vs Numeroff, 74 C.S. 498 (1936). *Casgrain, J.* held (R.H.) :—

"Where a child of four years of age suffers injuries as a result of having been struck by an automobile and an action in damages is instituted by the father as tutor to his minor son, the ground of defence setting up that the plaintiff as father of the victim, as well as the mother, were at fault in allowing their child to play near the highway when nobody was there to look after it, cannot be upheld, unless it be established that their fault alone was the cause of the accident, so that there was no fault on the part of the defendant.

"Such a child does not commit a fault by running into the roadway when an automobile is advancing. It has the right to recover all the damages sustained from the person who by his fault and negligence, contributed to the accident due in part to its own act."

See authorities cited in report.

Lafortune vs Dupuis, 17 R.J. 194 (1911). Held (R.H.) :—

> **"La responsabilité d'un accident, par lequel un enfant de trois ans est tué par une voiture, sur la voie publique, doit retomber sur les parents de cet enfant, lorsqu'il appert de la preuve que le conducteur de la voiture n'est coupable d'aucune faute, imprudence ou négligence, et que, l'accident est uniquement attribuable au fait que cet enfant a été ainsi laissé, seul et sans gardien, sur la voie publique."**

Cecire et al. vs Morissette, 23 R.J. 94, (C.C. 1916). Held (R.H.) :—

> **"Le père est, en loi, tenu de répondre du dommage causé par son enfant âgé de moins de cinq ans, laissé sans surveillance, qui, en lançant une pierre, brise une glace. La cause première d'un tel acte est dans le manque de surveillance, laquelle pour un enfant de cet âge, doit être de tous les instants."**

Herscovitch vs Mtl. Tramways Co., 21 Q.P.R. 249 (C.S. 1919). Held (R.H.) :—

> **"In an action in damages taken by a father, in his quality of tutor to his son, for an accident which happened to the latter, the defendant may plead that the father is guilty for having allowed his child to expose himself to danger."**

Kertland vs Mtl. Tramways Co., 22 R.L. 218 (C.R. 1915). Held, in part (R.H.) :—

> **"When a tramway company is guilty of negligence, the plea that a child of three years old should not be allowed on the street without being accompanied by a nurse or other grown up person, could only prevail in case the child herself would have been guilty of contributory negligence at the time of the accident."**

Couture vs Proulx et vir., 40 R.J. 400 (1934). *Trahan, J.* held, in part (R.H.) :—

> **"Lorsque les parents d'un enfant de six ou sept ans n'ont pas exercé à l'égard de ce jeune enfant la surveillance de tous les instants requise en pareil cas, lui confient un message relativement dangereux à accomplir, il doit être décidé que ces parents manquent de prudence et de vigilance, et une action prise par eux dans un pareil cas doit être renvoyée."**

In *Mtl. Tramways Co. et al. vs Turgeon,* 26 K.B. 496 (1917) the jury found the father was in fault for not instructing his nine year old daughter to be careful and keep the path prepared for pedestrians. (See p. 498 of report). As to care on the part of the parents and proper education of children etc. see *supra* p. 143.

Age of child.

"Primâ facie, no conduct in a child under seven years of age will infer contributory negligence". *(Beven on Negligence, 4th Ed.* p. 196). Thus a plea that an accident is due solely to the fault of a child aged three and a half years is not a good defence. *(Nichol vs Auclair,* 39 R.L. 211 (1933). See also *Chaussé vs J.J. Joubert & Co. Ltd.,* 65 C.S. 144 (1926)).

Burke vs Provencher, 67 C.S. 500 (1929). Held (R.H.):

> **"Commet une faute le conducteur d'un automobile qui, non seulement excède la vitesse permise, mais néglige d'arrêter lorsqu'il le pouvait encore, alors qu'un enfant de huit ans apparait devant lui.**
>
> **"L'enfant victime de l'accident est aussi en faute lorsqu'il traverse une rue en faisant irruption derrière un tramway sans s'assurer qu'il peut le faire sans danger, mais vu son âge la faute doit peser plus légèrement sur lui."**

In *Bernier vs Généreux,* 12 K.B. 24 (1902) it was held that a boy of 13 is not expected to show the prudence and thoughtfulness which would be expected and required from an adult. In *Harnois vs Sansregret,* 44 R.J. 19 (1937)

a boy aged 11 had been struck by an automobile. *Casgrain, J.* found that the boy had actually less intelligence than a boy of 7 and, therefore, held him incapable of contributory negligence.

Bouvier vs Fee, (1932) S.C.R. 118. Held, in part:—

> **An issue of contributory negligence or common fault cannot be raised as a ground of appeal in the case of a child of eight years of age i.e. barely above the age under which all responsibility must be denied.**
>
> **See also *Delage vs Delisle*, 10 K.B. 481 (1901).**

Champagne vs La Cie des Chars Urbains de Mtl., 35 C.S. 507 (1909). Held, in part (R.H.):—

> **"La faute de la victime d'un accident qui lui en ferait partager la responsabilité, devient un cas fortuit lorsqu'elle est commise par un enfant trop jeune pour avoir conscience de ses actions. Il en est tenu compte de la même manière que de la faute commune dans l'arbitration des dommages."**

Desroches vs St. Jean, 44 K.B. 562 (1928). Held, in part:—

> **"Quoiqu'on ne puisse attendre d'un enfant de neuf ans, le discernement et la prudence d'un adulte, au cas de faute de sa part, il sera responsable de l'accident mais dans une proportion moindre que celle d'un adulte..."**
>
> **See also *Beaulne vs Chalifoux* (footnote to p. 161 *supra*).**

SECTION 9

COLLISIONS WITH HORSES AND HORSE DRAWN VEHICLES

When a motor vehicle comes into collision with a horse or horse-drawn vehicle on a public highway the presumption under *S. 53 (2)* M.V.A. *(supra* p. 107) operates against the motorist; see:—

> ***Gohier vs Vannier,*** **62 C.S. 6 (1923);** ***Hébert vs Borden's Farm Products Co. Ltd,*** **52 K.B. 335;** ***Roy vs Pierre et al.*** **(*infra,* p. 180);** ***Dallaire vs Quenneville*** **(*infra,* p. 181);** ***Archambault vs Laperle,*** **61 C.S. 211 (1923).**

Reference should also be made to the local by-laws. In Montreal, *By-law No. 1319, Art. 6* provides that a person riding or driving an animal upon a highway shall be subject to the provisions of the by-law applicable to the driver of any vehicle. (See *New York Bakery Co. Ltd. vs Mtl. Trucking Ltd.*, 34 R.L. 125 (1927)). *Art. 119* of the same By-law provides that no person shall allow any horse or other animal, whether attached or unattached to any vehicle, to stand on any street, public lane, or public ground unless the reins be in the hands of some person in charge of said horse or other animal, or within his immediate reach. (See *Currie vs Trudeau*, 59 C.S. 314 (C.R. 1920); *Hébert vs Borden's Farm Products Co. Ltd., (supra).*

Duty of motorist on approach of horse.

S. 36 (8) M.V.A. provides:—

> **"Upon the approach of any horse ridden or driven, the driver of a motor vehicle shall so manoeuvre such vehicle as to prevent such horse being frightened and to safeguard and protect the person riding or driving it; and if such horse appear to be frightened, the person driving the motor vehicle shall diminish the speed thereof, stop the noise made by the motor, and even stop such motor if requested to do so by a signal made with the hand by the person in charge of such horse, and he shall not approach nearer such horse unless such movement be necessary to avoid an accident or damages."**

The above section might well be divided into two parts, — first the duty of the motorist on the approach of a horse, and secondly his duty when the horse appears to be frightened.

In *R. vs Hyndman*, 17 C.C.C. 469 (K.B. 1910) it was held to be the duty of the driver of a motor vehicle to stop on *signal* from a person approaching and driving a carriage, although the horse did not at the time of the signal appear to be frightened. *Hutchinson, J.* referring to the former statute *(6 Ed. VII, C. 13, S. 24 (1) & (2))* stated, at p. 472:—

> **"The object of the law is evidently to avoid all danger that may be caused by the passing of a motor vehicle, and the person most capable of judging as to the danger was the driver of the horses.**
>
> **"As the carriage was on the edge of the ditch, and if he allowed the motor vehicle to rush past him without making any signal to stop a serious accident might have happened, and then the appellant would have a good answer by saying: 'You did not give me any signal to stop, and if you had done so I would have immediately stopped, and the accident would have been avoided'.**
>
> **"As mentioned in the first part of this section of the Act the duty of the person having control or care of the motor vehicle is not only to prevent the horse from being**

frightened but also to safeguard and protect the person driving."

In *Roy vs Pierre et al.*, 29 R.L. 432 (1923) it was held, in part (R.H.) :—

"...A l'approche d'un cheval sur un chemin public, le chauffeur d'un véhicule-moteur doit prendre toutes les précautions possibles pour éviter qu'il soit effrayé. Ainsi, s'il laisse les toiles de l'automobile ballantes et flottantes au vent et qu'un cheval effrayé s'emballe et est frappé et blessé par la machine, le conducteur est responsable des dommages."

Dubois vs Courtemanche, 35 R.L. 296 (C.C. 1929). Held (R.H.) :—

"Le conducteur d'une automobile, lorsqu'il va croiser un troupeau sur la route, doit en garder suffisamment le contrôle pour pouvoir arrêter instantanément; autrement il est responsable des dommages causés aux animaux.

"Les dommages seront cependant diminués, si le troupeau est sous la garde de conducteurs trop jeunes et inexpérimentés."

Lubier vs Michaud et al., 38 C.S. 190 (C.R. 1910). Held (R.H.) :—

"Il y a faute du chauffeur d'une automobile qui, voyant l'épouvante du cheval d'un attelage rencontré, se contente de stopper, sans arrêter le moteur, dont le bruit maintient l'état d'effarement de l'animal, et les propriétaires de l'automobile sont solidairement responsables d'un accident qui en résulte. Le défaut de clôtures ou de garde-fous le long du chemin, ne supplée pas une défense à l'action exercée contre eux."

Prevost vs Lapointe, 69 C.S. 482 (1931) :

Plaintiff's horses were injured on taking fright at the approach of defendant's automobile which was decorated with flags and ornaments for a wedding cele-

bration. Plaintiff's action for damages against defendant was dismissed on the ground that the defendant had complied with S. 36 (8) M.V.A. in stopping his automobile about 40 or 50 feet from the horses when he realized they were frightened. It was held under the circumstances that the defendant was entitled to decorate his car as he had done, and that the accident was due to the exceptionally nervous disposition of the horses.

Deschamps vs City of Mtl., 48 C.S. 351 (1915). Held, in part:—

"Lorsque la Cité de Montréal fait des excavations dans ses rues et qu'elle emploie pour cela des machines à vapeur produisant un bruit suffisant pour effrayer les chevaux, elle est responsable de l'accident causé par un cheval qui, effrayé, a pris le mors aux dents..."

Dallaire vs Quenneville, C.S. 7419, (Beauharnois) *Duranleau, J.*, June 1937:

Plaintiff's colt, being led along the highway by a simple halter and piece of cord, took fright on the approach of defendant's automobile and backed sideways as the car was passing, with the result that it was struck and injured. ***Held***, plaintiff was partly to blame (40%) for allowing his colt to be led on the highway by a means which did not provide sufficient control in the event of the animal taking fright; that defendant was also to blame (60%) for failing to stop or slow down, or take proper precautions when he saw the animal was frightened. Under the circumstances he had not rebutted the presumption under S. 53 (2) M.V.A.

Overtaking and passing.

As to ***overtaking*** see ***supra***, p. 64 et seq.

Archambault vs Laperle, 61 C.S. 211 (1922):

A horse-drawn vehicle was struck in the rear by an automobile. ***Archer, J.*** pointed out that the burden of proof that the damage was not due to the negligence of the

owner or driver of the automobile was on the owner or driver of the automobile. He also drew attention to the rule that a person driving a horse-drawn vehicle shall bear to the right to permit the passing of any person driving a motor vehicle. Applying both these principles in the case of a rear-end collision, he held there was common fault where the automobile was driven at an excessive speed while on the other hand the driver of the horse-drawn waggon had not attempted to give free passage to the automobile.

If a waggon parked close to the sidewalk is struck from behind by an automobile, the presumption of fault against the motorist is not rebutted by proof that the waggon had been left unattended (contrary to *Montreal By-law 1319, Art. 119)* if the driver's omission to leave the horse in charge of someone did not contribute to the accident. *(Hébert vs Borden's Farm Products Co. Ltd.,* 52 K.B. 335, (1932)).

In *Lachambre vs Coleman,* 37 R.L. 374 (1931) it was held that the driver of an auto passing too close to a parked horse without moderating his speed is as much at fault as the owner of the horse who leaves it without any one in charge.

Letourneau vs Gagné, 69 C.S. 401 (1930). Held (R.H.):—

"Le propriétaire d'un animal est responsable du dommage causé à une automobiliste, alors que l'animal, sans être conduit ou dirigé, s'élance à l'improviste sur la voie publique dans la course d'une automobile, de manière à rendre une collision inévitable.

"C'est commettre une imprudence que de laisser des animaux s'engager sur un chemin public, sans contrôle, ou sans s'assurer que la voie est libre."

S. 36 (1) M.V.A. provides:—

"Every person, driving a vehicle or an animal on the public highway, must, whenever possible, keep to the

side of the road at his right, and leave at his left as wide a passage as possible and at least one-half of the road when meeting another vehicle or a herd of cattle, or at least eight feet when meeting a pedestrian, a cycle or a stray animal."

See *Grenier vs Landreville*, 65 C.S. 249 (1927), and *supra*, p. 161.

Girard vs Wayagamack Pulp & Paper Co. Ltd. et al., 51 C.S. 317 (1916). *Désy, J.* held, in part:—

"... Lorsqu'un règlement municipal statue que les personnes en charge d'animaux doivent suivre le côté droit de la rue, c'est-à-dire, ne pas dépasser la ligne du centre de cette rue, celui qui place son cheval et sa voiture en biais sur la rue de manière à ce qu'ils dépassent le centre de deux pieds et demi, commet une faute et n'a aucun recours si son cheval est frappé par un automobile qui, sans commettre d'imprudence, passe sur cette rue à sa droite en dedans de cette ligne."

Lights.

While local by-laws may provide for lights on horse drawn vehicles (see *Larouche vs Riberdy*, 60 K.B. 451 (1935) and *supra* p. 29) the M.V.A. at present contains no such provision.

Forbes vs Savard, 39 R.L. 58 (1931). Held, in part:—

"... Ce conducteur doit savoir que les voitures à traction animale ne sont pas obligées de porter des lumières, et il doit se conduire en conséquence; plus dangereuses seraient les circonstances, plus grandes et plus sérieuses devraient être ces précautions..."

Gordon vs Vineberg, 50 K.B. 262 (1931). Held (R.H.):

"L'omission de placer des lumières sur une voiture à traction animale, circulant le soir sur un chemin public, ne constitue pas une faute imputable au conducteur de ce véhicule."

See also *Ouellette vs Filion*, 39 R.J. 257 (C.C. 1933). However, in *Cinq-Mars & Paquette (Ltd.) vs Hodge*, 72 C.S. 44 (1934) *White, J.* held that under modern conditions the failure of the driver of a horse-drawn vehicle to carry a light, or some means of protecting himself in the dark, must be considered an act of negligence which at least contributes to any accident that might occur.

Responsibility for animals.

Article 1055 C.C. provides, in part:—

> **"The owner of an animal is responsible for the damages caused by it, whether it be under his own care or under that of his servants, or have strayed or escaped from it.**
>
> **"He who is using the animal is equally responsible while it is in his service..."**
>
> **See also Art. 1054 C.C. (*supra*, p. 114).**

See *Caron et Frères vs Séguin*, 27 R.L. 26 (1920) and *Beauchemin vs Rheault et al.*, 61 K.B. 127 (1936) *(supra* p. 48). The effect of the presumption under *Art. 1055* C.C. was discussed by *Galipeault, J.* at p. 132 of the *Beauchemin* case, in part as follows:—

> **"...bien qu'il y ait deux écoles en France, celle qui soutient qu'il s'agit d'une responsabilité absolue, et celle qui ne veut voir dans les dispositions de l'article qu'une présomption de faute contre le propriétaire, notre jurisprudence d'une façon générale, appuyée par M. Mignault, Droit civil canadien (*Tome 5, page 377*) est à l'effet que le propriétaire est admis à démontrer qu'il n'a pas été négligent et a ainsi s'exonérer." (*Bédard v. Hunt*, 10 C.S. 490; *Grant v. Durand*, 5 C.S. 179; *Collas v. Langevin*, 40 C.S. 441; *Ville de Québec v. Picard*, 14 C.S. 94; *Birmingham v. Gallery*, 36 C.S. 481; *Caron et frère v. Séguin* 1921, 27 R.L. 26; *Noel v. Duchesneau*, 15 C.S. 352).**

See *Tremblay vs Allard*, 47 K.B. 530 (*supra*, p. 47); *Delbe vs Ladouceur*, 64 C.S. 392; *Poulin vs Mtl. Stockyards*, 77 C.S. 320. [1]

Currie vs Trudeau, 59 C.S. 314 (C.R. 1920). Held (R.H.) :—

"Le propriétaire d'un cheval lequel, en approchant d'un pont bâti sur un canal, prend peur et s'échappe, effrayé par le son du timbre annonçant l'ouverture du pont et à l'apparence du bras fermant le passage des voitures et des piétons et qui dans sa course écrase une personne, n'est pas responsable, s'il ne s'est rendu coupable d'aucune faute ou négligence, et s'il a fait tous ses efforts pour contrôler son cheval, sans y réussir.

"L'accident est dû uniquement à la victime qui s'est engagée dans la rue pour la traverser, malgré les avertissements et les cris des passants, lorsque le cheval venait à l'épouvante et sans prendre la précaution de s'arrêter, regarder et écouter.

"Même en appliquant le principe de la présomption *juris et de jure* de l'art. 1054 et 1055 C. civ., le défendeur peut repousser sa responsabilité par une preuve contraire."

Denis vs Kennedy, 46 C.S. 459 (C.C. 1914). Held (R.H.) :—

"Aux termes des articles 1054 et 1055, C. civ., le propriétaire d'un animal ou d'une chose est responsable des dommages par eux causés lorsqu'ils sont hors de son contrôle et que le tort arrive sans sa participation; mais lorsqu'au moment de l'accident ils sont sous sa dépendance et dirigés ou mis en mouvement par le propriétaire, sa responsabilité est celle de l'article 1053 C.civ., et celui qui lui réclame des dommages-intérêts doit prouver faute, négligence ou incurie de sa part."

In *Roth vs Elmhurst Dairy Ltd.* (C.S. 140286, April 14th 1937) an unsuccessful attempt was made by plaintiff

1. In appeal to K.B.

to invoke the presumption under *Art. 1055* C.C. against the owner of a horse-drawn vehicle which had run over a child.

Marcotte vs Desourdy et al., 75 C.S. 439 (1937). Held:

The owner of an animal found wandering on a public highway which causes damage to the owner of an automobile is responsible without proof of fault on his part, his responsibility being only removed if he proves fortuitous event or impossibility of preventing the accident. But a municipality which has failed to keep a fence in proper order by reason of which neglect the animal escaped onto the public highway, is responsible in warranty to the owner of the animal whom it must indemnify for the damages and costs.

See *Direct Transport Co. vs Cornell*, (1938) 3 D.L.R. 456; *McMillan vs Wallace*, (1929) 3 D.L.R. 367 (Ont.); see also 16 Can. Bar. Rev. 494; & Annotation on *"Animals at Large, Negligence of Owner"*, 2 D.L.A. 1741.

Negotiorum gestor.[2]

Lortie vs Adelstein, 46 C.S. 543 (1914). Held (R.H.):

"Lorsqu'une personne, par son acte libre et volontaire, agissant comme *'negotiorum gestor'* prend soin de la chose d'une autre, en son absence et à son insu, mais pour le bénéfice de cette dernière, elle a le droit d'être indemnisée des pertes qu'elle a subies en prenant ses intérêts. Ainsi, celui qui voit venir un cheval à l'épouvante et qui se jette au devant de lui et l'arrête, a droit, s'il est blessé, de réclamer du propriétaire du cheval les dommages qu'il en souffre."

See *Gagné vs Trahan*, 68 C.S. 40 (1928) and authorities cited in that report.

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2. A *negotiorum gestor* is one who, spontaneously and without authority, undertakes to act for another during the latter's absence.

SECTION 10

RESPONSIBILITY OF GARAGE PROPRIETOR[1]

For responsibility when an automobile is being *driven* by a garagist or garage employee, see *supra*, p. 139 et seq.

The principle set forth in *Curley vs Latreille, (supra* p. 123) may also be applicable to a case of a garage proprietor and his employee. Accordingly, a garage proprietor who employs a man only to wash and repair automobiles, and expressly forbids him ever to drive them, is not responsible if that man causes damages to a third party while driving a customer's car. (*St. Pierre vs French,* 70 C.S. 359 (1932)).

The word *"garage"* is defined by *S. 2, Ss 14,* M.V.A. as follows:—

> **"The word 'garage' means the establishment where, for a consideration, motor vehicles are put up, repaired or altered, or where any two or all three of such operations are performed at the same time. However, the establishment where repairs are made to the body of the vehicle only, without any alteration being made therein, and where motor vehicles are not stored at the same time, is not a garage."**
>
> **See *Percepteur du Rev. du Dist. de Que. vs Verret et al,* 53 C.S. 21 (1917).**

A garage must be duly *licensed,* and the holder must post up his license in a conspicuous place in the garage.

1. The word "proprietor" is used for the sake of brevity to include the person or persons responsible for the garage, whether a private individual or a company, partnership, etc.

He is obliged to keep a register giving, amongst other information, the registration numbers of the vehicles, together with the names and addresses of their owners; and he must otherwise comply with the regulations set forth in *S. 20*, M.V.A.

The *contract* between a garage proprietor and an automobile owner has been referred to as a "nameless contract", consisting partly of hire of services and partly of deposit, but more especially the latter because safekeeping is the principal object of the contract. *(Parizeau vs Kushner & Commercial Credit Corp. of Canada*, 75 C.S. 32 (1937)). In most instances contracts of this nature are contracts of Deposit for monetary consideration; (see, for example, *Schwartz vs Savard*, 37 R.L. 476 (1931)).

If a garage proprietor without his customer's knowledge or consent, permits the latter's car to be used by an unauthorized party, the garage proprietor will be held liable for the damages caused to said automobile while being so used. (See, for extent of liability, etc., in this connection, *Wendman vs Jetté Automobile Ltée*, 77 C.S. 392 (1939)).

A garage proprietor is obliged to exercise the care of a *bon père de famille*. In order to prevent the automobiles being damaged by the *cold* in winter he is obliged to take all necessary precautions to keep the doors and other openings closed and in good condition. *(Dupré vs Ferland*, 35 R.J. 415 (1929)). He is responsible for damage to an automobile by *fire* unless he can prove the damage resulted from fortuitous event or *force majeure*, or, in any event, that there was no fault or negligence on his part. (See *Brunet vs Painchaud*, 48 C.S. 59 (1915); *Leduc vs The British Canadian Ins. Co.*, 35 K.B. 342 (1923); *British Canadian Ins. Co. vs Ledoux Jennings Ltd.*, 63 C.S. 515 (1925)). In *Lavigueur vs Globe Indemnity Ltd.*, 47 K.B. 100 (1929) *Tellier, J.* stated at p. 101:—

"Le défendeur avait l'automobile à son garage, pour la réparer. En tout cas, il ne conteste pas qu'il était obligé de la rendre. Il devait donc la conserver en y apportant tous les soins d'un bon père de famille (C.C. 1064). Se trouvant aujourd'hui dans l'impossibilité de remplir son obligation, il ne peut en être libéré qu'en prouvant le cas fortuit qu'il a allégué ou, ce qui revient au même, en justifiant que l'inexécution de son obligation provient d'une cause qui ne peut lui être imputée (C. c. 1071, 1072, 1200)."

See *La Prévoyance vs Auger*, 40 R.L. 442; *Travelers Fire Ins. Co. vs Auger*, 40 R.L. 445 (1934) (fire caused by introduction of inflammable "anti-freeze" liquid).

The contract between the owner of an automobile and the proprietor of a *Repair Shop* — as distinct from a garage where automobiles are *kept* — is, generally speaking, a contract for lease and hire of services or of work, and not of deposit. Such proprietor is obliged to exercise the care of a *bon père de famille*. In a case where burglars broke into a Repair Shop (notwithstanding the fact that it was equipped with solid doors, etc) and stole an automobile, it was held that the proprietor, having exercised the care required of him by law, was not responsible for the loss. *(Trans-Canada Ins. Co. vs Locke*, 56 K.B. 97 (1934)). See also:—

***Ginchereau vs Wright*, 36 K.B. 150 (1924); *Moore vs Allen*, 47 C.S. 417 (1915); *Bachand et Dionne Ltée vs Birs*, 31 K.B. 365 (1920). For legal position of depositary in the event of the thing deposited being stolen see 5 Mignault, p. 663; *Antecol vs Brit. Am. Oil Co.*, 45 R.J. 221 (1939). See also *Spiegel vs Tatem et al*, 60 K.B. 275 (1936).**

In *Lavoie vs Lesage*, 77 C.S. 150 (1939) consideration was given to the legal effect of a *clause of non-responsibi-*

lity in a contract between a garage proprietor and a car owner.[2] *Pratte, J.* held, in effect, as follows:—

> A clause of non-responsibility frees the garage proprietor from the burden of proving fortuitous event or *force majeure* in the event of his being unable to return the car, but does not deprive the car owner of the right to claim damages if he can prove fault on the part of the garage proprietor: that, even if such a clause could free the garage proprietor from certain quasi-delictual responsibility, it would be without effect upon responsibility resulting from his gross negligence (*faute lourde*).
>
> See *Can. N. Que. Ry. Co. vs Argenteuil Lumber Co.*, 28 K.B. 408 (1918) *Carroll, J.* at p. 420, *Lamothe, C. J.* at p. 423; *Harbour Commrs. of Que. vs Swift Can. Co.*, 47 K.B. 118 (1929); see also *Perrault, Traité de Droit Commercial* Vol. 2 p. 262 et seq. As to stipulation by employer of non-responsibility for damage caused by employees in course of work for which they are employed (under 1054 C.C.) see *Can. N. Que. Ry. Co. vs Argenteuil Lumber Co.* (*supra*); *Furness Withy & Co. vs Vipond*, 54 S.C.R. 521 (1916); *C. P. R. vs Parent*, (1917) A.C. 195; *Miller vs G.T.R.* (1906) A.C. 187; *C. N. R. vs City of Mtl.*, 43 K.B. 409 (1927). See also *Perrault, Stipulations de Non-Responsabilité* (1939).
>
> For garage proprietor's *right of retention*, etc., see *Marcotte vs Auto Garage Ltée et al*, 53 C.S. 77 (1917); *Schwartz vs Savard*, 37 R.L. 476 (1931); *Rapid Motor Co. vs Dagenais*, 24 R.J. 101 (C.C. 1917); *Senecal vs Maynard et al*, 70 C.S. 505 (1932); *Colonial Finance Corp. vs Bourgoin et al*, 71 C.S. 157 (1932); *Terry vs Auto Owners Ass'n*, 65 C.S. 390 (1927).

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2. e.g. to the effect that no responsibility will be assumed for fire, theft or accident.

SECTION 11

TRAMWAYS

It is important to bear in mind that a tramcar is not a "motor vehicle" within the meaning of the M.V.A. (see definition of *motor vehicle, supra* p. 19). Reference should be made to local traffic by-laws. In Montreal, *By-law No. 1319, Art. 1 (39)*, follows *S. 2 (1)* M.V.A. in excluding tramcars from the definition of motor vehicle. However, certain provisions of that by-law are specifically stated to apply to tramcars.

Right of way.

The distance required to stop a tramcar is greater than that required to stop an automobile at any given speed; and, while an automobile may be moved in any direction, a tramcar, obviously, is restricted to the track upon which it travels. The courts have recognized these facts and have held that, generally speaking, a tramcar motorman is entitled to assume that a motorist or pedestrian approaching the track will follow the prudent course of stopping to permit a tramcar to pass by.

In so far as the Montreal Tramways Co. [1] is concerned, the duties and obligations of that Company are embodied in a contract with the City of Montreal which is reproduced as Schedule "A" with the Quebec Statute (1918) *8 Geo. V, Ch. 84*, and which was declared ratified, legal

1. Referred to hereafter in this Section as "M.T.C.".

and binding by *Section* 75 of that Statute. *Article 64* of said contract provides:—

> **"Within and without the limits of the City, the cars of the Company shall have the right to use its tracks as against all other vehicles whatsoever, and all other such vehicles using the said tracks, whether meeting or proceeding in the same direction as the said cars, shall turn out of the said tracks and permit the said cars to pass, and shall in no case and under no pretence whatever obstruct or hinder the passage thereof and the free use of the said tracks by the said cars of the Company."**

It should be noted, however, that while in principle a tramcar has the right of way over other ordinary vehicles, such right of way is not *absolute* and does not dispense with the motorman's obligation to follow the rules of reasonable care and prudence. The jurisprudence on this subject is summarized hereunder.

M.T.C. vs Empellezzire, 51 K.B. 71 (1931). Held (R.H.):—

> **"Lorsque le wattman d'un tramway conduit sa voiture selon les règles de la prudence et ne dépasse pas la vitesse permise par la loi, le conducteur d'un camion automobile ne peut prétendre qu'étant arrivé avant le tramway à l'intersection de deux rues, il avait priorité de passage."**

Letourneau, J. stated, at p. 77:—

> **"Je crois d'abord que cet article 31 du règlement 890 de la Cité de Montréal que l'on invoque et qui prescrit de laisser, à une intersection, la préférence à celui qui vient sur la droite, ne s'applique pas au tramway et qu'il résulte plutôt de la cédule A du statut 8 Geo. V, ch. 84 et plus particulièrement de l'article 64 de cette cédule que le *right of way* appartient en principe à la compagnie. Cela ne dispenserait pas l'appelante des règles ordinaires de la prudence, mais établirait seulement qu'elle était dans l'exercice d'un droit en traversant sans**

s'arrêter la rue Carillon, à la seule condition que le serre-frein ait cru son chemin libre et ait pu raisonnablement penser que l'intimé ne tenterait pas comme il a fait, de lui couper le passage."

M.T.C. vs Coleman, 52 K.B. 70 (1931). Held (R.H.):

"It is unreasonable for the driver of a motor-car which is free to move in any direction and can be easily and promptly stopped at will, to take the risk of attempting to cross tramway tracks in front of an approaching tramcar, when there is nothing to suggest to the motorman that the driver is not going to follow the usual and prudent course of stopping his car before it reaches the tracks (in the present instance, at the intersection of a 'non stop' street.)

At p. 73:—

"Considering that the tramcar was unusually large and heavy and was at the time filled with passengers, and that it could not have been stopped, at the speed at which it was moving when the motorman first saw the respondent's automobile, in less than 30 ft., which would have carried it considerably past the point of collision;

"Considering that the motorman was justified in concluding that the respondent would follow the usual and prudent course of stopping his automobile before reaching the appellant's tracks and allow the tramcar to pass in front of him..."

See also *M. T. C. vs Thifault*, 51 K.B. 270 (1931); *Alliance Ass'ce Co. vs M. T. C.*, C.S. No. 72171, *Mercier, J.* 4th Jan. 1932; *Bouchard vs M. T. C.*, C.S. No. 77062, *Greenshields, J.*, Nov. 9th, 1931 (unrep'd).

In *M.T.C. vs Eliasoph*, 53 K.B. 166 (1932) the trial judge in instructing the jury had said, *inter alia*:—

"It has been held... that the Montreal Tramways Company have no more privilege for its cars on the streets of the City of Montreal than trucks or ordinary vehicles... they must hold the car in such control as to be able to stop

suddenly if necessary, and the arrival of a motor on the right, which would engage the intersection first, would have the right of way."

In commenting upon these directions *Dorion, J.*, stated, at p. 170:—

"Il y a certainement dans ces déclarations erreur de droit. La défenderesse a droit de préférence sur sa voie, elle a droit d'y passer avant les autres et tous doivent lui céder le pas."

He went on, however, to remark as follows:—

"Cela ne lui donne pas le droit de passer sur sa voie quoi qu'il arrive. Elle est responsable de tout dommage qu'elle aurait pu éviter même envers un trespasser. D'ailleurs, tous ont droit de circuler sur la voie du tramway quand elle est libre, et j'appelle un trespasser celui qui persiste à occuper la voie à l'encontre du tramway."

Letourneau, J., stated, at p. 175:—

"Notre Cour a tout récemment et dans des circonstances à peu près analogues, exonéré de tout blâme un chauffeur d'automobile qui avait dû, au moment de pénétrer dans un garage, s'arrêter pendant une couple de minutes en travers des voies de la compagnie des Tramways; elle a placé sur celle-ci toute la responsabilité de l'accident parce que le serre-freins avait eu tout le temps et tout l'espace voulu pour se rendre compte de l'obstacle qu'il avait devant lui (*Desjardins vs Montreal Tramways Company* — octobre 1930)."

M.T.C. vs Rosenbloom, 54 K.B. 75 (1932). Held (R.H.):—

"Where an automobile running on the car tracks of the Montreal tramways stops at a street intersection to comply with traffic regulations, the company is responsible for the damages suffered if the automobile is struck in the rear by a tramcar which was not under proper control."

Hall, J., stated, at p. 77:—

"The only defence offered by the company appellant is based upon the contention that the respondent had no right to bring his automobile to a stop on the car tracks, on and over which the company appellant has the absolute right-of-way.

"It has been repeatedly pointed out by this Court that the company's right-of-way is not absolute, and does not preclude other drivers from passing thereon, or stopping directly on the cartracks when obliged to halt in compliance with the traffic regulations of the City of Westmount..."

See also *Massé vs M.T.C.*, 25 R.L. 246 (C.R. 1918); *Thompson vs Que. Ry. L.H. & P. Co.*, (1937) 4 I.L.R. 361; *Laplante vs M.T.C.*, 29 R.L. 462 (1923); *Donoghue vs M.T.C.*, 45 R.J. 417 (1939).

Royal Trust Co. vs Toronto Transportation Commission (1935) S.C.R. 671. Held, in part (R.H.):—

"Generally speaking, a street car motorman is entitled to assume that a pedestrian or motorist approaching the track will stop to permit the street car to pass by, and there was in the present case a statutory right of way in favour of the street car; but the existence of a right of way does not entitle the motorman to disregard an apparent danger that confronts him. In the circumstances appearing in the present case, the motorman should have seen the automobile and realized the probability of its driver continuing in his course across the track at the approaching intersection. Had either the motorman or the motorist used due care or caution, the collision would not have occurred..."

Carleton vs City of Regina, (1912) 1 D.L.R. 778. *Lamont, J.* stated, in part, at p. 782:—

"...It is a matter of common daily occurrence for a motorman to see both pedestrians and vehicles approach a track on which a car is moving and stop when they come within a few feet of it and allow the car to pass. A prudent and cautious man would not attempt to cross in front of a moving car unless there was clearly time to cross safely..."

See also *Morrison vs Dominion Iron & Steel Co. Ltd.*, 45 N.S.R. 466.

In *M.T.C. vs St. Louis, No.* 875 K.B. Dec. 22nd, 1936 *(unrep'd)* respondent was held negligent in turning his automobile out of a line of traffic to the right with the intention of crossing the track when, at the moment he turned, an approaching tramcar was 60 feet away. (See also *Auger vs M.T.C.*, 19 R.L. 525 (1913); *Fairbanks vs M.T.C.*, 22 R.L. 24 (1914)).

In *Cerat vs Chars Urbains de Mtl.*, 20 R.L. 13 (1913) it was held that the driver of a vehicle who stops before crossing the track should not start up again until he is quite sure that the approaching tramcar is at a distance amply sufficient for him to have time to cross.

Naud vs M.T.C., C.S. No. 81914, 6th Nov. 1933 *(unrep'd) McDougall, J.* held, in part:—

> **"...If it is true, as stated by the driver of said automobile, that he did not have a clear view of the street to his left, because of the buildings at the corner, then, knowing, as he undoubtedly did, of the presence of tracks on said Rachel Street, it was incumbent upon him to exercise the greatest caution before proceeding to cross said tracks, a precaution which he apparently completely failed to observe: ..."**

Horsnell vs M.T.C., C.S. No. 120242, 25th May, 1934 *(unrep'd). McDougall, J.* cited the *Eliasoph* and *Empellezzire* judgments and stated, in part:—

> **"...a tramcar, bound and fettered to the rails upon which it travels, does not possess the freedom of action of the lighter and more mobile automobile and that as between the two, all things being equal, the tramcar has, on principle, the right of way at intersections... the application of which rule, however, does not dispense the tramcar from the ordinary rules of prudence and care, but merely esta-**

> **blishes that it is entitled to proceed across such intersection without stopping if the driver considers that the way is clear."**

In *Rondeau vs M.T.C.*, 25 R.L. 403 (C.R. 1919) it was held that tramcars of the M.T.C. had no greater privilege on the streets than other vehicles; but, in view of the more recent Appeal Court decisions above cited, this can no longer be considered good law.

In *McKeague vs Niagara, St. Catharines & Toronto Ry. Co.*, 36 C.R.C. 379 (1930) *Garrow, J.*, at p. 385, cited *Chancellor Boyd* in *O'Hearn vs Town of Port Arthur*, 4 O.L.R. 209 as follows:—

> **"A driver of a vehicle moving along a street on which cars are running and who knows when and where he intends to cross the car tracks is bound to be vigilant to see before crossing that no car is coming behind him. A greater burden in this regard rests on the driver than on the motorman who is not to be kept in a state of nervousness and apprehension lest someone may at any moment cross in front of the moving car. The driver can move in any direction, not so the motorman. The right of way being with the streetcar the driver should keep out of its track unless upon observation he is satisfied that the passage is clear."**

Lalonde vs M.T.C., C.S. No. 131932 28th Feb. 1935, *McDougall, J. (unrep'd):*

> **Plaintiff's automobile travelling in the same direction as a tramcar was struck in the rear by the tramcar. The Court cited the *Empellezzire* and *Coleman* cases, and *Huddy, "The Law of Automobiles", 8th Ed., Sections 719 and 720,* and held *inter alia* that the plaintiff, who was familiar with the district, was imprudent in keeping his automobile on the track, particularly as the weather and visibility were bad, and knowing he would probably be overtaken by a tramcar moving in the same direction.**

Dugas vs Que. Ry. L.H. & P. Co., 71 C.S. 519 (1932). Held (R.H.) :—

> **"L'automobiliste qui en démarrant dirige sa voiture sur la voie ferrée, en avant d'un tramway en mouvement, assume le risque d'une collision possible, s'il n'a pas laissé au tramway un espace suffisant pour permettre au wattman de modérer sa vitesse; il ne peut justifier son recours par le motif qu'il aurait préalablement signalé sa course."**

In *Fauquier vs M.T.C.*, C.S. No. 76177, 14th June, 1932 *(unrep'd) Lane, J.* held that it was negligence for the driver of an automobile, after driving away from the curb, to move across the line of traffic when a tramcar was only 40 feet behind. (See also *Rajotte vs Benoit & M.T.C.*, C.S. 107782, 11th Oct. 1933, *Mercier, J. (unrep'd)).*

Que. R.L.H. & P. Co. vs Rousseau, 39 K.B. 65 (1924). Held, *(Hall, J. dissenting)* (R.H.) :—

> **"Une compagnie de tramways n'est pas responsable des dommages causés à une automobile dans une collision avec un de ses tramways, alors que l'accident est arrivé sur sa voie privée, où le conducteur de l'automobile commet un trespass, à moins qu'on établisse contre elle un acte de négligence grossière.** [2]
>
> **"Dans l'espèce, une violente tempête de neige avait empêché, de nuit, le garde-moteur d'apercevoir l'automobile en panne sur la voie assez tôt pour éviter la collision."**

City of Westmount vs M.T.C., 68 C.S. 484 (1930). Held (R.H.) :—

> **"Where a right of way is established in favour of Fire Department vehicles by a by-law of a municipal corporation obliging any tramcars to come to a standstill on their approach until such vehicles have passed, the right thus conferred prevails over the privilege granted by a contract which merely obliges vehicles using the tracks to turn out thereof in order to allow tramcars to pass."**

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2. See also *infra* p. 208 et seq.

Speed.

In accordance with the principle already discussed excessive speed of a tramcar does not render a tramways company responsible for an accident, if such speed was not the determining or a contributing cause of the accident. (See *supra* p. 83).

It should be mentioned that under *Arts. 23* and *31* of the Contract between the M.T.C. and the City of Montreal (ref. *supra* p. 191) the M.T.C. is obliged to give a "rapid, sure and efficacious service" both within and without the city limits. By *Art. 54* of the same Contract the *Montreal Tramways Commission* was empowered to determine from time to time the speed of cars in and outside the city limits, and to allow a speed in excess of what might otherwise be fixed by law. In virtue of that Article the Commission passed a resolution in December 1920 authorizing the Company to operate its cars at a speed sufficient to maintain a schedule (or average speed) of 10 M.P.H. on all its system, except on the Lachine, Cartierville, Back River and Laval de Montreal Divisions where a schedule (or average speed) of 20 M.P.H. was authorized. The effect of that resolution was considered in *M.T.C. vs Empeilezzire*, 51 K.B. 71 (1931). *Letourneau, J.* stated at p. 78:—

"...Il serait inexact de dire que la résolution de la Commission du Tramway passée le 16 décembre 1920 et qui a été produite, doive s'interpréter comme limitant à dix milles à l'heure la vitesse du tramway à l'endroit où s'est produit l'accident; cette résolution tendrait plutôt selon moi, à prescrire un minimum de vitesse suffisant pour assurer un service de dix milles à l'heure sur la ligne dont il s'agit et cela impliquerait plutôt, d'après ce que nous explique le témoin Duperron, à cause des arrêts et des retards imprévus, une vitesse moyenne de vingt milles à l'heure au moins..."

At p. 73 *Galipeault, J.* pointed out that the speed of the tramcar in question was 15 to 16 M.P.H. before arriving at the intersection, and that it was then decreased to 12 or 13 M.P.H. At p. 75 he remarked that such a speed was

far from excessive and that if the defendant, obliged to give a suitable service to the public, was not permitted to run its cars through intersections where there was no stop at 12 to 15 M.P.H. the service would not be possible. See also *Mtl. Street Ry. Co. vs Deslongchamps*, 14 K.B. 355 (1905), *Hall, J.* at p. 359.

Injury to passenger.

A tramways company is not an insurer of its passengers' safety, and is not liable for injury to a passenger unless there be some fault or negligence on its part, or on the part of someone for whom it is responsible; see:—

M. T. C. vs Pistchick, 41 K.B. 324; *C. P. R. vs Pyne*, (1919) 48 D.L.R. 243, 244 (*supra*, p. 118); *Chippendale vs Winnipeg Electric Ry. Co.*, (1928) 1 D.L.R. 920. See also *Common Carriers* (*supra*, p. 155 et seq.) and Carrier's duty to convey passengers safely to destination (*supra*, p. 157).

In *McGill vs M.T.C.*, 49 C.S. 326 (1916) it was held that if a person desiring to board a car signals a motorman to stop at a place other than a regular stopping place and the motorman, although not obliged to do so, returns the signal and slackens speed, he thereby assumes the obligation of seeing that the passenger is safely embarked. If he then starts the car before the passenger is safely aboard, and the passenger sustains injuries thereby, the company is liable for the damages involved.

In *Byette vs M.T.C.*, 68 C.S. 216 (1930) *Denis, J.* held that a tramway company which, notwithstanding the fact that the tram is crowded allows a passenger to stay on the foot-board, is responsible for an accident if the tramcar, continuing its course without regard to the presence of a nearby obstacle, causes injury to the passenger. (See authorities cited in the report). In *M.T.C. vs Gootkin*, 51 K.B. 165 (1931) the Company was held responsible for personal injuries to a passenger allowed to remain on the lower

step of the platform in a crowded car when it was intended that the car should not start until the doors were closed. (See also *M.T.C. vs Natovitch*, 49 K.B. 448 (1930)).

Common prudence requires that passengers shall not expose their arms and heads outside of the cars, and motormen are justified in taking it for granted that passengers will so conduct themselves; see:—

> ***Cross, J.*** **in *M. T. C. vs Lefebvre*, 24 K. B. 83 (1915) at p. 87. See also *Ostrosky vs M. T. C.*, 57 C.S. 535 (1920); *Jacques vs M. T. C.*, 60 C.S. 431 (1921); *G. T. Ry. Co. of Canada vs Mayne*, 56 S.C.R. 95 (1917).**

For example, when a passenger, sitting on the side of a car adjoining the tracks on which cars will pass in the opposite direction, puts his elbow out of the window, on top of a protective screen beyond the side of the car, he thereby assumes the risk of being struck, and cannot recover damages from the carrier for injuries suffered in such circumstances. *(Que. Ry. L.H. & P. Co. vs Robert*, 44 K.B. 274 (1927)). In the earlier case of *Jago vs Mtl. Street Ry. Co.*, 35 C.S. 109 (1908) the company was held responsible for injury to a passenger who was sitting with his elbow on the top of the outside partition. However, in that case there was an actual collision between the cars, and the passenger had not protruded his arm outside the car but was resting it against the exterior partition.

M.T.C. vs Mullin et al., 35 K.B. 392 (1923):

> **Some young men trying to force their way onto a tramcar pulled the rope of the trolley, which fell on the ground and injured one of them. *Held*, that *Art. 1054 C.C.*, relating to the owner of a thing under his control and care, did not apply as the damages were not caused by the thing itself but by the person who pulled down the trolley. *Held*, also, that even if the case were governed by *Art. 1054 C.C.* the company was within the exculpatory clause prov-**

ided in the article, as it was established that the conductor could not prevent the accident by any reasonable means.

If an injury is caused to a passenger by what is proved to have been the *violent jerk of the car,* the tramway company may be held liable according to the circumstances. However, occasional jolts or lurches are fairly incidental to travel on any type of railroad and should be held to have been contemplated by passengers. (See *Nellis on Street Railways, 2nd Ed., Vol. 1, S. 298).*

Stuart vs M.T.C., 69 C.S. 342 (1931). Held (R.H.) :—

> **"Commet une faute qui engage sa responsabilité une compagnie de tramway dont l'employé fait une démarrage brusque et violent qui entraîne la chute d'un voyageur se trouvant debout sur la plateforme de l'arrière alors qu'il n'y avait plus de sièges libres à l'intérieur du véhicule ni de courroies de protection disponibles."**

In *Marcotte vs M.T.C.,* 74 C.S. 51 (1936) *Philippe Demers, J.* held that, taking into consideration the circulation in the centre of the City of Montreal, the Tramways Company's employees cannot be obliged to wait before starting until every passenger has taken his seat.

Couture vs Que. R.L. & P. Co., 76 C.S. 262 (1938). Held, in part :—

> **"La circulation des tramways serait pratiquement impossible s'il était interdit aux employés de les mettre en mouvement avant que tous les voyageurs n'aient pris leurs sièges; la coutume suivie de démarrer dès que les voyageurs sont montés dans la voiture et avant qu'ils ne soient assis ne peut être considérée comme une faute, sauf lorsque l'employé constate qu'il y aurait danger à suivre la coutume à cause de la faiblesse, de l'âge ou de l'infirmité d'un voyageur, ou si quelqu'un sollicite une protection spéciale.**

"Doit être considérée comme un accident fortuit, attribuable à une pure distraction, la chute d'une voyageuse qui, au moment du départ d'un tramway, porte les deux mains à sa sacoche et se met ainsi hors d'état de pouvoir faire usage d'un point d'appui..."

M.T.C. vs Yervant, (1936) 3 D.L.R. 241. (Supreme Court) *Rinfret, J.* stated in part, at p. 244:—

"...while admittedly the sudden stopping of a car by a motorman in a case of emergency may not be negligence, yet, if the carelessness of the motorman occasioned the emergency which required him to bring the car to a stop, there would nevertheless be negligence on his part, taking the whole of his conduct into consideration, for which the tramway company might be found liable."

For a case of a passenger falling off a train while riding on platform against regulations — company exonerated — see *Askin vs C. P. R.* (1938) 2 D.L.R. 281; 47 C.R.C. 391. For case of passenger attempting to board moving train, see *C. N. R. vs Desrosiers,* 42 R.L. 448 (K.B. 1936).

Gebbie vs Saskatoon, 41 C.R.C. 45 (Sask. C.A. 1930). Held (R.H.):—

"The steps of a car constructed with care and foresight and adopted as the safest possible design, upon which a passenger, an invitee, slips and is injured, cannot be held to be a trap which implies some concealed danger; there being no evidence of any defect, negligence cannot be imputed to the street railway company for supplying a step of such character."

See also *Elliott vs Transportation Commission; Toronto Power Co. vs Pashwan,* (*supra,* pp. 159, 160).

For injuries to passengers *while and immediately after getting off a tramcar*[3] see *supra,* p. 158. See also local traffic by-laws; for Montreal see *supra,* p. 162.

3. In *Vdovjak vs M. T. C.*, C.S. 173563, Oct. 27 1939 (unrep'd) *Rhéaume, J.* held the plaintiff's wife solely responsible for injuries she received in getting off a *moving tramcar* which was not equipped with automatic doors.

Winnipeg Electric Co. vs Zeidel, (1929) S.C.R. 538:

Female plaintiff, while standing on a platform erected beside the track by the municipality, was injured when the platform was struck by the step of the tramcar she was waiting to board. *Held*, dismissing action in appeal, that the platform being one of the appurtenances of the public street, was under the care of the municipality. It could not be said that plaintiff used the platform "at the invitation of the defendant". The fact that the defendant made the platform one of its stopping places involved no assurance by it that the municipality had discharged its duty in respect of maintenance and repair.

Letang vs Ottawa Electric Ry. Co., (1926) 3 D.L.R. 457 (P.C.). Held, in part (R.H.):—

"Where a tramway company has built a flight of steps as a convenient mode of approach to its property and they are used by a large number of prospective passengers each day, a prospective passenger using the steps is an invitee, and there is a duty on the company to use reasonable care to prevent damage from unusual danger of which it knows or ought to know."

Our Courts have recognized that owing to climatic conditions it is sometimes impossible to prevent a *slippery condition existing upon the floors and steps of tramcars.* "In the month of February the climatic conditions in Montreal are such that it is impossible to prevent the floor of the cars used by defendant from being more or less wet and slippery, owing to the constant entry of passengers bringing in snow on their feet..." *(Tait, A.C.J.* in *Garand vs Mtl. Street Ry. Co.*, C.S. 275, 12th Feb. 1907; cited by *Mercier, J.* in *Schwartz vs M.T.C.*, C.S. No. 143196, 23rd April, 1936 *(unrep'd)*).

In *Nahamovitch vs M.T.C.*, C.S. 379, 17th Feb. 1920 *(unrep'd) Marechal, J.* held, in part:—

"Considering that owing to climatic conditions prevailing in this country, it is impossible to keep the steps

of tramways absolutely clear from snow or ice; that unless conditions revealing a want of ordinary care and prudence on the part of the Company defendant and its employees are proved, it cannot be held responsible for an accident to one of its passengers and more especially if said passenger did not take the ordinary precautions in getting off the said car..."

See also *McCormack vs The Sydney & Glace Bay Ry. Co.*, 37 N.S. L.R. 254.

Hébert vs M.T.C., 73 C.S. 114 (1935), *Gibsone, J.*, in dismissing an action resulting from plaintiff's fall in a tramcar, held, in part:—

"...Considérant la prétention de la demande à l'effet qu'il y avait faute et négligence pour engendrer la responsabilité sous l'article 1053, du fait que la défenderesse laissait circuler ses voyageurs sur un plancher mouillé, — un plancher mouillé étant plus glissant qu'un plancher sec, — et de l'avis de cette Cour cette prétention est mal fondée, car forcément en temps de pluie ou de neige fondante les voyageurs entraient avec leurs pieds de l'eau qui mouillait le plancher, et ce qu'il pouvait y avoir de danger à glisser, qui aurait résulté de cette humidité, était connu du public et il devait agir avec prudence, l'état des choses étant très visible."

In *M.T.C. vs Jacobs*, K.B. 987, 28th April, 1936 *(unrep'd)* plaintiff, whose wife fell while boarding a tramcar, claimed that the accident was due to the sleety and slippery condition of the steps and platform of the car. The action was dismissed on appeal (K.B.). *St. Jacques, J.* stated, in part:—

"...Tout ce qu'on peut et doit exiger, c'est que les degrés du marchepied et de la plateforme d'entrée soient tenus dans un état raisonnable, vu les conditions climatériques de notre Cité, particulières à cette saison de l'année, alors qu'il est établi que les rues étaient encore recouvertes d'une neige fondante."

Protection of railway passengers: see notes in 2 C.R.C. 96 *et seq.* In *Blain vs C.P.R.*, 2 C.R.C. 69, 85; *C.P.R. vs Blain*, 3 C.R.C. 143, the rule was laid down that if a railway company through its officers,

Reference should also be made to *Wilson vs C.P.R.*, 75 C.S. 510 (1937) which was concerned with a fall on a wet station floor. The Report includes a useful statement of the law by *McDougall, J.* (See also *infra* p. 220).

Injury to pedestrian.

A tramcar not being a "motor vehicle", the presumption under *S. 53 (2)* M.V.A. has no application in the case of injury to a pedestrian by a tramcar.

> See ***liability for injury to pedestrian*** **(*supra*, p. 161 et seq.). See also traffic by-laws; for Montreal (*supra*, p. 162).**

Lavoie et al. vs Que. Ry. L.H. & P. Co., C.S. 33280,[4] (1937) 4 I.L.R. 361. Held:—

> **"The mother of plaintiffs was struck and fatally injured by a tramcar while she was crossing in front of it to reach a spot where there was a stop sign. She had previously signalled the car thinking it to be one of a line which stopped at that particular place and the motorman had slowed and then increased his pace. It was held that the company was in fault in not having the stop-sign properly marked to show that only certain cars stopped there and in not having distinguishing marks put in the cars which would be recognizable at night."**

As to the precautions to be taken by a tramway company to safeguard *children*, see *M.T.C. et al. vs Turgeon, (supra* p. 170). For cases involving injury to children, see *Herscovitch vs M.T.C.; Kertland vs M.T.C., (supra* p. 175); *Champagne vs La Cie des Chars Urbains de Mtl. (supra* p. 177); *Borg vs M.T.C., (supra* p. 173). In *Beaubien vs M.T.C.*, C.S. 142791, Oct. 28th, 1936 *(unrep'd)* plaintiff sued for damages resulting from injury to his minor son who was struck by a tramcar under the following circumstances:—

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knows that an assault upon a passenger is probable, it is the company's duty to take reasonable precautions to prevent it, and if it fails to do so, it is liable for the consequences of its neglect. This principle was recent-

4. Judgment affirmed by K.B. June 1937.

The motorman, who was running his car north at a reasonable speed, first noticed two children playing around an automobile parked on the east side of the street. He sounded his gong, and, on looking to his left, saw plaintiff's child about 5 feet from the west curb and running quickly across the street about 12 feet in front of the car. The motorman applied brakes and reverse but was unable to prevent his car striking the child. On these facts *Mackinnon, J.* held there was no fault on the motorman's part, and dismissed the action.

In *Burton vs M.T.C.*, 51 C.S. 74 (C.R. 1916) a boy, 8 years of age, after getting off a tramcar and walking out from behind it to cross the street, was struck by another tramcar going in the opposite direction. The jury's verdict holding that both the motorman and the boy had been negligent was confirmed. (See, however, *Montreal By-law 1319, art. 22* now in force — *supra* p. 162, and the *Lemieux* and *Chastenais* cases hereunder).

In *Lemieux vs M.T.C.*, 37 R.L. 123 (1929) it was held, in part (R.H.) :—

"... Constitue une négligence grave lui enlevant tout recours contre la compagnie, le fait pour un passager qui descend d'un tramway de traverser la rue en arrière de ce tramway et de s'exposer ainsi à se faire frapper par un autre tramway venant en sens inverse."

A judgment to the same effect was rendered in *Chastenais vs M. T. C.*, 37 R.L. 100 (1931).

M.T.C. vs Hamilton, 27 K.B. 575 (1918). Held (R.H.) :—

"Where the movement of a person attempting to cross a street in front of a tramway car in motion, is made when the car is too near to him to make it practicable for the motor-man to stop the car or avoid striking him, the accident is attributable to him, and the tramways company cannot be held responsible."

---

ly applied in *Carrier vs C.N.R.*, Three Rivers C.S. 5422 Jan. 1940 (*unrep'd* to date). As to *ejection* of passengers see *Dunn vs Dominion Atlantic Ry. Co.*, 60 S.C.R. 310; *Nellis, Street Railways*, 2nd Ed. Vol. 1, p. 312 et seq.

See also *Thompson vs B. C. Electric Ry. Co.* (1939) 4 D.L.R. 761 (C. A.)

Pedestrian trespassers.

In *Latham vs Johnson & Nephew*, (1913) 1 K.B. 398 (Eng) *Hamilton, L.J.* stated, at p. 410:—

> "The duty which one person owes to another to take reasonable care not to cause him hurt by act or omission is relative both to the person injured and the person charged with neglect and the circumstances attending the injury. Among other such circumstances is that of place."

And at p. 411:—

> "...The owner of the property is under a duty not to injure the trespasser wilfully; 'not to do a wilful act in reckless disregard of ordinary humanity towards him', but otherwise a man 'trespasses at his own risk'".

Reference should also be made to the following leading cases:—

> *Grand Trunk Ry. vs Barnett*, (1911) A.C. 361 (P.C.); *Lowery vs Walker*, (1911) A.C. 10, per *Lord Halsbury* at p. 13; *C. P. R. vs Eggleston*, 36 S. C. R. 641; *G. T. R. vs Anderson*, 28 S. C. R. 541, and authorities cited in that report.

Maritime Coal Co. vs Herdman, 25 C.R.C. 206, (Supreme Court). Held (R.H.):—

> "A doctor returning along the track after making a professional call, was a trespasser and the company owed him no duty except not to run him down knowingly or recklessly. This the jury found had not been done and the company was not liable. Mere passiveness of the company in allowing the public to walk along the track, did not make them licensees for injury to whom the company would be liable."

In *Ullric vs Cleveland, etc. Ry. Co.,* 13 Am. & Eng. Ry. Cas. N.S. 783 (see p. 787) it was held that employees in charge of a train are entitled to assume that any one standing or walking on the track will in due time remove himself from danger, and they are not required to stop or check the speed of the train until they become aware that he is oblivious of his peril. (See also cases collected in *13 Am. & Eng. Ry. Cas. N.S.,* pp. 770-825).

"A street railway company owes no duty of foresight to a trespasser on its tracks, but only reasonable care to avoid injury after the danger is discovered." *(Nellis on Street Railways, 2nd Ed., Vol. 2, S. 371,* p. 794).

C.P.R. vs Anderson et al., 45 C.R.C. 1 (Supreme Court 1936). Held (R.H.):—

> **"A railway company, using a public street under a city franchise and engaged in the coupling or assembling of freight cars into a drag in the course of railway operations, is not liable for injuries to a small boy who climbed on one of the cars and fell from it when the train started moving, on the ground of maintaining a dangerous allurement to children; the boy being a trespasser the railway company owed him no duty other than to abstain from wanton or wilful injury."**

Globoff vs C.N.R., (1938) 1 D.L.R. 439 (Man. C.A.). Held:—

> **A woman crossing a spur track at night during a snow storm at a point not a crossing is a trespasser and the railway company owes her no duty other than to abstain from wilful injury to her; she is therefore not entitled to recover for injuries she sustained when struck by a train that was moving backwards on the track in the direction of a lumber yard.**

In *Jean vs Que. R.L. & P. Co.,* 64 C.S. 475 (1925), *Sir F. Lemieux, C.J.* held that a person who commits a tres-

pass in walking on the track contrary to law has no recourse in damages against the railway company if he is struck by a train, unless he proves an act of gross negligence on the part of the company or of its employees.

Jure vs Vancouver Harbour Comm'rs, (1931) 4 D.L.R. 916 (B.C., C.A.).

> **The jury had found the defendant guilty of negligence and the plaintiff of contributory negligence in an action for damages for personal injuries sustained by a pedestrian at a railway crossing. The judgment on that verdict was reversed by the B. C. Court of Appeal (*McPhillips, J.* dissenting), which held that as the plaintiff was off the beaten track, the plank roadway, and as it was not shown that he had any rights on that roadway, he was in the position of a trespasser to whom the defendants owed no duty "except to refrain from wilfully injuring him or what would amount thereto."**

Honke vs Manitoba Eastern Ry. Co., (1938) 3 D.L.R. 679. Held (R.H.):—

> **"An infant trespasser on the exclusive railway right of way cannot recover damages for injuries from a train if the evidence establishes no breach of duty on the part of the Railway Company, the only duty owing by the latter being (1) not intentionally to injure him or not to do a wilful act in disregard of humanity towards him, (2) not to act with reckless disregard of the presence of the trespasser."**

If the driver of a vehicle becomes aware that a pedestrian trespasser is apparently oblivious of his peril, the driver is obliged to exercise reasonable care for the pedestrian's safety. This principle has been held to apply to motormen and locomotive engineers.

C.P.R. vs Tapp, 18 K.B. 552 (1909). Held:—

> **The fault of a deaf and dumb person who contrary to law walks along a railway track does not relieve an**

engine driver of the obligation to do everything reasonably possible to avoid an accident: there is fault on the part of the person driving a locomotive behind a pedestrian when he observes the pedestrian continuing on the track in spite of sounding of whistle and bell, and does not decrease speed in time to avoid striking him. Although there may be fault on the part of the victim the railway company's responsibility is none the less engaged for its proportion of damages.

C.P.R. vs Hinrich, 15 D.L.R. 472 (Supreme Court 1913). Held:—

"A railway company may be liable for injury to a trespasser upon the right of way in breach of sec. 408 of the Railway Act, R.S.C. 1906, ch. 37, if their engine driver neglected to apply the emergency brakes at the time he became aware of the danger of accident when he first noticed deceased attempting to cross the tracks."

Duff, J. at p. 473 stated, in part:—

"...There was evidence from which the jury might conclude properly that the driver of the engine ought to have been aware that the victim of the accident was crossing the track while oblivious of the danger of doing so, in time to have averted the accident by applying the emergency brake..."

M.T.C. vs Simpchechen, 24 K.B. 81 (1915). Held *(Cross, J. dissenting)*:—

A tramway company which habitually permits a passenger getting off a tramcar to cross the track to go to his work, and stops the tramcar for that purpose, cannot consider such passenger a trespasser. Even in the case of a trespasser the company is obliged to exercise ordinary care to avoid an accident. (Judgment affirmed by S.C.C. July 1915, *Duff, J.* dissenting: both parties were held in fault.)

SECTION 12

HIGHWAYS — MUNICIPAL CORPORATIONS

The cases cited hereunder deal with the liability of a municipal corporation for damage to a vehicle caused by the improper condition of the highway.

Reference should also be made to *Cities and Towns' Act, R.S.Q., 1925, C. 102* and *Amendments; Public Street Act, R.S.Q., 1925, C. 113* and *Amendments;* the *Charter* of the corporation in question; and *Sections 59, 60, 61, 61a* M.V.A. and relevant Orders-in-Council. See also *Municipal Code of P.Q., 1916 (Annotated, Tellier, 1936).* See, *inter alia,* M.C. *Art. 478* as to obligation of corporation to keep its roads in good order; *Art. 553* as to municipal inspectors' right to permit road work which may inconvenience and obstruct traffic; *Art. 554* as to obligation to indicate excavations and other dangerous places while work referred to in *Art. 553* is in course of performance; *Art. 550* as to obligation to remove obstruction (referring to *Art. 553); Art. 453 (a)* (added by *1935, 25-26 Geo. V., C. 47)* providing that no municipal corporation may be held liable for damages resulting from an accident to a person on the sidewalks, streets or roads by reason of snow or ice "unless the claimant establishes that the said accident was caused by the negligence or fault of the said corporation, the Court having to take into account the weather conditions;" *Art. 143* as to corporation's responsibility for the acts of its officers in the performance of the duties for which they are employed. In *Chevalier vs City of Three*

Rivers, 43 C.S. 436 (C.R. 1913) it was held that the onus was upon the corporation to prove that its officer was acting outside the scope of his ordinary duties.

Apart from the obligations imposed by special regulations and statutes, a municipal corporation is responsible under the provisions of the Civil Code for damages caused by the improper condition of its highways. *(City of Quebec vs Conway,* 32 K.B. 242 (1921)).

Obligation of municipality.

Leblanc vs Cité de Fraserville, 42 C.S. 539 (C.R. 1912). Held (R.H.) :—

> **"Les corporations municipales ont l'obligation d'entretenir leurs chemins, rues et trottoirs dans un état qui permette aux passants d'en user sans danger. Leur défaut de le faire engage leur responsabilité pour les dommages qui en sont la conséquence."**
>
> **See also *City of Mtl. vs Légaré,* 28 R.L. 39 (K.B. 1921); *City of Verdun vs Burns,* 38 K.B. 116 (1925); *Spedding vs City of Mtl.,* 23 D.L.R. 681 (C.R. 1915); *City of Vancouver vs Cummings,* 46 S.C.R. 457 (1912).**

A *temporary* road, established by a corporation in order to facilitate traffic circulation while the principal road is under repair, should be kept in good condition in the same manner as the other roads of the municipality. *(Boily vs Corp. Canton Taché,* 68 C.S. 406 (1929)).

Bérubé vs Corp. de St. Louis de Kamouraska et al., 64 C.S. 78 (1925). Held, in part (R.H.) :—

> **"Bien que les corporations municipales soient obligées de tenir en bon ordre les chemins de leurs municipalités, elles ne sont pas tenues, à moins de règlements spéciaux, de changer la nature du sol qui sert d'assiette à ces chemins, lorsqu'ils traversent des crans et des rochers.**

> **"En pareil cas, il incombe à ceux qui fréquentent des chemins de cette nature d'user de plus de prudence afin de se garer des dangers apparents..."**

In spring-time when the *frost* is coming out of the ground it is practically impossible to maintain country roads in perfect condition; it suffices that they should be passable and that they are not dangerous, and under such circumstances it is for the users of the highway to exercise prudence and moderate their speed according to conditions. (See *Lépine vs Corp. de St. Dunstan,* 35 R.J. 161 (K.B. 1923); *Jetté vs Corp. d'Epiphanie,* 10 R.J. 574 (C.C. (1904)).

A corporation which permits a *flooded* roadway to be open to circulation without providing it with a suitable means of protection is guilty of negligence engaging its responsibility in case of accident. (See *Corp. de Compton vs Veilleux,* 22 K.B. 537 (1913); *Zaki vs Corp. de Rivière Bleue,* 26 R.J. 368 (1920)).

Watson vs Corp. of the Township of Hinchinbrooke, 26 R.J. 25 (1919). Held (R.H.):—

> **"Corporation défenderesse est responsable des dommages causés par un accident survenu au demandeur qui n'était pas en faute, à un endroit d'un chemin de 20 pieds de largeur, où il y avait un fossé ou décharge de 12 à 15 pieds de largeur et 7 pieds de profondeur sans aucune protection, garde-de-corps, lumière ou autre indication de danger, et dans lequel l'automobile conduit par le demandeur est glissé avec ses occupants."**

Dumas et al. vs Corp. of St. Prosper, 37 R.L. 20 (1931). Held (R.H.):—

> **"La municipalité qui autorise ou tolère le passage d'automobiles ou de voitures traînées par des chevaux dans un chemin durant l'hiver et y fait même certains travaux d'entretien, est tenue de voir à ce que ce chemin**

soit carossable et d'empêcher qu'il ne devienne dangereux. Elle est responsable des dommages causés par son défaut d'entretien."

Giroux vs Corp. of the Parish of St. Maurice et al., 27 R.L. 154 (1920). Held (R.H.) :—

"La loi permettant de se servir dans les chemins publics, en dehors des cités, d'un véhicule moteur n'excédant pas trois tonnes et demie de capacité, sans comprendre la charge, les municipalités ou les personnes chargées de l'entretien des chemins publics au lieu et place des corporations municipales, doivent tenir leurs chemins en état de porter sans accident un auto-camion de cette capacité, même avec une charge d'une forte pesanteur. Elles sont responsables des dommages qui résultent d'un accident dû au mauvais entretien de ces chemins."

Cadrin vs Corp de la Paroisse de St. Henri, 57 C.S. 310 (1919). Held (R.H.) :—

"Les corporations municipales, d'après la loi actuelle, ne sont pas tenues de faire plus que des chemins de voitures ordinaires, et elles ne sont pas responsables des conditions nouvelles crées par l'usages des automobiles.

"Il n'y a pas de recours en dommages-intérêts contre une corporation municipale de la part du propriétaire d'un auto-camion, qui brise sa voiture dans un chemin de terre grasse détrempée par les pluies et les gelées d'automne, en s'y aventurant imprudemment avec une lourde charge malgré les avis de tous. *'Volenti non fit injuria.'*

Caron vs Corp. de Berthier, 60 C.S. 482 (1922). Held, in part (R.H.) :—

"Les lois actuelles n'obligent les corporations municipales à faire des chemins que pour les moyens de transport en usage lors de l'adoption de ces lois.

"Si les chemins municipaux sont construits et entretenus conformément à ces lois, on ne peut reprocher aux autorités municipales comme une faute de ne pas les avoir appropriés à l'automobilisme..."

Deguise vs Corp. de la Paroisse de Notre-Dame-des-Laurentides, 50 C.S. 31 (1916). Held, in part (R.H.) :—

> **"Ainsi, une corporation municipale n'est pas responsable d'un accident d'automobile survenu dans une de ses routes, d'ailleurs en parfait ordre, à l'occasion du fait que le chemin y tourne à angle droit au sommet d'un talus."**

Corp. of the Township of Brome vs Gleason, 26 R.J. 113 (K.B. 1920). Held (R.H.) :—

> **"Le chemin de la Corporation n'était pas dans un état convenable et présentait un danger qui a contribué à l'accident; mais, le chauffeur, en voulant dépasser à gauche, alors qu'il y avait un signal suffisant de danger n'a pas été prudent, quoiqu'en théorie il eût le droit de passer à gauche. Il aurait dû attendre pour avoir la voie claire. Il a contribué à l'accident pour moitié, donc il y a eu faute commune."**

Bégin vs Richard and Richard vs City of Quebec, 55 C.S. 114 (1918). Held, in part (R.H.) :—

> **"Une corporation municipale ne peut s'exonérer de la responsabilité d'un accident occasionné par le mauvais état d'une de ses rues, du fait qu'en vertu d'un contrat, sanctionné par un règlement, l'obligation d'entretenir la chaussée de la rue est imposée à une compagnie de tramway. Elle ne peut par une convention privée se décharger d'une obligation qui lui incombe en vertu de la loi."**

Corp. de la Paroisse de Chertsey vs Laframboise, 53 K.B. 300 (1932). Held (R.H.) :—

> **"Ne peut être accueillie une demande en dommages-intérêts formée contre une corporation régie par le Code municipal par le propriétaire d'une automobile en réparation d'un accident qui aurait été causé par l'état défectueux d'un ponceau faisant partie d'un chemin de terre."**

Pouliot vs Corp. de Ste Claire, 30 R.J. 90 (1924). Held (R.H.) :—

"Les articles 543 et 478 C.M., tels qu'amendés en 1922, libèrent les municipalités de leur responsabilité pour accidents survenus sur un pont faisant partie d'un chemin de terre, aussi bien que pour un accident arrivé sur la partie en terre du dit chemin."

Corp. of the Township of Shipton vs Smith, 29 K.B. 385 (1920). Held, in part (R.H.) :—

"Although the land comprised within the fence, on both sides of a municipal road, belongs to the municipal corporation, one cannot expect that this municipality should keep and maintain the whole width, between the fence, in a state and condition proper to travel and especially for the circulation of automobiles.

"In the absence of positive evidence, a hole in a road within one foot and seven inches from the travelled roadway, cannot contribute to an accident of automobile, if the driver of the car remain within the space of the travelled roadway."

Gauthier vs Corp. de la Paroisse de Longueuil et al., 62 C.S. 101 (1923). Held (R.H.) :—

"Lorsqu'un accident d'automobile survenu sur un pont, entretenu tour à tour par une municipalité de paroisse et par la municipalité du comté, est causé par le mauvais état de ce pont, et que depuis longtemps la question de savoir si c'est un pont local ou de comté est débattue entre les deux municipalités, sans qu'elles aient pu s'entendre, elles seront tenues conjointement et solidairement responsables des dommages soufferts par le propriétaire de l'automobile."

Corp. de la Paroisse de Berthier et al. vs Berger, 35 K.B. 128 (1923). Held:

The owner of an automobile, following an accident happening on a road in the course of repair, under the control of the Provincial Government or its préposés, has no recourse (for the damages sustained) against the municipality where such road is situated.

See also *Mondehard vs City of Mtl. North*, 30 R.J. 192 (1924); *Brossard vs Corp. de la Ville de Laprairie*, 56 C.S. 114 (1919); *Turcotte vs Corp. de St. Joseph*, 20 Q.P.R. 250 (C.S. 1918); *Denis vs Corp. de la Paroisse de Ste. Elizabeth*, 28 R.J. 243 (1922).

Natural dangers.

A bridge or culvert seven feet high, the sides of which are not railed in or otherwise protected, renders the road unsafe, and the municipality is responsible if a heavy vehicle slides or skids over the side of the culvert causing damage. *(Corp. of the Township of Stanstead vs Davis,* 35 K.B. 531 (1923)). On the other hand, a municipal corporation is not liable for natural dangers inherent to the fact that the road runs alongside a precipice. *(Fafard vs City of Quebec*, 55 S.C.R. 615 (1917)).

See also *Caron vs Corp. de Berthier*, 60 C.S. 482 (1922); *Beloeil vs Rioux*, 27 K.B. 329 (1918).

Icy roadway.

City of Westmount vs Curtiss, 56 K.B. 209 (1934). Held (R.H.) :—

"The obligation of a municipal corporation to protect the public against the dangers of an icy roadway, as distinguished from the sidewalks, must depend upon the particular circumstances of each case. While there may be instances when the condition of the roadway, the permanent gravity of the danger, the Corporation's knowledge of conditions, and its failure to take necessary precautions, may amount to a fault, nevertheless, it may happen that the roadway may become dangerous at certain places, or under certain conditions which would not justify the conclusion that the Corporation was in fault.

"Where the condition of a roadway, though in fact dangerous, is due to the sudden, temporary and unexpected appearance of hoar-frost early in the morning, a

municipal corporation cannot be held guilty of negligence for the failure to spread sand or ashes on the roadway or to take other precautions to correct its slippery condition." (Judgment affirmed by Supreme Court, May 13th, 1935).

Grondin et vir. vs Cité de Québec, 67 C.S. 111 (1928). Held (R.H.) :—

"Bien que les corporations municipales soient tenues de répandre des cendres ou du sable sur les trottoirs, lorsqu'ils se recouvrent de glace, elles ne sont pas obligées d'employer les mêmes procédés relativement à la chaussée des rues. Ainsi, une corporation n'est pas responsable du préjudice subi par une personne qui fait une chute en traversant une rue dont la chaussée en plan incliné est rendue glissante par la circulation des voitures."

It is to be noted, however, that the judgment does not appear to have gone as far as the above summary would indicate. See pp. 115, 116 of Report.

See also *Wong Ling vs City of Mtl.,* 44 C.S. 329 (C.R. 1913); *City of Mtl. vs Gray,* 26 R.J. 141 (K.B. 1919); *Diblasio vs City of Mtl.,* 35 R.L. 512 (1927); *City of Quebec vs Coleman,* 49 K.B. 102 (1930).

In *City of Outremont vs Gratton,* 65 K.B. 484 (1938) it was held *(Letourneau and St. Germain, JJ. dissenting)* (R.H.) :—

"Municipalities are bound by law to keep their highways and sidewalks in a suitable state, regard being had to existing conditions such as climatic changes. As regards pedestrians this obligation is confined to sidewalks and crossings at intersecting streets, and should not be extended to the roadway itself, not forming part of a street crossing and where the pedestrian had no occasion to be."

Niemy vs City of Drummondville, 42 R.J. 431 (1936). Held, in part (R.H.) :—

"Depuis l'amendement apporté par la législature à la Loi des cités et villes, en 1935, la preuve incombe à la victime, dans le cas d'accident sur la voie publique, 'en raison de la neige ou de la glace'".

While the duties of municipal corporations towards pedestrians fall somewhat outside the subject matter of this book, reference may also be made to the following cases concerned with slippery and/or defective *sidewalk conditions:*—

City of Mtl. vs St. Arnaud, 36 K.B., 341 (1923); *Beauchamp vs City of Mtl.*, 41 K.B. 46 (1926); *City of Mtl. vs Michaels*, 49 K.B. 440 (1930); *Gingras vs City of Mtl.*, 68 C.S. 446 (1930); *Benoit vs City of Mtl.*, 48 K.B. 307 (1930); *City of Mtl. vs Dame Turgeon*, 56 K.B. 348 (1934); *Paquet vs Crépeault et al.*, 67 K.B. 381 (1939).

The mere fact of slipping does not indicate fault on the part of a municipality. *(City of Mtl. vs St. Arnaud, supra, Lafontaine, J.* at p. 343). Reference may also usefully be made to:—

***Wilson vs C. P. R.*, 75 C.S. 510 (1937); *Scott vs Dominion Stores*, 66 C.S. 457 (1928); *Villani vs City of Mtl.*, 49 C.S. 469 (C.R. 1916); *Cormier vs L'Assomption, Joliette*, C.S. 6139, *J. Demers, J.* (*unrep'd*); *M. T. C. vs Jacobs*, (*supra*, p. 205): *Contra, Mireault vs M. T. C.*, 35 R.L. 301 (K.B. 1928); *Nelson vs M. T. C.*, C.S. 176855, 5th Dec. 1939 (appeal to K.B. pending).**

In the *Wilson* case the plaintiff slipped on a wet concourse floor of a railway station sustaining personal injuries for which she sued the defendant in damages. In dismissing the action *McDougall, J.* stated that the condition of the floor was plainly visible to the plaintiff, and that "if such dampness constituted a danger, it was one to be reckoned with by the plaintiff herself. It was certainly no trap. The danger, if such it be, was one of which a rea-

sonable person had expectation or notice sufficient to have enabled him to avoid any evil consequences arising from it." The Court also pointed out that "the state of the floor may have been a condition *sine qua non* but it was not the *causa causans* of the accident."

In *Paquet vs Crépeault et al.*, 67 K.B. 381 (1939) plaintiff fell on a sidewalk on defendants' property which, through improper maintenance, was in a dangerous condition. The Court of King's Bench held that plaintiff was not guilty of contributory negligence when making use of the sidewalk as of right, even though she knew that it was not generally kept in proper condition. *St. Jacques, J.* stated at p. 386:—

> **"Je le répète, pour éviter cette butte qui couvrait toute la largeur du trottoir, il aurait fallu que la demanderesse marchât sur la chaussée, dans la rue. Elle n'y était sûrement pas tenue, à moins qu'elle ne sût, d'une façon claire et évidente, que la partie du trottoir où elle s'engageait était dangereuse et que, inévitablement, si elle y passait, elle tomberait."**

Obstructions.

In *City of Quebec vs Conway*, 32 K.B. 242 (1921) it was held that municipal corporations are under a duty to remove obstacles left upon the highways, and that their negligence in the accomplishment of that duty renders them responsible for accidents caused by such obstacles. *Rivard, J.* stated, at p. 244:—

> **"...Aucune loi n'oblige une personne qui passe dans un chemin public là où aucun obstacle ne doit se rencontrer, et dans des circonstances où il n'y a pas lieu de soupçonner qu'il s'en rencontrera, d'être constamment aux aguets pour apercevoir un danger extraordinaire et nouveau. Evidemment, quand on conduit une automobile, il faut y apporter un soin particulier à cause du danger**

> **inhérent à ce genre de voiture; mais l'automobiliste a tout de même le droit de présumer que le chemin où on lui permet de passer est dans de bonnes conditions, et, à moins de circonstances spéciales, il n'est pas obligé de présumer qu'il y a eu négligence de la part de ceux dont le devoir est de tenir le chemin en bon état d'entretien..."**

In *Schwartz et vir. vs City of Mtl.*, 73 C.S. 322 (1935) *Mackinnon, J.* referred to *Corpus Juris, Vol. 43*, p. 991 as follows:—

> **"The duty and consequent liability of a municipality to keep its streets and sidewalks in a reasonably safe condition for persons travelling thereon extends to those cases where the obstruction or unsafe condition of the street is brought about by persons other than the agents of the city. But in such cases the basis of the action being negligence, it devolves upon plaintiff to show that the city had notice of the defect or might have had knowledge thereof by the use of reasonable care and watchfulness. The negligence for which the municipality is chargeable is not for the creation of the defect but for permitting the defect to remain unguarded after actual or constructive notice thereof."**

Mackinnon, J. also referred to *City of Mtl. vs Gamache*, 24 K.B. 312 (1915) in which *Sir Horace Archambault, C.J.* stated, at p. 315:—

> **"Pour qu'une rue soit publique, il n'est pas nécessaire qu'elle soit inscrite au plan ou au registre des rues de la cité, il suffit qu'elle soit livrée à la circulation publique, et que le public y passe. Ce point, qui n'est pas contestable est admis en toutes lettres par l'appelant dans son factum."**

Prévost vs City of Mtl., 15 C.S. 39 (1899) (R.H.):—

> **"La cité de Montréal avait permis à la Compagnie du chemin de fer canadien du Pacifique de poser des rails sur une rue publique et ouverte à une grande circulation. Ces rails, posés sur des dormants, dépassaient le**

niveau de la rue de huit à neuf pouces et se terminaient abruptement et sans garde ni protection à l'extrémité de la ligne. En hiver ces rails ne servaient pas et étaient recouverts par une couche de neige:—

"*Jugé:* — Que, dans ces circonstances, la cité était responsable des dommages éprouvés par un individu qui, ignorant l'existence de ces rails, avait heurté sa voiture contre leur extrémité, et qu'elle ne pouvait échapper à cette responsabilité en prétendant que le recours du demandeur aurait dû être dirigé contre la compagnie de chemin de fer, propriétaire des rails en question."

Humphiries vs The Corp. of Mtl., 11 R.J.R. 319 (C.R. 1865). Held (R.H.):—

"That the corporation of a city is liable in damages for an accident which occurred, in consequence of part of a street being encumbered with building materials to more than half its extent, and not protected by a light at night."

See also *Corp. du Village de Eastman vs Vincelette*, 28 K.B. 514 (1919) where the corporation was held responsible for leaving boards on the highway without a guardian or light.

Lamothe vs Corp. of St. Pierre of Verone, 48 C.S. 481 (C.R. 1915). Held (R.H.):—

"Where an act of negligence is committed by a municipality such as to allow a public street to be obstructed by a telephone pole, the plaintiff suing in damages must prove that this negligence was the cause of the accident which resulted in damages."

Beverly vs City of Mtl. et al., C.S. 157094, May 1937 *(unrep'd):*

Three red lanterns were placed around an excavation made in the roadway, but the light in one of the lanterns ceased to function. Plaintiff, driving his automobile at night, saw the two lighted lanterns and turned his car accordingly. Owing to the third lantern showing no light he failed to avoid the excavation entirely and his car was

damaged. ***Mackinnon, J.*** held the City responsible for permitting the excavation to remain insufficiently lighted.[1]

Messenger vs the Town of Bridgetown, 31 S.C.R. 379 (1901):

This was an action for damages for injuries caused through alleged negligence of the corporation in permitting a mound of earth about eight inches in height to remain at the filling over a trench dug to lay a pipe across a public street. In passing over the obstruction during the night plaintiff's horse stumbled and fell, throwing the plaintiff from the vehicle, whereby the injuries were sustained. The court below held that there had been no negligence on the part of the defendant, that the obstruction was not serious or unusual, and that the accident occurred through want of proper care by the plaintiff in approaching, in the darkness, the dangerous place which he had previously seen in the same condition by daylight. That judgment was affirmed by the Supreme Court.

See also ***McCready vs Corp. of County of Brant,*** (1939) S.C.R. 278.

Scott vs City of Westmount, 76 C.S. 184 (C.C. 1938). Held (R.H.):—

"Where it appears that a pile of stones was placed on a street of the City of Westmount by some person, illegally and without the permission and knowledge of the municipal authorities, the City should be held responsible for the damages occasioned to a person's automobile when it collided, about midnight, with such obstruction. For the City to leave its street unprotected for a period of six or more hours before the accident constitutes a negligent act. The City should have known of the existence of the obstruction by the use of reasonable care and watchfulness."

Stackhouse, J., at p. 187, stated:—

1. *Mackinnon, J.* stated, in part: "Defendant Charest was at fault in that while carrying on excavation work on a main city thoroughfare he did not take proper steps to protect the safety of the public, and by failing to maintain unextinguishable lights on the excavation and to see that they were lighted at all times during the night. The City is also liable in that it allowed the creation of an obstacle which en-

> "...One conversant with the operation of a motor vehicle will appreciate that the attention of the operator is sufficiently occupied in watching for moving objects, such as pedestrians, and other vehicles, so that he should not be considered imprudent if he did not observe an immoveable object, such as a pile of stones, which he could not reasonably expect to find in his path..."

The Court cited, *inter alia*, *City of Verdun vs Burns*, 38 K.B. 116 (1924) to the effect that the City can only extricate itself from the statutory responsibility by positive proof, not only that it was unaware of the condition which caused the damage, but that it could not have discovered the same by an adequate system of patrol and inspection.

Turcotte vs Corp. de la Paroisse de St. Joseph-de-Beauce, 30 K.B. 13 (1919). Held (R.H.):—

> "Une corporation municipale n'est pas responsable des dommages résultant d'un choc d'un automobile contre un poteau de téléphone, érigé en marge de son chemin, et susceptible d'offrir quelque danger, si le poteau a été placé à cet endroit sans son autorisation, mais en vertu de pouvoirs conférés par la législature à une compagnie privée."

Force Majeure.

See *supra*, p. 47.

Corp. de la Paroisse de St. Jacques-des-Piles vs Blais, 30 K.B. 398 (1920). Held (R.H.):—

> "La submersion d'un chemin municipal résultant de l'éclusage d'une rivière par une compagnie industrielle opérant dans une municipalité voisine, constitue, quant à la corporation municipale qui est chargée de l'entretien du chemin, un cas de force majeure, dont elle peut se réclamer pour repousser une demande en dommages-intérêts fondée sur sa négligence à maintenir le chemin dans l'état requis par la loi.

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dangered the safety of those using the street and the fact that the defendant Charest is also liable does not exonerate the City. This principle is recognized by the provisions of Art. 548 and Art. 549 of the

"Le retard de la corporation à se pourvoir en justice pour demander la supression de la chaussée, qui cause la submersion de son chemin, n'est pas un fait susceptible de déterminer sa responsabilité."

Corp. of United Townships of Hansfield and Pontefract vs Denault, 30 K.B. 204 (1929). Held, in part (R.H.):

"... A municipality sued in damages for the bad state of the road under its care, cannot plead *cas fortuit* or *force majeure* and climatic conditions brought about by a great thaw which took place in the vicinity of the road and covered it with ice, when there has been ample time between the thaw and the accident to remedy the condition of the road."

Parker vs Corp. du Canton de Hatley, 33 C.S. 520 (1908). Held, in part (R.H.):—

"... Lorsque le concours d'un cas fortuit et d'un quasi-délit produit un accident, le recours de la victime, ou de ses représentants, n'en est pas moins ouvert contre l'auteur du quasi-délit; mais le tribunal doit arbitrer les dommages en tenant compte de ce concours de causes, comme dans le cas de faute commune."

Gagné vs Corp. de St-Henri-de-Taillon, 57 C.S. 105 (1919). Held, in part (R.H.):—

"... Pour qu'un événement constitue cas fortuit, il faut non seulement qu'on n'ait pu l'empêcher, mais encore qu'on n'ait pu le prévoir. Ainsi la formation chaque année de crevasses ou fissures dans la glace d'un lac, n'est pas un cas fortuit."

Defective lighting.

Turgeon vs City of Mtl., 69 C.S. 461 (1931):

If an arc-lamp located a certain distance from a safety zone established on a city street, fails to render visible the borders of such safety zone, the municipal corpora-

charter of the City of Montreal wherein it is provided that in the event of damages caused by reason of the failure on the part of a person carrying on any excavation on the streets in the city to maintain proper lights thereat, and that such person shall be joined as a co-

tion is responsible for damages caused to an automobile in striking such an obstruction.

In *Barron's Canadian Law of Motor Vehicles* the law is stated, at p. 1071, as follows:—

"Generally, a municipality is not compelled to light its streets, and when they do light them they are not responsible for lack of light resulting from intermittent interruptions in the light caused by no fault on their part, for it is considered as inevitable accident or a fortuitous event in an arc lamp system when interruptions are caused either by the elements or by dust in the air or other unknown causes."

Bastien vs City of Mtl., 22 R.L. 470 (1915). Held, in part (R.H.):—

"Bien qu'une municipalité ne soit pas tenue, en général, d'éclairer ses rues, elle ne peut échapper à la responsabilité en cas d'accident par défaut de lumière, si elle entreprend de faire cet éclairage sans y apporter les précautions et les soins convenables."

See also *Girard vs City of Mtl. et al*, 76 C.S. 107 (1938). As to *duty of driver of vehicle* when the street lighting is defective, see *supra*, p. 63.

Winter roads.

Reference should be made to M.C. *Arts. 480* to *498a* inclusive.

As to *river winter roads*, see *M. C. Art. 490* et seq: as to responsibility for accidents due to ice breaking, see *Bédard vs Corp. du village Beaulieu*, 50 C.S. 470 (1916); *Cloutier vs Corp. de la Paroisse de St-Jacques-des-Piles*, 55 C.S. 12 (C.R. 1918); *Morency vs Corp. de la Paroisse de L'Ange-Gardien*, 43 C.S. 537 (1913); *Préfontaine vs Corp. de la ville de Longueuil*, 20 R.L. 69 (old series, C.S. 1890). See also *Gagné vs Corp. de St-Henri de Taillon*, 57 C.S. 105 (1919), — accidents due to improper conditions of roads established on lakes and rivers.

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defendant as so required by the City, and that all judgments in virtue thereof shall be executed first against the defendant in default and afterwards against the city."

Children's slide.

A corporation is not liable for failing to place sand on a children's slide on a sidewalk of which it had no notice and no reason to know of its existence. *(Beauharnois vs Legault,* 46 K.B. 34 (1928)).

As to liability of a rural municipal corporation for accident to a pedestrian caused by child's sleigh sliding on hill serving as a public road see ***Ste. Melanie vs Pelletier,*** 34 K.B. 427 (1922). See also ***Dudeboir vs Corp. de Waterville,*** 20 K.B. 306 (1910); ***Bérubé vs Corp. St. Alexandre,*** 19 R.J. 430 (1913). As to liability of father see ***Vallee vs Ville de Black Lake,*** 35 R.J. 11 (1928).

Damage by pebbles.

Michaud et al. vs City of Levis, 58 C.S. 28 (1919). Held, in part (R.H.) :—

"Il y a négligence de la part d'une corporation municipale à laisser séjourner sur la chaussée du chemin les cailloux qui s'en détachent.

"Dans l'espèce, la corporation est tenue responsable des dégâts causés par le fait qu'un de ces cailloux roulants a été projeté par un automobile dans la vitrine d'un magasin . . "

See also ***Gaudreau vs Corp. de la Paroisse de Beauport,*** 54 C.S. 23 (1918) — injury to horse slipping on pebble or stone.

Injury to horse.

See ***Dufour vs Corp. de Ste. Fidele,*** 35 R.J. 45 (K.B. 1927); ***Maltais vs Corp. de Pointe au Pic,*** 48 C.S. 87 (1915); ***Gaudreau vs Corp. de Beauport,*** 54 C.S. 23 (1918); ***Rocheleau vs Corp. de la Paroisse de St-Barthélémi,*** 77 C.S. 185 (1939).

Nails, etc., in road repairing material.

See *Dufour vs St. Fidele*, 35 R.J. 45 (K.B. 1927); *Maltais vs Corp. de Pointe au Pic*, 48 C.S. 87 (1915).

As to municipality's responsibility for leaving a dynamite cap with attached fuse on a roadway under reconstruction, which cap was picked up and later exploded by a ten year old child, thereby causing injury, see *Rowland vs Corp. de la P. de Rawdon et al*, 77 C.S. 477 (1939).

Notice of claim and Prescription.

The purpose of the notice is to enable the corporation to investigate the accident and to obtain knowledge of the facts in order that the city may properly deal with any claim that may be made by the victim of the accident. (*Sigouin vs City of Mtl.*, 46 K.B. 397 (1929) at p. 399).

In *City of Quebec vs Baribeau*, (1934) S.C.R. 622 it was held, *inter alia*, that notice is *not a mere matter of procedure but is a part of the very formation of the right of action;* the notice is a condition precedent to the existence of the right of action. Moreover, this requirement of the law cannot be set aside on the ground of absence of prejudice, or because certain employees or officers of the corporation had knowledge of the accident. The Courts cannot treat knowledge thus acquired as exempting the victim from giving the notice in the manner and within the delay prescribed by law, though such knowledge may have some weight in deciding whether the details or particulars contained in a notice given within the delays are sufficient.

See *City of Verdun vs Harris*, 59 K.B. 23 (1935) and authorities cited in that judgment. See also *Lemay et al. vs Hon. M. Francoeur*, 70 C.S. 422 (1932); *Mtl. Street Ry. Co. vs Patenaude*, 16 K.B. 541 (1907); *Blair vs City of Mtl.*, 43 R.J. 295 (1937)[2] (and authorities cited in that report);

2. In appeal to K.B.

Goyette vs Ville de Cowansville, **42 Q.P.R. 265 (C.S. 1938).**

In the *Baribeau* case, however, the Supreme Court held that, under the circumstances, the plaintiff had not been able to give notice of the accident to the City sooner than he did, and that his case fell within the exception clause provided by *Art. 535* of the *Charter of the City of Quebec*. The condition of the plaintiff's mental powers constituted, if not a case of *force majeure* in the strict sense of the word, at least one of the analogous causes which the Legislature intended to foresee, and which entitled the trial judge to hold that it was a valid excuse for not having given notice of action within the delay provided by said *Art. 535*.

See also *Montreal vs Bradley,* (1927) 2 D.L.R. 1023 (Supreme Court); *Town of Mtl. East vs Leonard,* 59 K.B. 222 (1935); *Gagnon vs Ville de Magog,* 42 Q.P.R. 366 (1939); *Turcotte vs City of Mtl.,* 45 R.L. 338 (1939)[3]; *Paris vs City of Mtl.,* 77 C.S. 141 (1939).

As to validity of notice when given by a party other than a victim of accident see *Dupras et al. and City of Mtl. vs Johnston,* 63 K.B. 496 (1937).

Failure to indicate the *exact place* of the accident does not invalidate a notice, provided the place is sufficiently indicated to enable the city to make an enquete, prepare its defence, etc. *(City of Mtl. vs Pryor,* 39 K.B. 227 (1925); *Jeannotte vs City of Mtl.,* 45 R.L. 416 (1939)).

As to notice and 6 months' prescription see M.C., *Art. 453; Cities and Towns' Act, R.S.Q., 1925, C. 102, S. 622,* (amended *1929, 19 Geo. V., C. 34; 1935, 25-26 Geo. V., Chs 47, 48; 1939, 3 Geo. VI, C. 63).* An action against a municipal corporation, even though based on *Art. 1056* C.C., is prescribed by six months. *(Leblanc vs Ville de East Angus,* 33 R.J. 530 (1927); *City of Mtl. vs Weston,* 49 K.B. 183 (1930)).

3. In appeal to K.B.

SECTION 13

COLLISIONS AT LEVEL CROSSINGS (RAILWAYS)

In this section are cited a number of cases dealing with collisions between automobiles and trains at level crossings. Space permits reproduction here of only some of the important provisions of *The Railway Act, R.S.C., (1927), C. 170,* and reference should be made to the relevant sections of that Statute, and to the *Quebec Railway Act, R.S.Q. (1925), C. 230.*

In considering cases of this nature it is important to ascertain what, if any, orders and regulations have been made by the *Board of Railway Commissioners,* now called the *Board of Transport Commissioners* [1], pertaining to the crossing in question.

Duty of motorist to stop.

S. 41 (a) M.V.A. provides:—

> **"Before driving a motor vehicle over a level crossing, the person who is driving such vehicle must bring it to a stop for a moment near such crossing, and then start it in low gear.**
>
> **"This provision shall apply in the case of tracks of a railway subject to federal or provincial authority, but shall not apply in the case of tramway tracks, nor in the case of a level crossing while it is in charge of a signal-**

1. By *S. 3 (1)* of *The Transport Act* 1938, 2 *Geo. VI C.* 53, The Board of Railway Commissioners for Canada "shall hereafter be and be known as The Board of Transport Commissioners for Canada". It is hereinafter referred to as the "Board".

man or when it is equipped with gates or signals automatically indicating the approach of a train."

A motorist who fails to stop before driving onto a level crossing incurs not only a penalty but also civil responsibility for an accident which results. *(Desgagné vs Cie du Chemin de Fer Roberval-Saguenay,* 54 K.B. 30 (1932); *Laflèche vs C.P.R.,* 71 C.S. 150 (1932)). A stop made 50 or 60 feet from the crossing is not a compliance with the law. (See *C.P.R. vs McCarty,* 54 K.B. 211 (1932); *Fortin vs Mtl. & Southern Counties Ry. Co., (infra* p. 251)).

See *Sawyer vs C.N.R. et al.,* 45 R.J. 171 (1939) in which *Casgrain, J.* held that the *causa causans* of the accident was the negligence of the automobile driver in proceeding too fast and failing to comply with *S. 41 (a)* M.V.A. See also *Bissonnette vs G.T.R.,* 58 C.S. 281 (1920).

Right of engine driver to assume auto will stop.

Where the driver of a motor vehicle stops short of the crossing he should not slowly start again in the face of an approaching train, for, in such case, the locomotive engineer might reasonably assume that the driver, having stopped once, was simply driving closer to the track with a view to crossing as soon as the train had passed by. *(Bear vs Père Marquette Ry. Co.,* (1927) 31 O.W.N. 478. See also *Allen vs Esquimault,* (1921) 1 W.W.R. 750).

Hendrie vs G.T.R., 67 D.L.R. 165 (Ont. S.C. 1921). Held, in part:—

"In the absence of special circumstances the engine driver and fireman of a rapidly moving passenger train are not negligent in assuming when the train is within 200 yards of a crossing that the driver of a slowly moving motor truck approaching the crossing and about 50 yards distant and having an unobstructed view of the railway

track, will stop and allow the railway train to pass before attempting to cross the track, and failure on the part of the engine driver to give special warning and apply the emergency brakes under such circumstances is not actionable negligence." (*City of London vs Grand Trunk R. Co.*, (1914), 20 D.L.R. 846, 32 O.L.R. 642, followed).

Duty of motorist to look and listen.

C.P.R. vs Smith, 62 S.C.R. 134 (1921): *Sir Louis Davies, C.J.* stated, at p. 135:—

"The reasonable and salutary rule frequently laid down by the court with respect to persons crossing level railway crossings is that they must act as reasonable persons should act and not attempt to cross without looking for an approaching train to see whether they can safely cross. If they should choose recklessly and foolishly to run into danger, they must take the consequences.

"The rule so requiring persons crossing railway tracks to look for a possible approaching train may not be an absolutely arbitrary one. Circumstances may exist which might excuse their not looking, but those circumstances must be such as would reasonably warrant a jury in finding they were excused from their duty in that regard..."

Walker vs G.T.R., 53 D.L.R. 595 (Ont. S.C. App. Div. 1920). Held (R.H.):—

"It is the duty of a driver of a motor car to approach a railway crossing with due regard for his own safety. The 'cutting' of a freight train on a crossing in accordance with the railway regulations is not an invitation to the motorist to cross, and if the statutory warnings are given by an approaching, fast passenger train, the company is not liable for damages by such motorist taking such cutting of the freight train as a signal that the road is clear and attempting to cross the track and being struck by the passenger train, although he may have mistaken the freight brakesman's signal as an invitation to cross and that the road was clear."

Audet et al. vs C.N.R., 67 C.S. 357 (1928). Held, in part:—

> "Aux traverses à niveau, dont la disposition est telle qu'il est impossible d'observer à distance l'approche des trains, c'est une imprudence coupable pour le conducteur d'un véhicule que de s'engager sur la voie ferrée sans s'assurer qu'elle peut être franchie sans danger."

See also ***Cardin vs G. T. R.***, 22 R.L. 290 (1916); ***Bissonnette vs G. T. R.***, 58 C.S. 281 (1920).

G.T.R. vs Hainer, 36 S.C.R. 180 (1905). Held, in part (R.H.):—

> "...the fact of deceased starting to cross the track two seconds before being struck by the engine was not proof of want of care; that owing to the snow-storm and the escaping steam and noise of the freight train they might well have failed to see the headlight or hear the approach of the passenger train if they had looked and listened."

C.N.R. vs Clark, (1923) S.C.R. 730:

> Plaintiff owing to shrubbery, etc., was unable to see along the track until his automobile had reached the right of way. He then took a hurried glance along the line and neither saw nor heard any train approaching. After that he gave his attention to his automobile as it went up the grade and did not look again until it was too late to prevent a collision. The statutory signals had not been given, and in an action for damages the jury negatived contributory negligence on the plaintiff's part. On appeal by defendant, the Supreme Court held (***Davies, C. J.***, dissenting) that failure under the existing circumstances to make a more careful and complete observation, which would have disclosed the approaching train, did not so incontrovertibly amount to contributory negligence that no jury could find otherwise.

See also *Green et al. vs C. N. R.*, 40 C.R.C.[2] 157 (S. C.C. 1932).

See *Jewell vs G. T. R.*, (1924) 55 O.L.R. 68 — failure to see train, negligence of motorist; *Maygard vs C. P. R.*, (1929) 4 D.L.R. 1064 — collision with truck, failure of driver to keep proper lookout; *Tremblay vs C. P. R.*, 65 C.S. 406 (1927); *Friedman vs C. N. R.*, 31 C.R.C. 401 (Ont. S.C. 1924).

Signalman's signal to "go on".

The signal of a railway signalman at a level crossing to "go on" does not relieve the motorist of his duty nevertheless to look and see if it would be safe to proceed. *(Duthie vs B.C. Electric R. Co.,* (1924) 2 D.L.R. 462 (B.C. Court of Appeal)).

Auto stalled on crossing.

Stalling — struck by train — grade of approach — *R.S.C., 1927, C. 170, S. 266* — see *Raspberry vs C. N. R.*, (1928) 34 O.W.N. 164. See also *Staley vs B. C. Electric Ry. Co.*, (1938) S.C.R. 387.

Failure to lower gates sufficiently soon.

In *Vansantbergen vs Père Marquette Ry. Co.,* (1929) 36 O.W.N. 253 the railway company was held responsible because its signalman had allowed an approaching train to get too near the crossing before lowering the gates, and so permitted plaintiff's auto to get on the tracks when the train was so close that he could not save himself.

As to person entering between gates, see *Garside vs G. T. R.*, 23 D.L.R. 463 — affirmed by S.C.C. 29th Dec. 1915 (unrep'd).

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2. C. R. C. (Canadian Railway Cases) now called (Since Feb. 1939) C. R. T. C. (Canadian Railway and Transport Cases).

Statutory train signals.

S. 301 of *the Railway Act, R.S.C. 1927, C. 170*[3], was repealed by *20-21 Geo. V., C. 36 (1930)* and was replaced by the following:—

> **"Every locomotive engine propelled on the railway by steam shall be equipped and maintained with a bell of at least thirty pounds weight and a whistle; and every locomotive engine, car or other mechanism, propelled on the railway otherwise than by steam, shall be equipped and maintained with such signalling appliance or appliances as may be approved by the Board."**

S. 308 R.A. provides:—

> **"When any train is approaching a highway crossing at rail level the engine whistle shall be sounded at least eighty rods before reaching such crossing, and the bell shall be rung continuously from the time of the sounding of the whistle until the engine has crossed such highway.**
>
> **"Where a municipal by-law of a city or town prohibits such sounding of the whistle or such ringing of the bell in respect of any such crossing or crossings within the limits of such city or town, such by-law shall, if approved by an order of the Board, to the extent of such prohibition relieve the company and its employees from the duty imposed by this section."**

By *S. 287 (b)* the *Board*[4] may make orders and regulations with respect to the use of the steam whistle within any city, town or village, or any portion thereof. S. *419 (2)* provides that the company shall be liable for all damage sustained by any person "by reason of any failure or neglect so to sound the whistle or ring the bell."

In accordance with the general rule already discussed *(supra* p. 11) omission to give the statutory signals will

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3. Hereinafter referred to as R.A.
4. See footnote to p. 231, *supra*.

not render the railway company responsible for a collision unless such omission was the *determining or a contributing cause* of the collision. "Negligence is not to be presumed from failure to blow the whistle or ring the bell, unless it is shown that such default was one of the proximate causes of the accident". *(C.N.R. vs Montpetit,* (1925) 4 D.L.R. 151, 39 K.B. 114). "Il importe peu que le sifflet de la locomotive n'ait pas sifflé et que la cloche d'alarme n'ait pas sonné, s'il est établi que le bruit que faisait le train de marchandises qui passait à 25 milles à l'heure aurait empêcher d'entendre l'un et l'autre." *(Bissonnette vs G.T.R.,* 58 C.S. 281 (1920)).

Positive evidence that a signal was given is, generally speaking, preferable to negative evidence that it was not. Thus, in *Lefeunteum vs Beaudoin,* 28 S.C.R. 89 (1897) *Taschereau, J.* stated, at p. 93:—

> **"I have only one additional reason to give for our interference upon a question of fact with the concurrent findings of the two courts below. It is that it appears to me to have been lost sight of that it is a rule of presumption that ordinarily a witness who testifies to an affirmative is to be credited in preference to one who testifies to a negative, *magis creditur duobus testibus affirmantibus quam mille negantibus,* because he who testifies to a negative may have forgotten a thing that did happen, but it is not possible to remember a thing that never existed."**

Again, in *C.N.R. vs Montpetit, (supra, Greenshields, J.* stated, at p. 121:—

> **"...The rule is, that where a witness or a number of witnesses testify in the affirmative that a certain thing was done, viz.: a whistle was blown, and another witness, or an equal number of other witnesses testifies in the negative viz.: that they did not hear the whistle, the affirmative testimony must prevail."**

See also *Charest vs Ottawa N. & W. Ry Co.*, 23 R.J. 158 (C.R. 1911).

The jury is allowed to infer that the omission to give the statutory signals was the cause of the accident, although nobody can assert that had the bell been rung or the whistle blown the victim's attention would have been thereby attracted and the accident averted. (See *Wabash Ry. Co. vs Follick,* 1920, S.C.R. 375, *Anglin, J.* at p. 383). Mere compliance with all the statutory requirements as to warnings at a level crossing does not relieve a railway from liability for an accident caused by the negligence of the railway's employees. (*Napierville Jct. Ry. vs Dubois,* (1924) 4 D.L.R. 188 (S.C.C.)).

Litowitz vs C.N.R., (1935) 1 D.L.R. 216 (Man. C.A.):

A roofed-in sleigh driven by plaintiff and his wife on a clear day was struck by a train at a level crossing in the neighbourhood where they had been lifelong residents. The trial judge found that the cause of the accident was the unlawful speed of the train and failure to give the statutory signals; that although plaintiff was negligent in not looking after he came to the right of way, yet in all the circumstances he had acted reasonably. *Held,* on appeal, the trial judge was justified, his findings being in accord with principles decided in such cases as *G. T. R. vs Griffith, (infra)*; *Green vs C. N. R.* (1932) 4 D.L.R. 593; *Peart vs G. T. R.,* 10 O.L.R. 753.

The provisions regarding statutory signals *(S. 308 (1)* R.A.) do not apply to an engine engaged in *shunting* and never being in the course of its work more than 80 rods from any level crossing which it crosses *(G.T.R. vs McAlpine,* (1913) A.C. 838 (P.C.)); nor to a private crossing within the station grounds of the railway. *(Barlow vs C.P.R.,* (1926) 2 W.W.R. 11).

See *G. T. R. vs Griffith,* 45 S.C.R. 380 (1911) — jury's finding that fatal accident was due to failure to give

statutory signals upheld on appeal; *Hessler vs C. P. R.* (1935) S.C.R. 585 — accident to railway employee — walking on track in course of duties — failure to give statutory signals. See also *Brillant vs The King,* (1916) 15 Ex. Crt. Repts. 42 — Collision between train and sleigh — failure to sound whistle or ring bell — failure of sleigh driver to look both ways — common fault.

Train speed.

By *S. 287 (1a)* R.A. the Board may make orders and regulations limiting the rate of speed at which trains and locomotives may be run in any city, town or village or in any described portion thereof, or in any class of cities, towns or villages. By *S. 298 (1b)* the company is obliged to provide and install efficient apparatus to check the speed of its trains and bring them safely to a standstill. *S. 309* provides for a train speed limit of *10 M.P.H.* in the following cases:—

"(a) in or through any thickly peopled portion of any city, town or village, unless the track is fenced or properly protected in the manner prescribed by this Act, or unless permission is given by some regulation or order of the Board; or

"(b) over any highway crossing at rail level in any thickly peopled portion of any city, town or village, unless such crossing is constructed and thereafter maintained and protected in accordance with the orders, regulations and directions specially issued by the Railway Committee of the Privy Council or of the Board, in force with respect to such crossing, or unless permission is given by some regulation or order of the Board; or

"(c) over any highway crossing at rail level, if at such crossing, subsequent to the first day of January, one thousand nine hundred and five, a person or vehicle using such crossing, or an animal being ridden or driven over the same, has been struck by a moving train, and bodily injury or death thereby caused to such person or to any

other person using such crossing, unless and until such crossing is protected to the satisfaction of the Board; or

"(d) over any highway crossing at rail level in respect of which crossing an order of the Board has been made to provide protection for the safety and convenience of the public and which order has not been complied with."

Excessive train speed will not render the railway company liable for an accident unless such speed caused or contributed to the accident. *(Marchesseault et al. vs C.N.R.*, 42 K.B. 355 (1926); and see *supra* p. 83).

Cardin vs G.T.R., 22 R.L. 290 (1916). Held, in part:—

"Il n'y a pas de loi qui empêche un train de chemin de fer de rouler à une vitesse de quarante milles à l'heure même aux croisements des voies publiques ordinaires à la campagne, en l'absence de règlement de la Commission des chemins de fer."

A train is not obliged to reduce speed to 10 M.P.H. at a level crossing except in a thickly peopled portion of a city, town or village in the absence of particular circumstances. *(Ménard vs Que. Ry. L. & P. Co.*, 46 K.B. 1 (1928); *Critchley vs C. Nor. Ry. Co.*, 34 D.L.R. 245 (Alberta S.C. 1917)).

"Thickly peopled".

In *Vynerzenke vs C. Nor. Ry. Co.*, (1922) 22 O.W.N. 1 *Maclaren, J.A.* referring to *Railway Act, 1919, sections 274, 309* stated:—

"There is no definition of 'thickly peopled' in the Act. The words are to be taken in their everyday common sense meaning; and in each case the question whether a locality is thickly peopled is a question of fact to be determined by the jury."

A group of 29 houses near a station in a rural municipality does not constitute a "thickly peopled place",

(*Laflèche vs C.P.R.*, 71 C.S. 150. See also *Minor vs G.T.R.*, 35 D.L.R. 106 (1917); *Andreas vs C.P.R.*, 37 S.C.R. 1 (1905)).

G.T.R. vs McKay, 34 S.C.R. 81 (1903). Held (R.H.):

> **"In passing through a thickly peopled portion of a city, town or village a railway train is not limited to the maximum speed of six miles an hour prescribed by 55 & 56 Vict. c. 27, sec. 8, so long as the railway fences on both sides of the track are maintained and turned into the cattle guards at highway crossings as provided by sec. 6 of said Act. Judgment of the Court of Appeal (5 Ont. L.R. 313) reversed, Girouard, J. dissenting."**

C.N.R. vs Pommerleau, 48 K.B. 97 (1929). Held (R.H.):—

> **"Constitue un endroit populeux, la partie d'une ville de 2,500 âmes où se trouve un passage à niveau dans une rue à laquelle aboutissent cinq autres rues — y compris la route nationale — toutes garnies d'habitations; dans les circonstances visées par l'article 309 de la loi des chemins de fer, un train ne peut y circuler à une vitesse excédant dix milles à l'heure." (Judgment affirmed by Supreme Court (1931) S.C.R. 287).**

In *Bell vs G.T.R.*, 48 S.C.R. 561 (1913) (dealing with the speed limit of 10 M.P.H. through a "thickly peopled" portion of a city) it was held that the onus was on the company to prove "that the conditions existed which, under the provisions of said section, exempted them from the necessity of limiting the speed of their train to ten miles an hour or that they had the permission of the Board to exceed that limit, and as they had not satisfied that onus the plaintiff's verdict should stand."

> **See also *G.T.R. vs Labreche*, 64 S.C.R. 15 (1922); *Critchley vs C. Nor. Ry. Co.*, (*supra*, p. 240).**

Train moving reversely.

S. 310 R.A. provides:—

> "Whenever in any city, town or village, any train not headed by an engine is passing over or along a highway at rail level which is not adequately protected by gates or otherwise, the company shall station on that part of the train, which is then foremost, a person who shall warn persons standing on, or crossing, or about to cross the track of such railway.
>
> "2. The Board, upon the application of any railway company or person, shall have power to order that this section shall not apply to any particular trains or classes of trains, or to trains running on any specified portions of the railway of the company: Provided that no such order shall be made with respect to trains engaged in shunting or switching, or in yard or terminal movements."

Wright vs C.N.R., (1938) I D.L.R. 496 (Ont. S.C.). Held, in part (R.H.):—

> "Where an automobile is struck on a level crossing by the tender of an engine running in the reverse at night, and no signals or warnings were given to warn travellers of the approaching engine, nor any watchman stationed as required by s. 310 of the Railway Act, and only a light was carried on the tender which could have been mistaken for a street light, held that there was sufficient evidence of negligence on the part of the railway as the proximate cause of the accident to warrant the case to go to the jury, and that the plaintiff could not be non-suited under the stop, look and listen rule."

The uninterrupted ringing of the bell and a headlight on a tender, when moving reversely, constitute a reasonable warning of the approach of a train — especially in the case of employees working permanently in the yards of the railway where such locomotive is running [5]; such employees

5. See, however, *Ouellette vs C.P.R.* (1925) A.C. 569 (P.C.) holding railway must place lookout on foremost part of tender when engine and tender (which constitute "a train") are moving reversely in certain localities. (In that case two engines and tenders, coupled together, were running backwards.)

being strictly obliged under the circumstances to stop, look and listen. *(Kaczuryk vs C.P.R.,* 63 C.S. 334 (1925)). When a train moving reversely is being operated in compliance with all the requirements of the law and of the Board, the company will not be liable in damages for a collision with an automobile occurring at a level crossing unless it is shown that it has failed to take such steps or to do such things as ordinary prudence dictates, *(Curry vs C.P.R.,* 66 C.S. 476 (1928)). It is necessary only that the warning should be such as ought to be apprehended by a person of ordinary faculties in a reasonably sound, active and alert condition, and that the time given to avoid the danger should be reasonably sufficient to enable a person of that description to avoid it. *(G.T.R. vs McAlpine,* (1913) A.C. 838 (P.C.)).

> **See also *Mitchell vs G. T. R., 22 D.L.R.* 804 (Ont. S.C. 1915); *Helson vs Morrisey, etc. Ry. Co.,* (1912) 1 D.L.R. 33; *Bertrand vs C. P. R.,* 63 C.S. 368 (1925).**

Engine driver's duty to keep lookout.

McCaffry vs C.P.R., (1924) 2 D.L.R. 213 (Alberta S.C.). Held (R.H.) :—

> **"Failure to provide an adequate headlight on a yard locomotive may be negligence although there be no statutory requirements to provide such a headlight. If therefore damage results from the failure of an engineer to see an object on the track, that must have been seen if an adequate headlight had been provided, in time to avoid the accident, the railway company is guilty of an act wanting in ordinary care and liable for its negligence. (*Calper vs E. D. & B. C. R.,* (1923) 4 D.L.R. 674, applied)".**

In *Collin vs G.T.R.,* 48 C.S. 106 (C.R. 1915) it was held, in part, that the driver of a locomotive is not obliged to look constantly in front to see if there is anything on the line, and that he may make repairs to the engine while

it is in movement provided he has given all the signals required by law at crossings and other places.

Switching.

G.T.Pac. Ry. Co. vs Earl, (1923) 2 D.L.R. 741 (S.C.C.). Held (R.H.) :—

> "The failure of a railway company to provide a watchman at a railway crossing and to confine its switching operations to hours permitted by an order of the Board, although a violation of a statutory prohibition does not exclude the defence of contributory negligence nor render the company liable for injury to a person crossing the railway tracks, where such person has been guilty of such contributory negligence in not taking reasonable care to avoid placing himself in the way of the approaching train, but has gone blindly on the track knowing that a train was approaching the crossing."

Protection at crossings.

> See *Sections 256 (2), 257 (1)* R.A. As to safety devices at crossings or junctions of two or more lines see *S. 254.*

S. 267 R.A. provides :—

> "Signboards at every highway crossed at rail level by any railway, shall be erected and maintained at each crossing, and shall have the words ***Railway Crossing*** painted on each side thereof in letters at least six inches in length.
>
> "In the province of Quebec such words shall be in both the English and the French languages." 1919, c. 68, s. 267.
>
> For case of absence of proper signs and responsibility of company for accident, see ***Morton vs Que. R. L. & P. Co.***, 64 C.S. 272 (1926).

Gosselin vs C.N.R. et al., 68 C.S. 323 (1930). Held, in part (R.H.) :—

"Ne constitue pas une faute l'omission par une compagnie de chemin de fer ou par une municipalité d'installer une barrière ou autre moyen de protection dans un passage à niveau, quelque dangereux qu'il soit, à moins que l'installation de ces moyens de protection n'ait été ordonnée par la Commission des chemins de fer."

Precautions at railway crossings.

Sections 306 and *307* R.A. provide as follows:—

"306. No train or engine or electric car shall pass over any crossing where two main lines of railway, or the main tracks of any branch lines, cross each other at rail level, whether they are owned by different companies or the same company, until a proper signal has been received by the conductor or engineer in charge of such train or engine from a competent person or watchman in charge of such crossing that the way is clear.

"In the case of an electric car crossing any railway track at rail level, if there is no competent person or watchman in charge of the crossing, it shall be the duty of the conductor, before crossing and before giving the signal to the motorman that the way is clear and to proceed, to go forward and see that the track to be crossed is clear. 1919, c. 68, s. 306.

"307. Every engine, train or electric car shall, before it passes over any crossing as in the last preceding section mentioned, be brought to a full stop: Provided that whenever there is in use, at any such crossing, an interlocking switch and signal system, or other device which, in the opinion of the Board, renders it safe to permit engines and trains or electric cars to pass over such crossing without being brought to a stop, the Board may, by order, permit such engines and trains and cars to pass over such crossing without stopping, under such regulations as to speed and other matters as the Board deems proper. 1919, c. 68, s. 307."

Obstructed and dangerous crossings.

As to powers of Board to remove obstructions, etc., see *S. 258*, R.A. See also *Sections 255 (2), 256 (2).*

As to duty of motorist when the crossing is obstructed or dangerous see *supra*, p. 234.

Audet et al. vs C.N.R., 67 C.S. 357 (1928). Held, in part:—

"Une compagnie de chemin de fer ne peut être tenue responsable d'un accident, survenu à l'intersection d'un chemin public et de sa voie ferrée, à raison du fait que la disposition des lieux aux abords de la traverse la rend particulièrement dangereuse."

In *Cardin vs G.T.R.*, 22 R.L. 290 (1916) it was held that steps taken by a railway company to render a level crossing less dangerous should not be considered as an element of proof of the company's negligence before or at the time of the accident.

Littley vs Brooks & C.N.R., 4 D.L.R. 1 (1930) S.C.R. 416. Held, in part (R.H.):—

"While a regulation made by a Provincial Railway Board for the safety of the public at a railway crossing does not now apply, such railway having become part of the Canadian National system, and is inadmissible in evidence as a regulation, nevertheless since it embodied the result of inquiries made by a competent public authority in the exercise of a judicial or quasi-judicial duty and concerned a matter in which the public were interested, it is receivable as evidence of the dangerous character of the crossing."

See also *Gosselin vs C. N. R. et al.*, 68 C.S. 323 (1930).

Rock vs C. Nor. Ry. Co., 66 D.L.R. 255 (Sask. C.A. 1922). Held (R.H.):—

"The placing by a railway company of box cars, so that they project several feet on a highway and obstruct

the view of trains crossing the highway on the company's tracks, from persons travelling on the highway, is negligence, and where an accident results from such view being obstructed the company is liable for the resultant damage notwithstanding sec. 311 of the Railway Act, 1919 (Can.), ch. 68, which permits a railway company to obstruct traffic for short periods. It is for the jury to say whether the person injured used due diligence before proceeding to cross the track. (*Campbell v. C. N. R. Co.*, (1913), 12 D.L.R. 272, followed; *Gorris v. Scott*, (1874) L.R. 9 Ex. 125, distinguished.)"

Bogle vs C.P.R., 32 C.R.C. 107 (Ont. S.C. 1921). Held, in part (R.H.) :—

"It is not negligence in law for a railway company to leave box cars on a siding near a level highway crossing. There is no statutory or common law duty incumbent upon a railway company not to erect buildings or maintain trains or tracks or sidings near a highway crossing if such buildings or trains will have the effect of blocking the view of one approaching the crossing so as to prevent him seeing an approaching train."

See p. 112 of the case report. See also *Mtl. Trust Co. vs C. P. R.* (1927) 4 D.L.R. 373 — box cars close to highway, obstruction of view: *Reynolds et al vs C. P. R.* (1927) S.C.R. 505 — bank maintained on side of railway.

Crossing under repair.

Staley vs B.C. Elec. R. Co., (1938) 3 D.L.R. 81, (1938) S.C.R. 387. Held (R.H.) :—

"The finding of a jury that the removal of planks from a railway crossing in the course of repairs too close to train time and failure to replace them temporarily on the approach of an auto was negligence on the part of the railway company which caused the auto to drop into a hole where the plank was out and be struck by an oncoming train and that the risk was not so obvious to the driver of the car as to render his attempt to cross a neg-

ligent one, held not unreasonable and justified by the evidence."

Blocking of crossing.

S. 311 R.A. provides as follows:—

"Whenever any railway crosses any highway at rail level, the company shall not, nor shall its officers, agents or employees, wilfully permit any engine, tender or car, or any portion thereof, to stand on any part of such highway, for a longer period than five minutes at one time, or in shunting, to obstruct public traffic for a longer period than five minutes at one time, or in the opinion of the Board, unnecessarily interfere therewith."

Goodwin vs Goodwin & C.P.R., 40 C.R.C. 316 (Ont. S.C. 1933). Held (R.H.):—

"The blocking of a highway crossing by a standing train longer than the five minutes allowed by s. 311 of the Railway Act does not render the railway company liable for injury to an automobile colliding with the train, as the lapse of time went no further than to create the condition in which the accident occurred as distinguished from the cause thereof." (*Kerr v. Laing Produce & Storage Co.*, 40 O.W.N. 146, distd; *Gauley vs C. P. R.*, (1930) 4 D.L.R. 354, 36 C.R.C. 365, 65 O.L.R. 477, apld.)

Farm and private crossings.

S. 275 R.A. provides that the persons for whose use farm crossings are furnished shall keep the gates at each side of the railway closed when not in use.

Allen vs C.N.R., (1924) 2 D.L.R. 1078 (N. Scotia S.C.). Held (R.H.):—

"A farm-crossing is a mere privilege to be made use of largely at the owner's risk, and the railway is not liable for damages for injuries done by a train at such a crossing in the absence of recklessness or lack of

reasonable care consistent with the provision of speedy traffic."

See ***Highley vs C. P. R.***, (1929) 37 O.W.N. 243; ***Moisan vs C. Nor. Ry. Co.***, 57 C.S. 450 (1919).[5]

Gosselin vs C.N.R. et al., 68 C.S. 323 (1930). Held, in part:—

"Un passage à niveau appartenant à un particulier et utilisé de temps à autre par d'autres que le propriétaire ne devient pas public dans le sens de la loi des chemins de fer (art. 308 et 309), au sujet de la vitesse et des signaux".

See also ***Bellerose vs C. N. R. et al.***, 77 C.S. 104 (1938).

Booley vs C.N.R., 46 C.R.C. 382 (K.B. 1937). Held (R.H.):—

"Though a crossing was not an authorized highway crossing but had been for many years a *de facto* public crossing with the knowledge and acquiescence of the respondent railway company and the Board of Railway Commissioners had dealt with it as such by ordering the placing of a watchman and gates thereon, and, apart from an obscure notice parallel to the roadway that it was not a public highway, everything indicated it was a highway crossing open to the public, the railway company will be held liable in damages for an accident due to non-maintenance thereof in accordance with statutory regulations concerning highway crossings."

Cattle.

See *S. 274* R.A. as to cattle guards at crossings. *S. 272 (2)* provides that live stock, in using farm crossings at rail level, shall be in charge of some competent person, who shall take all reasonable care and precaution to avoid accidents. Reference should also be made to *Sections 278* and *386 (1)* and *(2)*.

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5. See also *Laurin vs C.N.R.*, 68 C.S. 566, in which the company was held responsible for an accident at a private crossing. This judgment was reversed by K.B. (No. 447, Feb. 1932, *unrep'd*) which held, in part:—

C.N.R. vs Smith, 64 K.B. 161 (1937). Held, in part:—

"...The owner of animals claiming damages resulting from the killing of a cow by a train on a highway crossing must prove that the cattle were in charge of a competent person. Such condition is not fulfilled if it appears that the man in charge opened the gate and let eighteen cows out on the highway only seventy-five feet from the intersection while he turned up the lane fifty or sixty feet to get round the last of the herd at a time he knew that a train was due to pass. At that moment the eighteen cows were on the highway with no one in charge within the meaning of section 278 of the Railway Act."

See also *Moisan vs C. Nor. Ry. Co.*, 57 C.S. 450 as to liability of company for loss of animals which had wandered onto track and had been killed.

Collision with track car.

See S. 301 R.A. *(supra* p. 236) with reference to the approval by the Board of a signalling appliance on a car or other mechanism, propelled on the railway otherwise than by steam.

Green et al. vs C.N.R., (1932) S.C.R. 689:

Plaintiff claimed damages resulting from his auto being struck by the company's gas-electric coach at a level crossing. The coach was equipped with horn and bell, but only the horn was sounded. Plaintiff took the latter for the horn of an automobile behind him, although there was no such automobile. He looked but did not see the approaching coach as the station obstructed his view. He knew that no regular train was due at that time. The trial judge held the company responsible on the ground that the bell had not been sounded. Reversing that decision the Appellate Division (26 Alta. L.R. 49) held by majority that plaintiff's contributory negligence was the *causa causans* of the accident. Finally, the *Supreme Court* held by majority that, under all the circumstances,

"...la défenderesse avait les clôtures qu'il fallait, chaque coté de son chemin de fer; qu'elle avait aussi pourvu la dite traverse des barrières de l'espèce que la loi requiert...

plaintiff was not guilty of contributory negligence and was entitled to recover. Referring to *S. 301* R.A. *Cannon, J.* stated, in part, at p. 692: —

"There is no evidence that the Railway Board have approved of, or determined that any device should be used as a signal by cars propelled otherwise than by steam. The company had, however, equipped this particular car with a horn and a bell, no doubt to be used by their employees as signals to avoid possible danger to the public."

Fortin vs Mtl. & Southern Counties Ry. Co., C.S. 286, Dist. of Bedford, *Verret, J.*, Feb. 8th, 1935 *(unrep'd)*:

Fortin sued the railway company in warranty in connection with damages resulting from a collision between his automobile and the company's track motor at a level crossing. Before the date of accident the Board had made an order (in virtue of *S. 301* R.A.) providing that cars of the company in question propelled otherwise than by steam should be equipped with certain signalling devices. However, the Company's track motor had not been so equipped, and it could moreover have been stopped in time to avoid the collision. On the other hand, Fortin brought his automobile to a stop only 60 feet from the crossing, and failed to stop again before driving onto the track. Under these circumstances the Court held that the accident resulted from the common fault of both Fortin and the railway company.

In *Lemieux vs Langevin et al.*, 54 C.S. 542 (C.R. 1918) it was held that the driver of a railway hand-car should signal its approach to a level crossing.

Duty to avoid accident.

Dowser vs C.N.R., (1929) 4 D.L.R. 233 (Alta. Supreme Crt):

There is always a duty to avoid an accident if it is possible by the exercise of reasonable care to do so, even though there is no antecedent duty to warn against

"...la défenderesse n'avait à pourvoir la dite traverse privée ou de ferme, ni d'affiches, ni de signaux d'alarmes; que la loi, ni l'usage ne requiert rien de tel, aux traverses privées ou de ferme..."

danger. Where a plaintiff fails to realize his peril until he is powerless to avoid the accident, and the defendant could have given an effective warning but does not do so, defendant has the *last clear chance* to avoid the accident and is alone responsible therefor.

Trespass on track.

See *Jean vs Que. Ry. L. & P. Co.*, 64 C.S. 475 (1925), and *supra*, p. 208 et seq.

Normal use of railway.

C.P.R. vs Roy, (1902) A.C. 220 (P.C.). Held, in part:

"A railway company authorized by statute to carry on its railway undertaking in the place and by the means adopted is not responsible in damages for injury not caused by negligence, but by the ordinary and normal use of its railway; or in other words, by the proper execution of the power conferred by the statute..."

SECTION 14

AUTOMOBILE INSURANCE

As this book goes to press, there are rumours — probably well founded — that the Provincial Government intends before long to introduce important legislation relating to automobile insurance. It is to be hoped that such legislation, should it come to pass, will follow that of other provinces in adopting what was intended to be a Uniform Automobile Insurance Act; and, at the same time, that the Motor Vehicle Act will be amended by the addition of suitable provisions requiring proof of financial responsibility on the part of motor vehicle owners and drivers. There can be no doubt but that the present state of the law, under which motorists from whom there is no prospect of collecting damages are permitted to run loose on the highways, is, to say the least, unsatisfactory.

Policy.

For distinction between motor vehicle and fire insurance contracts, nature of policy, etc., see *Boudreau vs Imp. Guar. & Acc. Co.*, (1923) 2 D.L.R. 57 (C.S. Que.). *S. 240a* of the Quebec Insurance Act R.S.Q. 1925, C. 243 (added by 20 George V., C. 90, S. 10) provides that "On and after the 4th of April, 1930, no motor vehicle insurance contract shall be executed or renewed except by an insurance policy approved by the Superintendent of Insurance as to its form and policy conditions."

Transfer of rights.

Art. 2584 C.C. provides:—

> **"The insurer on paying the loss is entitled to a transfer of the rights of the insured against the persons by whose fault the fire or loss was caused."**

In *Ginsberg vs Matthews Blackwell Co. Ltd.*, 27 R.L. 301 (C.R. 1921) it was stated that the principle was generally admitted that the transferee of a claim and right of action could sue in the name of his transferor. It was held that an insured against accident, who in case of a collision had been paid his damages by the insurance company, had the right to sue the person responsible for the accident for the benefit of the insurers, and that the plaintiff was not obliged to allege in his declaration that he was suing for the benefit of the insurance company, as the author of the damages having received no notice of the transfer could discharge himself of his obligation validly by paying the plaintiff.

In *Oliver vs Barbeau*, 37 R.L. 213 (1930) it was held that the transferee, having the right to take an action in the transferor's name, the insurance company could recover in the name of the insured the damages suffered by the latter and paid to him by the company. *Surveyer, J.* stated at p. 215:—

> **"...as to defendant objecting to a suit being taken in plaintiff's name on the ground that plaintiff's damages have been paid by an insurance company, that such objection is unfounded, the transferee of a claim or right of action having the right to sue in the name of his transferor."**

> **See also *Can. Northern Que. Ry. vs Argenteuil Lumber Co.*, 28 K.B. 408 (1918); *McFee vs Mtl. Transportation Co.*, 27 K.B. 421 (1918).**

In *Merchants & Employers Guarantee & Acc. Co. vs Brunet*, 58 C.S. 77 (C.R. 1920) it was held that the insurer against accidents who pays the damages suffered by the

insured has a recourse against the party responsible without being obliged to obtain a conventional "subrogation": the insurer has a direct right of action under *Article 1053* C.C. See also:—

> ***Cedar Shingle Co. vs Rimouski Ins. Co.*, 2 Q.B. 379; *London Lan. Guar. & Acc. Co. of Canada vs St. Marie et al.*, C.S. 32783, Que. Nov. 14 1936; *Motor Union Ins. Co. vs Sacks et al.*, 62 C.S. 14 (1923); *Hébert vs Rose*, 58 K.B. 459 (1935).**

Toronto Gen. Ins. Co. et al. vs Better, 71 C.S. 565 (1933). Held (R.H.):—

> **"The law does not recognize in favour of an assurer who has paid the sum he undertook to pay under his contract of assurance to his assured, a legal subrogation against the author of the damage: his right is to obtain a transfer from his assured under the terms of article 2584 C.C.**
>
> **"An assurer who has paid a loss to which he was held under his policy has a right of action against the author of the damage in virtue of article 1053 C.C., but he must specifically allege that the injury sustained by the victim was due to some fault on the part of the defendant."**
>
> **The judgment in the *Better* case cited, inter alia, *Merchants and Emp. Guarantee and Acc. Ins. Co. vs Blanchard*, 56 C.S. 278; Codifiers' Report upon Article 2584 C.C. Vol. III, pp. 256, 257; *Maryland Casualty Co. vs Dominion Flour Mills*, 49 C.S. 262, at p. 265 (1916).**

In *Côté vs Gagné*, 76 C.S. 499 (1938), *Laliberté, J.* pointed out that the document *subrogation receipt* — by which, in consideration of payment of his loss, the insured transfers his rights against third parties to his insurer — is not in fact a legal subrogation, but rather a transfer of rights. He cited *Sumien, Traité des Assurances terrestres*, n. 175, p. 79 as follows:—

> **"Malgré les termes employés 'subrogé, subrogation', il est aujourd'hui reconnu que la convention ainsi inter-**

venue entre l'assureur et l'assuré n'est pas une subrogation, mais bien la cession d'une créance éventuelle; cette cession est régie, par suite, non par les règles et les formes de la subrogation conventionnelle, mais par celles de la cession de créances, notamment en ce qui concerne la nécessité de la signification à faire au tiers responsable, débiteur cédé, conformément à l'article 1690 du Code Civil."

For judgment on *inscription-in-law* in the same action, see 76 C.S. 351.

Davis vs MacRitchie et al., (1938) 4 D.L.R. 187 (N.S. Supreme Crt.). Held (R.H.) :—

"Where the insured under an automobile collision policy is paid his loss under the terms of the policy, and later also settles the claim with the tortfeasor and his insurer, releasing them from liability, he is liable to his insurer for the amount the latter paid him under the policy, which but for the release the insurer could have recovered from the tortfeasor by way of subrogation."

Leduc vs The British Canadian Ins. Co., 35 K.B. 342 (1923). Held, in part (R.H.) :—

"Lorsqu'une police d'assurance contre l'incendie, sur un automobile, contient une clause défendant à l'assuré de prêter sa machine sous peine de nullité de la police, un tiers, poursuivi en dommages par la compagnie d'assurance qui a payé le propriétaire après l'incendie de l'auto et qui est à ses droits, ne peut prendre avantage de cette clause si la compagnie ne l'a pas fait." See *Guérin J.* at pp. 344-345 of the report.

Duplication of indemnities.

The tendency of Quebec jurisprudence on the subject of duplication of indemnities has been to follow the English law under which the right to recover insurance and the right to recover damages from the wrongdoer are considered two distinct and unrelated causes of action.

In *Hébert vs Rose*, 58 K.B. 459 (1935) it was held (reversing judgment of C.S.) that if a certain sum is found to be due for damages caused to an automobile through a collision, an amount received by the plaintiff from an insurance company which had insured his automobile against loss or damage through collision, cannot be deducted from the award. The trial judge had assessed the damages at $604.35 in favour of plaintiff but had deducted $400.00, being the amount received by the plaintiff under his collision insurance. *McDougall, J. (ad hoc)* said that the point was clearly dealt with by the judgment in the Ontario case of *Millard vs Toronto R.W. Co.*, 6 O.W.N. 519 in which, at p. 521, it was stated as follows:—

> **"He (the assured) has two distinct causes of action; the one on the contract with the insurance company which has insured him against accident, that they shall, on the occurrence of an accident, pay him a sum of money, not certain perhaps, but which the accident makes certain. That contract he has paid money for and is entitled to enforce even if he lets the wrongdoers go. The other cause of action he has is in tort against the wrongdoer for damage, which he may enforce even if he lets the insurance company go. There is no reason why both cannot be enforced...**
>
> **"If now he sues the wrongdoer, he is entitled to the full amount for himself if the insurance company have not paid him; if they have paid him, the insurance company have rights which we need not go into here; they are indicated in the cases cited. But with the rights of the plaintiff and the insurance company *inter se*, the wrongdoer has no concern. Mayne on Damages, pp. 495 seq. of the 8th Ed. may be consulted..."**

In accordance with the same principle, amounts received by a plaintiff from an employees' mutual benefit association, during the period of incapacity resulting from an accident, should not be deducted from the damage

award. *(Corbeil vs Zinman et al.*, 45 R.J. 360 (1939)). Reference should also be made to the following leading cases:—

> ***Sevigny vs Bourdon*, 40 R. L. 125 (1932); *McGarr vs Carreau*, 46 C.S. 448 (1914); *Woolfson vs Canada Steamship Lines*, 67 C.S. 499 (1929); *Dagenais et al. vs Charbonneau*, 72 C.S. 489 (C.C. 1934); *Saindon vs The King*, 15 Ex. Ct. Rep. 305 (1914); *contra*, *Hall vs Pageau*, 70 C.S. 197 (1932).**

However, in calculating damages in actions under *Art. 1056* C.C., account should be taken of the saving of premiums on a life insurance policy, and of a policy stipulating a double indemnity in case of accidental death. (See also *infra* p. 304 et seq.).

Omnibus clause.

The following is a typical example of the "omnibus clause" in automobile insurance policies:—

> **"If the use of the automobile is specified by the words 'private use' or 'private use and business calls' (commercial delivery excepted) then to indemnify in the same manner and under the same conditions as the Insured is hereby entitled to indemnity, any person or persons while riding in, or legally operating the automobile, and any person, firm or corporation legally responsible for the operation thereof; but upon condition that such use or operation is with the permission of the Insured; or if the Insured is an individual, with the permission of an adult member of the Insured's household other than a chauffeur or domestic servant; provided that the indemnity payable hereunder shall be applied, first, to the protection of the Insured and the remainder, if any, to the protection of the other persons entitled to indemnity under the terms of this section as the Insured shall in writing direct."**

The legal effect of such a clause was determined by the Supreme Court of Canada in *Joseph Hallé vs Canadian Indemnity Co. & Rolland Hallé (mis-en-cause),* (1937) S.C.R. 368:

The Canadian Indemnity Co. issued a policy in favour of Rolland Hallé whereby it undertook to indemnify him for all losses and damages resulting from his legal responsibility towards third persons as a consequence of bodily injuries or of death sustained by the latter and caused to them through the maintenance or use of the automobile described in the policy. The policy also contained an « omnibus clause » similar to the one above set forth. One day Rolland Hallé *(mis-en-cause)* lent his automobile to his brother, Joseph Hallé (appellant) and the latter while driving two companions in the car met with an accident resulting in serious injuries to both his passengers. One of them took action against the appellant to recover the damages he had sustained. The appellant, alleging he was protected against liability under the policy with the respondent Canadian Indemnity Company, instituted in his own name an action in warranty against the respondent.

In defending the action the insurance company unsuccessfully pleaded collusion on the part of the principal plaintiff and the plaintiff-in-warranty. However, its main grounds of defence were, first, that the omnibus clause was ineffective owing to lack of insurable interest on the part of the *mis-en-cause,* and secondly, that the action was premature (a) because the insured had not given instructions as to the application of the sums payable in accordance with the last part of the omnibus clause, and (b) because, contrary to a statutory condition in the policy, the action had been taken before the amount of the loss had been determined. *Laliberté, J.* in the *Superior Court* agreed that the omnibus clause was ineffective for lack of in-

surable interest, and also that the action was premature because of the insured's failure to give written instructions in accordance with the terms of the policy, and the warranty action was dismissed. This judgment was subsequently affirmed by a three to two majority in the *Court of King's Bench* (61 K.B. 522). An appeal was then successfully taken to the *Supreme Court* where it was held: (R.H.) :—

> "...under the terms and conditions of the insurance policy, the respondent company was liable to indemnify the appellant for all losses or damages resulting from the accident.
>
> "The appellant was legitimately in possession of the automobile, was driving it with the permission of the insured and was legally responsible for the manner in which the automobile was being driven. He was, therefore, one of the persons whom, under the terms of the policy and in consideration of the premium paid to it by the *mis-en-cause*, the respondent insurance company undertook to indemnify. He was not therein mentioned by name; but, according to the law of Quebec, as expressed in the French doctrine and jurisprudence, it is not necessary for its validity that the stipulation for the benefit of third parties should be made in words definitely ascertaining these persons; it is sufficient if they are ascertainable on the day when the stipulation takes effect in their favour. Therefore the respondent company cannot escape the obligation of indemnifying the appellant unless it is shown that its stipulation is prohibited by law. But the clause in favour of third persons invoked by the appellant against the respondent company is valid and enforceable, because stipulations in favour of third parties are valid and enforceable in civil law. They are expressly authorized by article 1029 C.C.; and no special rule exists, in the chapter of the code dealing with insurance, of a nature to exclude insurance contracts from the application of the general principle enacted in article 1029 C.C. And this view is strengthened by the enactments of article 2480 of the above chapter, where

the civil code expressly singles out a class of policies which are declared prohibited. — The definition of 'insurance' as contained in article 2468 C.C. adapts itself to the policy issued by the respondent company: it applies both to the main obligation undertaken for the benefit of the *mis-en-cause* and to the undertaking towards the other persons ascertainable under the above-cited clause. The fact that up to the moment of the accident the appellant had not yet signified his assent to the stipulation made in his favour by the *mis-en-cause* is not a bar to the action: his assent was not necessary to bind the insurance company and it was sufficient if he manifested his intention to avail himself of the stipulation as soon as the event happened which made the stipulation effective in his favour. In civil law, a valid stipulation in favour of a third person creates a contract (*vinculum juris*) between the third person and the person who has agreed to be bound by the contract."

See *Articles 1029, 2468, 2472, 2474, 2476, 2480 C.C.*

The Company's contention that the action was premature was also held to be unfounded, the Court holding that the provision regarding written instructions applied only when there was a distribution to be made between the insured and some other person (see *Rinfret, J.* at pages 381-2). Furthermore, the clause forbidding the institution of action until the amount of the loss had been determined was inapplicable as this was an action in warranty. (See *infra* p. 269).

In the earlier case of *Vandepitte vs Preferred Accident Ins. Corp. of New York*, (1933) A.C. 70; (1933) 1 D.L.R. 289 the omnibus clause was held to be ineffective by judgment of the Judicial Committee of the Privy Council, and that judgment was relied upon by the trial judge, and to a certain extent by one of the judges forming the majority in the Court of King's Bench in the *Hallé* case. However, the *Vandepitte* case was decided under the *In-*

surance Act of British Columbia and upon general legal principles which were inapplicable to the *Hallé* case. (See *Rinfret, J.* page 384 of the *Hallé* case above cited).

For discussion of the *Vandepitte* case see *Can. Bar Review* 1939, Vol. 17 p. 436. See also *Crown Bakery vs Preferred Acc. Ins. Co.* (1933) 4 D.L.R. 117 (Sask C.A.).

Collision.

In *Kliant vs Providential Ass'ce Co.,* 63 C.S. 7 (1924) a collision was defined as "the meeting and mutual striking of two or more moving bodies or of a moving body with a stationary one". In *MacDonald vs Guardian Ass'ce Co.,* (1929) 1 D.L.R. 518 (N.S. Supreme Crt.) *Harris, C.J.,* remarked that it was "not necessary nor would it be advisable to attempt any definition of the word 'collision' ".

London Guarantee & Accident Co. vs Sowards, (1923) S.C.R. 365:

An automobile was insured against loss or damage by "being in accidental collision... with any other automobile, vehicle or object." *Held,* reversing the judgment of the Appellate Division, that the automobile, coming into contact with the earth by being capsized after striking a rut in the road, was not in "collision" within the meaning of that term in the policy.

Kliant vs Providential Ass'ce Co., (cited above):

***Duclos, J.* held (distinguishing the *Sowards* case) that if a driver of an automobile in order to avoid the actual collision of his automobile with another automobile drives his car away from the road — thus suffering less damage — he is entitled to an indemnity in accordance with the clause in his policy providing for same on account of a collision. Referring to the *Sowards* case, *Duclos, J.* pointed out that there was no other automobile in question and no possible collision, therefore, with any other automobile, vehicle or object. That case, therefore, did not apply.**

In *Collins vs Guardian Casualty Co.*, 40 D.L.R. 133 (1918) the *B.C. Court of Appeal* held that a pile of sand on the roadway is not part of the roadbed, and is not within the exception excluding loss or damage by "striking any portion of the roadbed or by striking the rails of any street, steam or electric railway."

MacDonald vs Guardian Ass'ce Co. (cited above):

> **The driver of an automobile miscalculated his distance in making a turn, and the car left the road and landed on its wheels in the water at right angles to the road. The car was insured for loss or damage caused by "accidental collision with another object, either moving or stationary". *Jenks, J.* held that "The bed of the river and the water therein are objects within the meaning of this language", and referred particularly to *Harris vs Am. Casualty Co.* (1912), 83 N.J. 641. In appeal by defendant, which was dismissed, *Harris, C. J.* pointed out the difficulty of defining the word "collision" and continued at p. 523:—**
>
> **"There are American decisions by strong Courts expressing the view taken by the trial Judge that the bed of the river and the water therein are objects within the meaning of the clause in this policy, and I do not wish to be understood as questioning the authority of these cases. I prefer however in the present case to base my decision upon what I think is the proper inference to be drawn from the evidence that the car before reaching the waters of the river came into collision with rocks or trees or both after it left the road and was thereby injured.**
>
> **"That is damage which was undoubtedly caused by 'accidental collision with another object' within the meaning of the policy."**

Austin vs Jordan, (1931) 4 D.L.R. 292 (Ont. Supreme Crt):

> **In crossing a bridge forming part of the highway the front wheels of an automobile sank into a soft depression in the roadway as they left the bridge, thereby causing**

the bottom of the car to strike the shoulder of the bridge, resulting in damage to the car.

Held **that the shoulder of the bridge was an "object" within the meaning of a clause insuring against loss or damage to the car if "caused by accidental collision with another object, either moving or stationary, or by upset."**

See also *Sandford vs Canadian Fire Ins. Co.*, (1931) 3 W.W.R. 316 which held that damage to an automobile by objects being hurled against it, as a result of an explosion, constituted a collision within the meaning of a clause in the policy covering "collision with another object."

Notice of accident.

In *Murray vs The Preferred Accident Ins. Co.*, 34 R.J. 301 (1928) it was held that when an insured person suffers an automobile accident he must immediately give notice in writing to the insurance company: a verbal notice given by the insured to the agent who had obtained the policy for him cannot be considered a notice regularly given to the company.

Landry vs Murray & Preferred Acc. Ins. Co. of New York, 67 C.S. 402 (1928). Held (R.H.) :—

"Advenant un accident d'automobile suivi de blessures, subi par une personne autre que l'assuré, la notification par ce dernier à l'agent d'assurance qui avait fait souscrire la police, ne peut tenir lieu de l'avis par écrit à la compagnie.

"L'assuré qui est assigné en recouvrement de dommages-intérêts dans ces circonstances, ne peut exercer de recours contre son assureur, s'il ne s'est pas conformé aux termes de sa police quant aux avis, quant à la transmission des procédures et à l'établissement de la perte par transaction ou jugement."

See also *Lovell vs Employers' Liability Ass'ce Corp.*, 65 C.S. 56 (1926); *Law Union & Rock Ins. Co. vs Acme Hat Mfg. Co.*, 36 K.B. 351 (1923).

Dubé vs Consolidated Fire & Casualty Ins. Co., 6 I.L.R. 25 (1939). Held, in part:—

"An insurance broker who places risks with more than one company is not the agent of the company with whom he places any particular risk so as to bind it in relation to the policy; if the insured signs the application in blank and the broker fills out the answers, the broker is acting as the agent of the insured who is bound by his acts (Note: Cf. *Gagne vs Beland*, 5 I.L.R. 41; 3 D.R.S., Q. 210.)"

Bercovici vs Guardian Ins. Co., 77 C.S. 305 (1939).[1] Held, in part:—

"A clause requiring immediate written notice[2] of an accident is peremptory and the insurer is free from any liability if no notice is given until six months after the accident. If, with full knowledge of the facts, the insurer chooses to act for the insured on verbal notice he may be bound, but not where the insured has sought to deceive him by false statements of fact.

"A broker who acts for a number of companies and places risks where he chooses is not the agent of the insurer but of the insured and notice to him is not notice to the insurer."

As to *authorization from Insurance Company to agent* see *Courville vs Central Can. Manufacturers Mutual Life Ins. Co.*, 25 R.L. 225 (C.R. 1918).

Aubertin vs Northern Ass'ce Co., 37 K.B. 349 (1924). Held (R.H.):—

"Immediate written notice of loss, as required by the terms of an insurance policy, is dispensed with if the company receives and acts on verbal notice and subsequently receives written notice without objection."

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1. In appeal to K.B.

2. Where an automobile insurance policy stipulates that in case of accident "the insured shall promptly give notice thereof to the insurer", the insured is not entitled to claim under the policy the amount

Flinn vs Canadian Surety Co., (1935) 2 D.L.R. 771 (N.S. Supreme Crt.). Held (R.H.) :—

> **"A delay of 3 days in giving notice of accident where the insured believed her policy had lapsed and did not know plaintiff was injured and the insurance company later defended an action against the insured upon receiving verbal notice is no violation of a condition in the policy requiring prompt written notice; nor is a statement by the insured shortly after the accident that she was poor and not to be hard on her a voluntary assumption of liability prohibited by the policy so as to relieve the company from liability."**

John Caldwell & Co. Ltd. vs The British Oak Ins. Co. Ltd., 33 R.L. 332 (C.C. 1927). Held, in part (R.H.) :—

> **"If the insurance company does anything that can be considered as a waiver of its right to have a written notice, e.g. sends one of its inspectors to investigate after receiving oral notice, the insured is not obliged to fulfil the condition stipulated by law and the policy."**
>
> **See a'so *Wiseman vs Queensland Ins. Co.*, 39 R.L. 1 (1931).**

Michelin vs La Cie d'Assurance Trans Canada, 39 R.L. 14 (1932). Held (R.H.) :—

> **"Quand l'assureur répudie son obligation d'indemniser l'assuré, celui-ci est dispensé de donner l'avis stipulé dans la police. (Dans l'espèce, la police stipulait libération de l'assureur, si l'accident survenait quand l'auto serait utilisée 'à des fins de démonstration ou d'épreuve')."**

Co-operation.

In *Provident Ass'ce Co. vs Adamson*, (1938) S.C.R. 482 it was decided that respondent, who held a motor vehicle liability policy issued by the appellant insurance company, was not entitled to recover under it any indemnity against the company in respect of the judgment reco-

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of a judgment rendered against him for $34 and costs, if it appears that the first notice to the company was that contained in a letter five weeks after the accident. The contention of the insured that he considered the damages were so slight that he did not believe that a

vered against respondent in a certain action for damages for injuries caused by the motor vehicle (driven by respondent), on the ground that by respondent's course of conduct he had failed, in violation of his obligations under the statutory conditions forming part of the policy *(4 (1), 4 (2),* under *S. 188* of the *Insurance Act, R.S.O. 1937 c. 256)* to give promptly to the company "all available particulars" of the accident *(4 (1))* and to *"co-operate with the insurer except in a pecuniary way, in the defence"* of the action against respondent (within the meaning of said statutory condition *4 (2))*. It was held that *the defence of the action* necessarily involves, in any practical construction of the term, the *opportunity for an early and favourable settlement* of the action. The respondent had, in fact, deliberately withheld particulars from the insurance company for several months. Had the true story been told at the proper time, the company would no doubt have made every reasonable effort to effect a settlement.

In *Rosenberg vs Northern Ass'ce Co. Ltd.*, 77 C.S. 500 (1939), the policy in question included the following two statutory conditions:

> **"The insured shall not voluntarily assume any liability or settle any claim except at his own cost. The insured shall not interfere in any negotiations for settlement or in any legal proceedings, but, whenever requested by the Insurer shall aid in securing information and evidence and the attendance of any witnesses, and shall co-operate with the Insurer, except in a pecuniary way, in all matters which the Insurer deems necessary in the defence of any action or proceeding or in the prosecution of any appeal.**
>
> **"No action to recover the amount of a claim under this policy shall lie against the Insurer unless the foregoing requirements are complied with and such action is brought after the amount of the loss has been ascertained either by a judgment against the insured after**

claim would be made, cannot be upheld (*Goldstein vs Pearl Ass'ce Co.* 77 C.S. 574 (1939)).

trial of the issue or by agreement between the parties with the written consent of the Insurer and no such action shall lie in either event unless brought within one year thereafter."

The automobile of Rosenberg (who was insured with defendant under a policy of automobile insurance) was involved in an accident in which one, Miss Lacroix, was injured. Subsequently Miss Lacroix sued Rosenberg for damages sustained in said accident, and the defendant company, on being notified of the claim and action, entered an appearance, through its attorneys, in the name of Rosenberg, and undertook to defend the action as provided in said policy. In due course Rosenberg was notified of the date on which the trial of the action would proceed, and two weeks later (the day before the trial) was served with a subpoena requiring his attendance as a witness thereat. When the case was called on said date Rosenberg was not present, and defendant's attorneys were compelled by the court to proceed with the case without him. Later,judgment was rendered condemning Rosenberg to pay certain damages to Miss Lacroix. Rosenberg was obliged to satisfy that judgment and costs and then claimed from the present defendant the payments so made, under the terms of his insurance policy. The excuses offered by Rosenberg for failure to attend the trial (that on the morning of trial he was reporting another accident to the defendant company, and that he then had difficulty in locating the court room, etc.) were considered inadequate by *McDougall, J.* who stated in part: —

"...Whatever may have been his reasons for absenting himself from the hearing of his case, of which he had been duly notified and subpoenaed to attend, the fact remains that he was not present to furnish evidence. Since he was the driver of the automobile, it may be taken that his evidence was essential to the defence; at all events, it was so regarded by the defendant."

In dismissing Rosenberg's action against the insurance company *McDougall, J.* made the following important observations regarding co-operation:—

> "...Co-operation does not mean that the assured shall lend himself to any improper suggestions, but it does mean that there shall be fair and frank assistance to present facts favourable to the defence. It is impossible to say whether the Plaintiff's testimony would have brought about another result, but that is of no consequence. It is possible to say, however, that his reluctance and failure to co-operate constitutes a ground of non-recovery under the terms of his Policy." (See statutory conditions above set forth). "Co-operation with the insurer is one of the conditions of the Policy. When the condition was broken the policy was at an end if the Insurer so elected and the possible good faith of the Plaintiff is immaterial (C.C. 2490). The case is not one of the mere breach of a covenant, with varying consequences as to damages, but one of failure to fulfil a condition upon which the obligation is dependent."

Warranty actions against insurer.

In *Hallé vs Canadian Indemnity Co.*, (1937) S.C.R. 368 [3] the statutory condition in the policy forbidding institution of action against the insurer until determination of loss was as follows:—

> "Aucune action aux fins de recouvrer le montant d'une réclamation en raison de cette police ne pourra être intentée contre l'assureur à moins que les exigences ci-haut n'aient été observées et que telle action ne soit entamée après détermination du montant de la perte soit par un jugement contre l'assuré après audition du litige, soit par convention entre les parties avec le consentement écrit de l'assureur, et, de toute façon, aucune telle action ne pourra être intentée à moins qu'elle ne soit entamée avant l'expiration d'une année subséquemment."

When the action in warranty was taken by the appellant no judgment had yet been recovered against him on the principal action, nor, of course, had any amount

3. *Supra*, p. 259.

been determined by agreement with the consent of the insurer, and the insurance company accordingly contended that the action in warranty was premature. *Rinfret, J.* stated, in part, at p. 383:—

> "It will be observed that the restriction put upon the right of the insured by the statutory condition, is that he may not bring an action to recover the amount of his claim under the policy, before the measure of his liability towards the victim has been determined by judgment or by agreement. The right to bring an action in warranty is not touched. Under the policy, the insurer is obliged 'à indemniser en la même manière et aux mêmes conditions auxquelles l'assuré y a droit, d'après les présentes, toute personne, etc.'. That provision gave 'toute personne' (and, therefore, Joseph Hallé) all the rights of Rolland Hallé... The respondent was, therefore, obliged to contest, on behalf of Joseph Hallé, the action brought against the latter by Louis Bourget, and to do so at its own costs. As the respondent refused to comply with that obligation, the appellant rightly brought the action in warranty to compel it to fulfil its undertaking."

In *Murray vs Preferred Acc. Ins. Co.*, 34 R.J. 301 (1928) *Surveyer, J.* held that a clause such as the one above quoted should be interpreted strictly and that an action in warranty taken by the insured in such a case before judgment had been rendered against him was premature. However, a clause that the insured shall have no recourse against the insurer unless and until judgment has been rendered against the former does not prevent the insured from calling in the insurer in warranty by virtue of a clause in the policy requiring the insurer to defend the insured. (*Martineau vs Cohen et al*, 69 C.S. 505 (1931) *P. Demers, J.* at p. 506).

See *Langlois vs Reid and Indemnity Ins. Co. of North America*, 67 C.S. 207 (1929) at p. 211; *Melukhova vs Employers Liability Ass'ce. Corp.*, 63 S.C.R. 511 (1922); *Racine vs Véroneau*, 35 K.B. 255.

Alliance Ass'ce Co. vs Siskind, 29 R.L. 200 (K.B. 1923). Held, in part (R.H.):—

> "The question whether the action on an insurance policy is premature cannot be raised, if it has not been pleaded; the plea that the insured has not complied with the conditions of the policy is not sufficient for that object.
>
> "The condition in the policy as to when an action may be taken is not an absolute condition, de rigueur and should not be strictly construed.

Misrepresentation and concealment.

The general rules as to representation and concealment are set forth in *Articles 2485-2489* C.C. as follows:—

> "2485. The insured is obliged to represent to the insurer fully and fairly every fact which shows the nature and extent of the risk, and which may prevent the undertaking of it, or affect the rate of premium.
>
> "2486. The insured is not obliged to represent facts known to the insurer or which from their public character and notoriety he is presumed to know; nor is he obliged to declare facts covered by warranty express or implied, except in answer to inquiries made by the insurer.
>
> "2487. Misrepresentation or concealment either by error or design, of a fact of a nature to diminish the appreciation of the risk or change the object of it, is a cause of nullity. The contract may in such case be annulled although the loss has not in any degree arisen from the fact misrepresented or concealed.
>
> "2488. Fraudulent misrepresentation or concealment on the part either of the insurer or of the insured is in all cases a cause of nullity of the contract in favour of the innocent party.
>
> "2489. The obligation of the insured with respect to representation is satisfied when the fact is substantially as represented and there is no material concealment."

In *Mutual Life Ins. Co. N.Y. vs Ont. Metal Products Co.*, (1925) 1 D.L.R. 583, (1925) A.C. 344 (P.C.) it was held that a policy of insurance will not be avoided for inaccuracies in the answers in the application unless, had the questions been answered accurately, they would have influenced a reasonable insurer to refuse the insurance or stipulate for a higher premium. *Lord Salvesen,* who delivered the judgment of the Judicial Committee, stated, at p. 351:

> **"It is the insurers who propound the questions stated in the application form, and the materiality or otherwise of a misrepresentation or concealment must be considered in relation to their acceptance of the risk..."**

Thus where an answer is true according to an *equitable interpretation* on the question asked, the insurer will not be allowed to impose another interpretation on the question which vitiates the answer of the insured. *(General Ins. Co. of America vs Coté,* (1936) 3 I.L.R. 589; *Rural Municipality Victory vs Sask. Guar. & Fidelity Co.,* (1928) 2 D.L.R. 829 (S.C.C.)).

Wiseman vs Queensland Ins. Co. Ltd., 39 R.L. 1 (1931). Held, in part (R.H.) :–

> **"Quand il résulte de la police qu'il faut, pour l'annuler, une déclaration faite faussement 'au préjudice de l'assureur', la preuve de ce préjudice incombe à l'assureur.**
>
> **"Il importe aussi de rechercher si l'assuré a agi frauduleusement ou de bonne foi, en faisant sa déclaration.**
>
> **"...La police stipulant que: 'L'auto... sera habituellement remisée dans un garage public ou privé', et la perte étant survenue le 194e jour de sa date, si l'auto n'a été remisée dans un garage que 40 jours, il faut dire qu'elle ne l'a pas été 'habituellement'.**
>
> **"Aussi, quand survient la perte, alors que l'auto est dehors, la nuit, sur un terrain public et non enclos, bien**

qu'à la porte de la maison de l'assuré, il faut en conclure que ce dernier a perdu son recours contre l'assureur.

"En effet, cette imprudence permanente de l'assuré, de laisser l'auto 'habituellement' (149 jours et nuits sur 194), plutôt sur la rue, surtout la nuit, a augmenté injustement le risque assumé par la défenderesse, à l'encontre d'une clause formelle du contrat."

Desmarais vs London Guarantee & Acc. Co., 25 R.L. 301 (C.R. 1919). Held (R.H.) :—

Il n'y a pas de fausses représentations ou de réticences frauduleuses de la part d'un propriétaire, qui a fait assurer son automobile, dans les déclarations suivantes; (a) la machine était gardée dans un garage privé, tandis qu'au moment du contrat d'assurance, elle était temporairement dans un garage public d'où elle a été quelques jours après, amenée chez l'assuré; (b) l'assuré a déclaré que l'automobile était payé; tandis qu'il avait donné, en l'achetant, trois billets, et s'était chargé d'acquitter certaines dettes en rapport avec l'auto.

"Lorsque l'assureur allègue que la valeur de la chose a été exagérée, c'est lui qui doit en faire la preuve."

Declaration by the insured that his *automobile is new* when it is second hand, and of a value less than that mentioned, and that it is kept in a public garage when in fact it is held in various private garages, or left in the street, constitute false representations which void the policy. *(Mtl. Trucking Ltd. vs The Globe & Rutgers Fire Ins. Co.*, 33 R.L. 428 (1927))

Boudreau vs Imperial Guar. & Acc. Ins. Co., (1923) 2 D.L.R. 57 (C.S. Que.). Held (R.H.) :—

"An insurance policy in Quebec covering a motor car against fire and theft, not being a simple fire insurance contract is governed by art. 2490 Que. C.C. and not by R.S.Q. 1909, sec. 7034, and a warranty by the insured that his car was a 1917 model when, in fact, it was a 1915

model, nullifies the contract, notwithstanding the good faith of the insured."

See also *Holdaway vs British Crown Ass'ce. Corp* (1925), 3 D.L.R. 269 (Ont. S.C. App. Div.)

Paradis vs Law Union & Rock Ins. Co. Ltd., 38 R.L. 244 (1931). Held (R.H.) :—

"Peu importe l'erreur quant à l'un des numéros de l'auto assurée, quand c'est bien la voiture assurée qui a été couverte par la police, et qui a été incendiée.

"C'est à l'assureur qu'incombe la preuve que l'auto assurée était d'un modèle plus ancien que celui indiqué dans la police.

"Le demandeur, porté comme bénéficiaire dans la police, a le droit de réclamer l'indemnité prévue dans cette police, jusqu'à concurrence de sa créance contre l'assuré.

"Quand, d'après la police, il faut, pour annuler celle-ci, qu'une fausse description ou déclaration cause préjudice à l'assureur, la preuve en incombe à ce dernier.

"Il suffit que les déclarations de l'assuré soient suffisamment exactes."

Adler vs Dominion Gresham Guarantee & Casualty Co., (1927) 33 O.W.N. 160:

Plaintiff insured three trucks with defendant company, one of which was involved in an accident. When the policy was written for the truck which was involved in the accident the motor number of another of plaintiff's trucks was given as the serial number of the truck in question. Defendant's agent, however, had investigated the matter and had issued an endorsement correcting the error, and had properly identified the truck in question and had signed the endorsement. The accident happened a few days following the date of the endorsement, and the question arose as to whether the policy covered the truck in question. It was held that upon the evidence the contract was intended to cover the truck which was involved

in the accident, and that the error was that of the agent in not properly describing it in the policy, and that the plaintiff was entitled to recover. At p. 162 *Wright, J.* pointed out that the true test as to materiality of representations was stated in *Mutual Life Ins. Co. of N. Y. vs Ont. Metal Products Co. Ltd.*, (1925) A.C. 344, 351 and 352 (*supra*, p. 272).

Tetreault vs La Cie d'Ass'ce Canadienne Britannique, 36 K.B. 402 (1924). Held (R.H.) :—

"La fausseté d'une représentation, garantie par l'assuré, même faite par un tiers (agent) sur un fait essentiel à l'assurance, et toute réticence qui peut affecter la nature du risque, entraînent la nullité de la police."

See also *Rochefort vs Royal Ins. Co.*, 34 R.L. 267 (1928); *Guimond vs Fidelity Phoenix Co.*, 47 S.C.R. 216 (1912); *Provident Savings Ass. Soc. vs Mowat*, 32 S.C.R. 147 (1902).

Roy vs Toronto Casualty Fire & Marine Ins. Co., 69 C.S. 476 (1930). Held (R.H.) :—

"Lorsque le propriétaire d'une automobile n'a pas révélé dans une demande d'assurance contre l'incendie que ce véhicule devait servir comme taxi et que la police exclut toute responsabilité dans ce cas, cette police doit être annulée."

Dubé vs Cons. Fire & Casualty Co., 6 I.L.R. 25 (1939). Held, in part :—

The insured cannot plead that he did not know the declaration had been made on his behalf if the policy recites the declaration and he has accepted it, especially when the policy bears on its back a notice asking him to read it.

A representation that the insured had not had his driver's license suspended, annulled or refused within three years prior to the date of the policy is a warranty essential to the insurance and of a kind to affect considerably the nature of the risk; hence, if such a decla-

ration is not true, the insurer is not bound by the policy.

Bercovici vs Guardian Ins. Co., 77 C.S. 305 (1939).[4] Held, in part:—

> **Where an insurance policy contains a clause that any wilfully false statement or declaration in reference to certain particulars 'shall vitiate the claim of the person making the declaration in any matter affected by such fraud or false statement', the insured loses his right of action to recover the amount of the judgment pronounced against him if it is proven to the satisfaction of the court in both trials that his version of the occurrence which was to the effect that the person injured was not struck by his (the insured's) car but fell and hurt himself was not worthy of belief.**
>
> **See also *Gagné vs Beland et Con. Fire & Cas. Ins. Co.*, 44 R.J. 1 (1937).**

Bourdon vs Hudson Bay Ins. Co., 72 C.S. 146 (1933). Held (R.H.):—

> **"Seule la faute intentionnelle ou dolosive de l'assuré lui fait perdre le bénéfice de l'assurance contre les accidents d'automobile, comme contraire en pareil cas à l'ordre public. Dans le cas de faute même lourde, la compagnie d'assurance ne peut échapper à son obligation d'indemniser l'assuré pour responsabilité encourue pour dommages causés à autrui.**
>
> **"L'aveu judiciaire de l'assuré dans une poursuite criminelle, invoqué par une compagnie d'assurance pour faire rejeter une action de l'assuré, mais qui avait été fait sous l'empire d'une erreur de fait et d'un malentendu, ne lie pas l'assuré qui est admis à faire la preuve de l'erreur par témoins en établissant le malentendu et que de fait il n'avait pas commis un acte criminel."**

Glen Falls Ins. Co. vs Murchéson, 24 R.L. 342 (K.B. 1918). Held (R.H.):—

4. In appeal to K.B.

> **"It is a general principle of the law of evidence that the proof adduced must have direct connection with the question in issue. Therefore, in a plea to an action on an insurance policy, the allegations that the insured had conspired with other persons to defraud, and made a business of defrauding insurance companies in general, may be rejected on an inscription in law."**

As to material change in risk, and notification to be given to insurer of such change, see *Johnson vs British Canadian Ins. Co.,* (1932) 4 D.L.R. 281 (S.C.C.).

Intoxication.

For meaning of "intoxication" see *supra* p. 55 et seq.

The Supreme Court of Canada has held that a statutory condition providing that the insurer under an automobile policy shall not be liable under that policy "while the automobile, with the knowledge, consent or connivance of the insured, is being driven by . . . an intoxicated person" does not apply to the insured himself; — see *Home Ins. Co. of New York et al. vs Lindal et al.,* (1934) S.C.R. 33: *Lamont, J.* stated, at p. 36:—

> **"...This is not apt language to describe an act done by the insured himself... To exclude liability, the automobile, when driven by an intoxicated person, must be driven with the knowledge of the insured. If statutory condition 5 is construed so as to include the insured himself, we should have this remarkable result: that, if the insured were so intoxicated as not to know what he was doing, the condition would not apply owing to the insured's want of knowledge; while, if he were but slightly intoxicated, he would know that he was driving and the condition would be applicable. In our opinion condition 5 is not to be construed as applicable to the insured."**

Gauvreau vs Cie d'Ass'ce Trans-Canada, 73 C.S. 568 (1934). Held)R.H.) :—

> **"La clause d'une police d'assurance-automobile stipulant que la compagnie n'est pas responsable d'un accident lorsqu'une automobile est, avec la connaissance, le consentement et la connivence de l'assuré, conduite par une personne en état d'ébriété, ne peut s'appliquer au cas où c'est l'assuré lui-même qui conduit son véhicule."**

A ruling to the opposite effect was made in *Whitfield vs Gen. Acc. Ass'ce Co. of Canada Ltd.*, 50 K.B. 310 (1931) where it was held that a clause such as the above applies to the insured who drives his automobile in an intoxicated condition.

In *Wall Chemicals Ltd. vs American Auto. Ins. Co.*, 6 I.L.R. 108 (1939)[5] *McDougall, J.* held, in part:—

> **"A clause in a policy that 'the insured shall not permit, suffer, allow or connive at the use of the automobile' by any person under the influence of liquor does not operate as a ground of defence when it is proven that the driver through whose fault the accident occurred was usually of sober habits and was not under the influence of liquor when he started on his rounds.**
>
> **"The fact of drunkenness is not sufficient to defeat a recovery under the policy. Knowledge of such physical condition must be brought home to the insured. The burden of proof of knowledge of the employee's condition is on the insurance company, which raises the defence."**

In *O'Hearn vs Yorkshire Ins. Co.*, 67 D.L.R. 735 (1921 Ont. S.C., App. D.) it was held that an insured cannot maintain an action on a policy of insurance to indemnify him from the civil consequences of his own *criminal act* in driving an automobile while in a drunken condition, as a result of which he ran down a pedestrian and injured him to such an extent that he subsequently died.

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5. Appeal to K.B. pending.

Weir vs Dickson, etc.,[6] C.S. 173412 *McDougall, J.*, 7th Sept. 1939 (see *6 I.L.R. 189*). Held:—

(a) A condition in a liability policy to the effect that "The insurer shall not be liable under this policy while the automobile, with the knowledge, consent or connivance of the insured is being driven... by an intoxicated person" does not apply to case where it was being driven by the insured himself. See: *Home Insurance v. Lindal & Beatty*, 1 I.L.R. 95; *Gauvreau vs Comp. d'Assurance Trans-Canada*, 3 I.L.R. 124.

(b) Moreover, the court will not find the driver of the automobile to be intoxicated on disputed medical evidence in the face of evidence to the contrary proffered by persons who saw him on the same evening.

(c) The fact that a post-mortem examination was illegally made does not compel the court to reject evidence based thereon.

(d) If the court is convinced that the driver of the automobile was "manifestly" intoxicated the insurance company will be relieved from responsibility on the ground of public policy as such an act is a criminal offence. Similarly, if the acts of the insured amounted to "criminal negligence", the company will not be responsible, but there must be compelling evidence of intention or wilfulness the burden of which is on the person alleging the fact. Clearly, it would be against public policy for a person who is liable to be punished for his acts to pass on the civil consequences thereof to a third person, the insurance company.

See also *Home Ins. Co. of New York et al. vs Lindal et al.*,[7] (*supra* p. 277) in which *Lamont, J.*, at p. 38, cited *Kennedy, J.* in *Burrows vs Rhodes*, (1889) 1 Q.B. at p. 828 (Eng.) as follows:—

6. In appeal to K.B.

7. It was held in the *Lindal* case that the peril insured was in fact brought into being by an act which constituted a manifest violation of *S. 285 (4)* Criminal Code. As to criminal responsibility see also *McCarthy vs the King*, 62 S.C.R. 40.

"It has, I think, long been settled law that if an act is manifestly unlawful, or the doer of it knows it to be unlawful, as constituting either a civil wrong or a criminal offence, he cannot maintain an action for contribution or for indemnity against the liability which results to him therefrom. An express promise of indemnity to him for the commission of such an act is void."

See *Whitfield vs Gen. Acc. Ass'ce Co. of Canada Ltd.* (cited above) at p. 311 and *Gauvreau vs Cie d'Ass'ce Trans-Canada* (*supra*, p. 277) at p. 570 et seq. See also *Tinline vs White Cross Ins. Assoc.* (1921) 3 K.B. 327 (Eng.); *James vs British Ins. Co.* (1927) 2 K.B. 311 (Eng.); *Wesley vs Toronto Gen. Ins. Co.* (1939) 4 D.L.R. 731 (Ont. C.A.).

In *Mongeau & Perras et al. vs Mongeau & Robert Co.*, 77 C.S. 455 (1939) it was held that a conviction by an Ontario Court against the driver of a car for criminal negligence does not constitute *res judicata* against the owner of the car in a civil proceeding against the insurer of such owner in Quebec, and that the insurer cannot so plead in defence to an action brought against it by the persons injured in the accident resulting from the driver's criminal negligence, in order to avoid liability on the ground of public policy. (Appeal to K.B. pending).

The burden of proving intoxication of a driver at the time of the accident is upon the insurer. (*Halifax Fire Ins. Co. vs Pearson*, 53 K.B. 523 (1932)).

See remarks of *Martineau, J.* in the *Pearson* case *supra* p. 59.

Theft.

As to what constitutes theft, and injury caused by theft, see *Henderson vs N.-W. Mutual Ins. Co.* (1925) 1 D.L.R. 339 (B.C.); *Boyle vs Yorkshire Ins. Co.* (1925) 2 D.L.R. 596 (Ont.).

Ouimet vs National Ben Franklin Fire Ins. Co., 58 C.S. 299 (C.R. 1920). Held (R.H.):—

"Le fait d'un propriétaire d'automobile, qui, tient sa machine dans un garage, de prêter de bonne foi, pour faire laver cette voiture, ses clefs à une personne préposée au service d'un autre auto de ce même garage, ne constitue pas cet individu son employé.

"Si celui-ci, au lieu de nettoyer la machine comme il devait le faire, s'en empare, s'en sert personnellement, subit un accident et finalement l'abandonne sur une route dans un état complet de démolition, pour laquelle offense il est arrêté, plaide coupable et est condamné à deux ans de pénitencier, la compagnie d'assurance, qui a émis une police contre le vol de l'automobile, est tenue de payer à son propriétaire le montant de sa perte."

In *Israelovitch vs Railways Passengers Ass'ce Co.*, 29 R.L. 402 (1923) *Maclennan, J.* held it was not illegal to park an automobile on a street, near the proprietor's residence, between 4 and 5 A.M., the street in front of his residence being blocked on account of repairs, and that the insured could recover from the insurance company on a policy against theft in spite of that fact. *Ward vs Alliance Ins. Co. of Philadelphia*, 55 O.L.R. 451, was concerned with the theft of an *unlocked automobile*, the policy having provided that the automobile should be kept locked when unattended; see *supra* p. 40.

As to insurer's rights against third party into whose hands a stolen automobile has passed after insurer has paid the loss to its insured, see:—

***Yorkshire Ins. Co. (Ltd.) vs Gervais*, 38 K.B. 515 (1925); *Allied Fire Ins. Co. of Utica vs Duchaine*, 64 C.S. 356 (1925); *Colonial Finance Corp. (Ltd.) vs Canadian Gen. Ins. Co.*, 72 C.S. 189 (1934).**

Alliance Ass'ce Co. vs Siskind, 29 R.L. 200 (K.B. 1923). Held, in part (R.H.):—

"If the owner of an automobile insured against theft, sells it and transfers the policy to the buyer, and the in-

surance company accepts the transfer, this company, in an action for the amount of the policy after the theft of the auto, cannot plead that the buyer has no insurable interest in the machine, whether the buyer has paid his vendor or not, it is estopped from disputing the buyer's interest in the automobile insured, or from requesting him to furnish proof of his ownership, by its acceptation of the transfer of the policy."

Demonstration and testing.

Michelin vs La Cie d'Ass'ce Trans-Canada, 39 R.L. 14 (1932). Held (R.H.) :—

"Si l'accident survient pendant que le garagiste de l'assuré, à sa demande, essaie l'auto, pour constater s'il l'a bien lestée, pour prévenir le dérapage, etc., durant l'hiver, cet essai n'en est pas un qui soit couvert par cette clause de non-responsabilité."

"The practice of testing automobiles in a public street is a dangerous one and should be carried out with the observance of every possible precaution". (*Mackinnon, J.* in *Corbeil vs Zinman et al.*, 45 R.J. 360 (1939)).

Amount of indemnity.

Viner vs Union Ins. Society of Canton, 62 C.S. 308 (1924) :

Where the amount of indemnity under an insurance policy is fixed as "the actual cash value of the car at the the time of the loss", this means the value of the car to the insured, and not necessarily its market value nor its replacement value. The actual condition of the car before the fire must be considered.

Aubertin vs Northern Ass'ce Co., 37 K.B. 349 (1924). Held (R.H.) :

"Evidence of value of a car, consisting of calculating the depreciation in value at a certain percentage of its

costs per year of use, is not to be accepted as against direct evidence of the value of the particular car at the time of the loss. The retail value of the car is to be used as a basis, although the assured may have purchased it at wholesale price." (see also *infra*, p. 308).

Stewart vs Haliburton, etc. Auto Co., 55 N.S.R. 537:

The insurer after paying the cash value of a car at the time of the fire is entitled to take possession of the car and sell the remaining parts.

Maher vs Lumbermen's Mutual Casualty Co. et al., (1932) 2 D.L.R. 593 (S.C.C.). Held (R.H.):—

"Where a contract of insurance on a motor car provides that the insured will be indemnified in money or, at the option of the insurer, by the reinstatement of the car, and where the insurer exercises his option to repair, the contract to pay is superseded by a new contract on the part of the insurer to repair, and the sole liability of the insurer is for damages resulting from the breach of the second contract."

For interpretation of clause *"Limits and amounts — one person $5,000 and subject to the said limit for each person $10,000 for one accident"*, where insured had assigned the benefit of his policy to plaintiffs following judgments against him of $7,500 and $6,375 respectively, see *Kelly et al vs Constitution Indemnity Co. of Philadelphia*, (1933) O.L.R. 57 (S.C.).

Total loss — abandonment to insurer.

Merchants & Employers Guar. & Acc. Co. vs Prevost, 35 K.B. 306 (1923). Held (R.H.):—

"L'intimé ayant pris une police d'assurance dans la compagnie appelante pour son automobile, celle-ci, à la suite d'un accident, entreprit de la réparer elle-même, comme elle en avait le droit. L'intimé, trouvant que les réparations avaient été mal faites et avaient complètement détruit sa machine, l'abandonna à la compagnie et la pour-

suivit pour une perte totale. Subséquemment, il notifia la compagnie qu'il reprenait son auto, sous la réserve de tous ses droits. L'intimé, en prenant de nouveau possession de son automobile et en s'en servant, n'a pas changé la nature de son action. La Cour pouvait, sans juger *ultra petita*, lui accorder le coût des réparations nécessaires.

"Si le tribunal de première instance, ordonne à une partie de faire une chose qui n'est pas demandée dans les plaidoiries, la Cour d'appel peut retrancher cette partie du jugement."

Action against insured by insured's minor son with former's consent.

The Fidelity & Casualty Co. of New York vs Marchand, (1924) S.C.R. 86. (R.H.) :—

"The appellant company issued in favour of the respondent an automobile insurance policy against loss from liability imposed by law upon him for damages resulting from any accident caused by reason of the use of the respondent's automobile. The respondent, while backing his car from his residence to the public highway, ran over and injured his minor son. The respondent took the necessary steps to have a tutor appointed to enable an action to be brought by his son against himself for damages and was condemned to pay $5,000. The respondent paid this amount to the tutor before the delay for appealing had expired and while the appellant company was considering the advisability of so appealing. The liability of the appellant under the policy was subject to certain conditions amongst which were condition A. which provided that the assured should 'at all times render to the company all co-operation and assistance within his power', and condition E. which provided that 'the assured shall not... settle any claim... without the written consent of the company previously given'. Upon an action by the respondent to recover from the insurers the amount of $5,000 paid by him to the tutor:

"*Held*, Idington J. dissenting, that the respondent was not entitled to recover on the policy, as such payment by him without the consent of the company was a voluntary payment and constituted a settlement of the claim made in violation of condition E. of the policy.

"*Per* Davies C. J. and Duff J. — Such payment was moreover made in violation of condition A. of the policy.

"*Held* also that the respondent was guilty of actionable negligence against his own child for which he was liable under Art. 1053 C.C. Anglin, J. *semble*.

"*Per* Idington J. (dissenting) — Such payment was not such an acquiescence in the judgment as to bar an appeal by the company, if it had been desirous to take it."

Garage proprietor.

See *supra*, p. 187; ***British Canadian Ins. Co. vs Ledoux Jennings Ltd.***, 63 C.S. 515 (1925); ***Liverpool, London & Globe Ins. Co. vs Cie. Giguère***, 31 K.B. 305 (1921).

Conveyance on ferry.

British Empire Underwriters vs Wampler, (1922) S.C.R. 591. (R.H.) :—

"A policy insuring an automobile provided that 'this policy is extended to cover the insured' while on a 'ferry or inland steamer' subject to the condition 'while being transported in any conveyance by land or water — stranding, sinking, collision, burning or derailment of such conveyance, including the general average and salvage charges for which the insured is legally liable.'

"*Held*, reversing the judgment of the Appellate Division (48 Ont. L.R. 428) Davies C.J. and Idington J. dissenting, that the liability of the insurer only attached in the case of loss or injury from one of the specified causes, stranding, sinking, etc., and did not extend to the case where the automobile was damaged by falling

into the water between the end of a ferry-boat and the wharf."

Evidence disclosing insurance.

As to illegality of evidence relating to amounts recovered by plaintiff under insurance policy, see *Millard vs Toronto R.W. Co.,* (1914) 31 O.L.R. 526. The danger of *disclosing to a jury* the fact that a motorist sued for damages is insured was stressed in *Wood et al. vs Armstrong et al.,* (1931) 3 D.L.R. 321 (Man. K.B.). *Dysart, J.* stated, at p. 323:—

> **"...Long years of experience with juries has demonstrated that in cases where a motorist is sued for damages by a person injured by his motor car, it is dangerous to the ends of justice to disclose to the jury that the defendant is insured. So serious is such a disclosure thought to be that when made, the jury may be summarily discharged and the trial, either continued by the Judge without a jury, or adjourned at the costs of the offending plaintiff while a new jury is summoned..."**

Medical witnesses in particular are inclined to refer inadvertently to the question of insurance: e.g. "When the insurance company's adjuster first telephoned me... etc." Witnesses should be warned beforehand to refrain from any such reference in front of a jury.

Taxis — advertising that passengers will be insured.

Poirier vs Latulipe, 34 R.L. 404 (1928). Held, in part:—

> **"L'annonce faite dans les journaux, par un propriétaire de taxi, que les personnes qui voyagent dans ses automobiles sont couvertes par une police d'assurance contre les accidents, ne constitue pas un engagement personnel d'indemniser ces personnes des dommages soufferts, au cours du voyage, par la faute d'un tiers.**

"Même si cette annonce pouvait avoir cette portée, le voyageur, pour en réclamer le bénéfice, devrait prouver que c'est sur la foi de cette garantie qu'il avait choisi ce taxi."

Rider.

A typewritten rider attached to an automobile liability policy changing it from "commercial or private" into one of "garage liability — payroll basis", controls the printed conditions of the policy with respect to liability. (*Poole & Thompson Ltd. vs London & Lan. Guar. & Acc. Co.* (1938) 4 D.L.R. 6 (S.C.C.)).

See *All-Canada Digest*, Vol. 2, Cols. 3724 et seq.; *Laverty, The Insurance Law of Canada*, 2nd Ed. pp. 64, 230-231.

Driving without license.

See *supra*, p. 25 et seq.

Stewart vs Chickadee Ltd., (1938) 3 D.L.R. 779 (C. S.). Held (R.H.) :—

"The insurer under a policy of indemnity insurance issued in respect of a motor vehicle, cannot defend on the ground that the driver was unlicensed, unless the driver is shown to be incompetent or the lack of a licence was a cause of the accident."

Anderson vs Caledonia Ins. Co., (1938) 4 D.L.R. 126. (B.C. C.A.) :

"A policy issued to the husband for an automobile owned by the wife will insure the wife. But the insurance company is not liable when the car had been entrusted to an unlicensed driver contrary to a condition in the policy; the fact that the insurer, relying on the representations of the insured that the car was operated by such driver without her consent, defended the action, will not estop it from denying liability after the insured had been adjudged to have entrusted the car to such an

unlicensed driver; nor is it liable for failing to communicate an offer of settlement made by the borrower of the vehicle which it was not bound to do under a statutory condition in the policy."

"Property used by or in charge of insured."

A clause in a policy whereby the insurer was not liable to indemnify the insured for damages caused to his property or to the property of others used by him or under his charge, covers the case of damages caused by the insured to the doors and structure of a garage which, while not leased to him, had been used by him as such with the permission of the landlord. *(Novick vs Guardian Ins. Co. of Canada,* (1939) 4 D.L.R. 796 (C.S.)).

Financial responsibility.

There is, at present, no provision in the Quebec M.V.A. requiring proof of insurance or financial responsibility on the part of automobile owners and drivers. (See, however, *supra* p. 253).

SECTION 15

DAMAGES

The provisions regarding damages are set forth in *Arts. 1070-1078* C.C. inclusive. Damages awarded by a civil Court in an automobile accident case should take the form of a pecuniary award, representing as nearly as possible reparation or compensation for the loss sustained by the plaintiff and the profit of which he has been deprived, provided that they are the *immediate and direct consequence* of the defendant's fault. *(Arts. 1073, 1075* C.C. and see *Racine vs Cloutier,* 42 R.L. 62 (1935)). There should be no question, however, of awarding exemplary, otherwise known as "punitive" or "vindictive" damages, and such damages are seldom granted by the civil Courts in any event. See, for example:—

> ***Savignac vs Boivin,* 58 K.B. 228 (1934) *Bond. J.* at p. 230; *Guibord vs Dallaire,* 53 K.B. 123 (1931) at p. 131; *French vs Hétu,* 17 K.B. 429; *Girard vs Tremblay,* 40 R.J. 467 (1934).**

A very learned discussion on the chain of causality *(Lien de Causalité)* is to be found in *Mazeaud,*[1] *Vol. 2,* pp. 379-620. See also *Mtl. Tramways Co. vs Léveillé,* (1933) S.C.R. 456 at p. 466 et seq; *Singleton Abbey vs Paludina*

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1. *Traité de la Responsabilité Civile Délictuelle et Contractuelle* (1939).

A miscarriage which results from a fall constitutes direct damage giving the victim a right to compensation (*Mtl. Tramways Co. vs McDonnell,* 27 K.B. 566 (1918)). Compare *Rock vs Denis* (1888), 4 M. L.R. C.S. 356 (*infra,* p. 293).

(1927) A.C. 16; *The "Volute"* (1922) 1 A.C. 129, at p. 140 et seq.; *Tremblay vs Ribaud,* 64 K.B. 68 (1937); and see *supra* p. 52 et seq.

Damages claimed in actions arising from automobile accidents are of two classes, — general and special. Examples of *general damages* are pain and suffering, inconvenience, loss of enjoyment of life, reduced earning capacity. Examples of *special damages* are hospital and medical accounts, repairs to a damaged motor vehicle, cost of having some one replace plaintiff to carry on his duties while injured, past loss of income.

Appreciation of damages.

Appreciation of damages is the province of the jury and not of the judge, except, of course, in cases tried before a judge alone.

The jury may determine the total amount of the damages suffered by the accident victim and are not as a rule required to specify the amounts awarded on each source of damage. *(Merry vs Mtl. Tramways Co.,* 53 C.S. 226 (C.R. 1917)). If the amount awarded by the jury is either *grossly excessive* or *grossly insufficient,* the Court may refuse a new trial provided that the plaintiff agrees in the one case that it be reduced to an amount which the Court considers not excessive, and in the other case that the defendant agrees to its being increased to an amount which the Court considers not insufficient. *(Arts. 503, 504* C.P. and see *Sevigny vs Bourdon,* 40 R.L. 125 (1932)). However, the judge should not interfere with the jury's verdict, if it was one which from the evidence the jury could *reasonably find* (see *supra* p. 14). And an Appeal Court is not justified in reducing the general damages awarded by a jury for personal injuries reasonably war-

ranted by the evidence; it should not usurp the functions of the jury and substitute its opinion in such a matter. See, for example, *Warren vs Gray Goose Stage Ltd.*, (1938) 1 D.L.R. 104 (S.C.C.); *City of Mtl. vs Michaels*, 49 K.B. 440 (1930); *Pratt vs Beaman*, (1930) S.C.R. 284 at p. 287. The last named case was concerned, *inter alia*, with the amount of an award originally made by the trial judge for pain and suffering which had been reduced by two thirds by the Court of King's Bench. As to setting aside of verdicts and reversal of judgments on appeal, see *supra* p. 14 et seq.

General cases.

Sevigny vs Bourdon, 40 R.L. 125 (1932). Held, in part (R.H.):—

> **L'art. 504 C.P. permet au juge, présidant un procès par jury, s'il trouve le montant accordé 'de beaucoup insuffisant', de refuser un nouveau procès, pourvu que le défendeur consente à une augmentation que la Cour ne considère pas insuffisante.**
>
> **"Pour arbitrer le dommage dû à la victime d'un accident, il faut tenir compte des 'accidents ordinaires de la vie' (49 B.R., bas p. 443), de la 'situation' du demandeur, 'et de son genre de vie, ainsi que des aléas de la vie, maladies, infirmités... et usure par l'effet des années" (50 B.R., bas p. 420).**
>
> **"De plus, les tribunaux ne doivent pas accorder à la victime d'un accident un capital qu'elle pourrait transmettre intact à ses héritiers, après en avoir retiré une rente viagère égale à la perte pécuniaire par elle subie (20 B.R., bas p. 365, et 366, et 50 B.R., bas p. 420 à 421).**
>
> **"Mais il faut aussi prendre en considération les 'souffrances physiques et morales' de l'accidenté (26 B.R. bas p. 475, 49 B.R. 440), etc.**
>
> **"La jurisprudence refuse à l'auteur du dommage le droit de prouver que la victime a retiré, ou doit retirer**

> **une indemnité d'un tiers, compagnie d'assurances contre les accidents qui a préalablement émis une police en faveur de la victime."**

In *Racine vs Cloutier*, 42 R.L. 62 (1935) *Gelly, J.* after referring to *Art. 1074* C.C. which provides that, in the absence of fraud, the debtor is liable only for the damages which have been foreseen or might have been foreseen, proceeded (at p. 76) to discuss the rules applicable in the cases of damages caused by delicts and quasi-delicts. He stated, in part:—

> **"La doctrine et la jurisprudence assimilent le cas de dommages résultant d'un délit ou d'une quasi-délit, quant à ce qui concerne le montant exigible, au cas de dommages résultant de l'inexécution d'obligations dans le cas de dol du débiteur."**

See full text of judgment and authorities cited at p. 80 of report. It has been suggested by Nicholls *(Offences & Quasi Offences in The Province of Quebec*, p. 109) that unforeseen damages can be awarded for a delict but not for a quasi-delict.

All the elements of proof at the disposal of the judge at the trial should be taken into consideration in the valuation of damages.[2] *(N.Y. Bakery Co. Ltd. vs Mtl. Trucking Ltd.*, 34 R.L. 125 (1927)). The rules of the workmen's compensation law for estimation of damages are not applicable to cases of personal injury in the civil courts *(Parent vs City of Rivière du Loup*, 40 R.J. 84 (1933)); and the extreme difficulty of laying down precise rules as to the measure of damages in such cases was discussed by *Cock-*

2. If it appears that the trial Judge found the amount of damages demanded to be insufficient in the light of the facts and for that reason granted interest on the condemnation from the date of summons instead of from the date of judgment, the Court of Appeal will not disturb the judgment on that score. — *Doré vs Durieux*, 67 K.B. 214 (1939).

burn L.C.J., in *Phillips vs London & S.W. Ry.*, 48 L.J.; Q.B. 693-694. He referred to the rule as stated by *Brett, J.*, in *Rowley vs London & N.W. Ry. Co.*, 42 L.J. Ex. 153, 159, as follows:—

> "...a jury in these cases must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case, and give what they consider *under all the circumstances a fair compensation.*"

James L.J., in the *Phillips* case stated, in part:—

> "So far as the injury results in actual pecuniary loss, you must give the plaintiff full compensation for that loss, but so far as he is entitled to damages for the suffering of being made a helpless cripple, you cannot proceed upon the principle of making full compensation."

See ***Mayne on Damages***, 10th Ed. p. 450 et seq.; ***Beven on Negligence***, 4th Ed. p. 258.

Physical pain.

The Courts will award damages for physical pain and suffering.[3] (*Cutnam vs Léreillé*, 37 R.L. 84 (K.B. 1927);

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3. As to *mental and nervous shock* see *Can. Bar Review* (1939) Vol. 17, p. 56 et seq., p. 541 et seq.; *Pollock, The Law of Torts*, 13th Ed. p. 50 et seq.

In *Rock vs Denis* (1888) 4 M.L.R., C.S. 356 it was held (in Review, affirming Davidson, J.) that damage resulting from fright or nervous shock unaccompanied by impact or actual physical injury was too remote to be recovered. The rule has been stated that when a collision occasions a nervous or mental shock arising from sudden terror, it cannot be said that such injuries flow from the negligence which causes the collision, when there is no physical contact (see *Barron, Can. Law of Motor Vehicles*, p. 594 *and Supplement*, p. 140). See, however, *Owens vs Liverpool Corp.*, 55 T.L.R. 246, (1939) 1 K.B. 394 (Eng.) where (although there was no apprehension of injury to a human being) mourners at a funeral, who were relations of the deceased, were held entitled to recover damages for mental shock occasioned by a collision between the hearse and defendant's negligently driven tramcar, which caused deceased's coffin to be overturned.

As to *mental anguish* see *infra*, p. 300.

Scvigny vs Bourdon, 40 R.L. 125 (1932) ; *Semeno vs Imp. Oil. Co.,* 28 R.L. 174 (1920)). The amount awarded will, of course, depend upon circumstances. For example in *Fisher vs Ouimet,* C.S. 144269, Jan. 1937 *(unrep'd)* the plaintiff who had fractured his little finger claimed $150.00 for pain and suffering. *Casgrain, J.* considered this too high and awarded only $10.00 on that item. In *Low vs C.P. Express Co.,* 77 C.S. 31 (1938), plaintiff (a woman) claimed $10,000. for "pain and suffering and loss of enjoyment of life to date". She suffered principally from a compression injury to the back, and injury to the breast. *Mc Dougall, J.* held this "was out of all proportion" and awarded $400.00 on these two items. The Court pointed out that "litigants should realize that to advance exorbitant claims does not advance their cause". In *Corbeil vs Zinman et al.,* 45 R.J. 360 (1939), *Mackinnon J.* awarded $100.00 for suffering caused by a broken nose. Pain and suffering *must be alleged and proved:* the Court will not assume its existence. *(Parent vs City of Rivière du Loup,* 40 R.J. 84 (1933)).

Assessment of damages for permanent disability.

Damages awarded for permanent disability are based upon several factors. Amongst the most important of these are the plaintiff's age and his normal expectancy of life, the approximate percentage of disability, and the salary he previously earned. The Courts must also take into consideration the plaintiff's station in life, the nature of the work for which he is fitted, his capacity for work, periods of enforced idleness, and ordinary risks of life and health. (See *Rolbin vs Fréchette,* 51 K.B. 514 (1931), *Bond, J.* at p. 515).

In many cases the plaintiff calls evidence to establish the cost of an *annuity* equivalent to his estimated future

annual loss. While this evidence may be considered together with the factors above mentioned, it is quite clear that the cost of an annuity, government or otherwise, is not the proper basis for a permanent disability award. (See *Rolbin vs Fréchette, (supra)* at p. 515; *Mtl. Tramways Co. vs Dupéré,* 50 K.B. 414 (1931), *Lafontaine, C.J.* at p. 421). In the *Fréchette* case the trial judge had allowed a capital sum of $2,745.50 as representing the cost of an annuity of $150.00. In appeal (K.B.) this was reduced to $1500.00. In *Hull Iron & Steel Co. vs Brisebois,* 44 K.B. 6 (1927) the trial judge had allowed $3,631.82 as the capital required to purchase a $200.00 annuity. In appeal (K.B.) this was reduced to $2,500.00 including some expenses. In *MacPherson vs Héritiers Gamache,* 69 C.S. 142 (1931) *de Lorimier, J.* held, in part, as follows (p. 147) :—

> **"La perte de capacité permanente peut être dans l'espèce de 10%; le salaire de la demanderesse étant $936 par année et 10% de cette somme donnent $93.60; or pour acheter une rente annuelle de $93.60, il faut un capital de $1,718.69, pour une personne de 28 ans, l'âge de la demanderesse; mais étant donnés les aléa et l'incertitude de la durée de la vie, il convient de réduire cette somme de moitié et fixer la diminution de capacité de la demanderesse à $859.34."**

In *Paquet vs Crépeault et al.,* 67 K.B. 381 (1939) the plaintiff, a married woman aged 37 and earning $540.00 a year, suffered a permanent disability of 8%, i.e. a reduction in annual earning capacity of $43.20, as the result of a fall on a sidewalk due to the defendants' negligence. According to the evidence it would have cost her $892.51 to purchase an annuity of $43.20. The Superior Court allowed her $495.84 for her permanent disability, which figure was approved by the Court of King's Bench (see *Sir M. Tellier* at p. 394 and *St. Jacques, J.* at p. 387. The

judges' notes also contain an interesting discussion on the question of medical expenses.).

In estimating damages for future incapacity the possibility of recovery or partial recovery must be taken into account.

Inconvenience, etc.

Apart from damages for physical pain and suffering and for loss of earning capacity, the Court may, in the case of serious personal injury, also award damages for *inconvenience and loss of enjoyment of life.* (See, for instance, *City of Mtl. vs Légaré,* 28 R.L. 39 (K.B. 1921) *Tellier, J.* at pp. 47-48 and *Sevigny vs Bourdon,* 40 R.L. 125 (1932) at pp. 168-169).

Medical opinions.

As to defendant's right to have plaintiff *medically examined*, see *supra*, p. 7.

While due weight should be given to the expressions of opinion given by medical experts at the trial, the judge is fully qualified himself to estimate the approximate depreciation in a plaintiff's earning capacity: see *Hall, J.* in *Rolbin vs Fréchette,* 51 K.B. 514, 523: at p. 522 *Hall, J.* stated:—

> **"The custom of calling physicians and surgeons to express an opinion upon the percentage of loss of capacity has grown up in the last twenty-five or thirty years, in connection with the estimation of a compensation to which workmen are entitled under the Workmen's Compensation Act. Even for such purposes, such expressions of opinion are not, in any sense, evidence, but merely arbitrary guesses made by professional men who undoubtedly have experience in the treatment of injuries, but are not qualified as experts to estimate the working capacity after such an injury."**

The Court may order a special medical examination, if such an examination is necessary to establish the extent of incapacity. Thus in *Painchaud vs Millen,* 68 C.S. 487 (1930) it was held (R.H.) :—

> **"Lorsque la victime d'un accident a subi des blessures et qu'elle refuse de se soumettre à un examen médical, le tribunal, s'il est d'avis qu'il est impossible de fixer l'indemnité sans que l'état pathologique actuel du demandeur soit établi à dire d'expert, peut nommer un médecin aux fins d'examiner le demandeur et de faire rapport sur sa diminution de capacité."**
>
> **Permission to appeal from the above judgment was refused by *Howard, J.* of Court of K.B. (49 K-B. 565). See also *Bellefeuille vs C. P. Express Co., supra,* p. 7.**

Aggravation of malady.

Schiller vs Mtl. Tramways Co., 52 C.S. 385 (C.R. 1916). Held (R.H.) :—

> **"L'aggravation d'une maladie, causée par une collision de tramways, est une question de fait qui peut être soumise et décidée par un jury en déterminant le montant de dommages-intérêts à accorder au demandeur."**

If the plaintiff, instead of resorting to proper medical treatment, allows himself to be treated by a "quack" with the result that his malady is aggravated, he cannot recover from the party responsible for the offence or quasi-offence any more than the damages which immediately and directly resulted from the accident. *(Boily vs Corp. du Canton Taché,* 68 C.S. 406 (1929) : see also *Sigouin vs City of Mtl.,* 66 C.S. 147 (1928), 46 K.B. 397; *Noël vs Que. Ry L.H. & P. Co.,* 48 C.S. 130 (1915)).

Refusal to submit to operation.

A plaintiff claiming damages for personal injury cannot be compelled to undergo an operation to correct the

injury. (See *Tremblay vs Bonaventure Pulp & Paper Co.*, 33 R.J. 5 (1926); *Dekerelle vs C.N.R.*, 34 R.J. 111; *Vaccaro vs Reid Bros.*, 64 C.S. 499). However, if a minor operation would cure the plaintiff and he refuses to undergo it, his damages should be assessed accordingly. In *Charland vs Proulx*, 77 C.S. 397 (1935) the plaintiff had suffered a fractured coccyx but refused to undergo an operation to correct it. *White, J.* stated, in part, as follows:—

> **"While it has been held that an injured person cannot be compelled to undergo a serious operation, the Court must necessarily take into consideration the fact that a minor operation would in all probability effect a permanent cure, and assess the damages accordingly."**

Syphilis.

When recovery of an accident victim is unusually slow syphilis may be suspected. In *Gray's Attorneys' Textbook of Medicine (1934)* it is stated, in part, pp. 389-390:—

> **"There is no doubt that syphilis plays a much greater part in producing major claims than is usually believed... Every patient whose trouble is of questionable origin, or who does not recover in a normal time, even though there can be no doubt about the original cause, should be studied by a syphilologist. Negative Wassermanns are insufficient to rule out this disease. The test should only serve to help verify a diagnosis made upon study of the symptoms and expert examination of the patient."**

Damages resulting from death.

Article 1056 C.C. provides as follows:—

> **"In all cases where the person injured by the commission of an offence or a quasi-offence dies in consequence, without having obtained indemnity or satisfaction, his consort and his ascendant and descendant relations have a right, but only within a year after his death, to recover from the person who committed the of-**

fence or quasi-offence, or his representatives, all damages occasioned by such death."

The second paragraph of the article is concerned with cases of duels, in which we are not interested. The article then continues:—

"In all cases no more than one action can be brought in behalf of those who are entitled to the indemnity and the judgment determines the proportion of such indemnity which each is to receive.

"These actions are independent of criminal proceedings to which the parties may be liable and are without prejudice thereto. — 20 Geo. V. c. 98, s. 1 — C. 2262".

There has been a good deal of discussion as to how this Article came to be included in the Code. For the present purposes it is sufficient to say that in all probability it is derived indirectly from *Lord Campbell's Act (1846), 9-10 Vict., C. 93 (Eng.).*

Being exceptional in nature *Art 1056* C.C. should be strictly interpreted, and the right of action must be limited to the persons mentioned in the Article. In *Flaherty vs Mtl. Tramways Co.*, 69 C.S. 515 (1931) the brother of the victim sued to recover funeral expenses. In dismissing the action *Greenshields A.C.J.*, distinguishing *Paquin vs G.T.R.*, 9 C.S. 336 (1896), held that the brother of a person killed in an accident is under no legal obligation to expend money in the burial[4] of his brother's body; if he does, he cannot hold the alleged tort-feasor responsible for such expenses. (See also *Flauvelle vs Guérin et al.*, 38 Q.P.R. 32 (C.S. 1934); *Tessier vs G.T.R.*, 5 R.J. 1 (1898)).

In *Town of Mtl. West vs Hough*, (1931) S.C.R. 113 it was held that neither the father nor mother of an illegi-

4. The same rule applies to *hospital* expenses, — *Thompson vs J. A. Ogilvy's Ltd. et al.* (1935) 2 I.L.R. 73, K.B. 1122 (1936); and see *Bahen vs O'Brien, infra* p. 303.

timate child has a right of action under *Art. 1056* C.C. See also *Windsor Hotel Ltd. vs Stadnicka et al.*, 64 K.B. 298 (1938) which decided that illegitimate children cannot exercise the recourse under *Art. 1056*. Neither (it has been held) has a step-father such a right of action for death of his step-son. *(St. Laurent vs La Cie de Tel. de Kamouraska*, 7 Q.P.R. 293 (C.S. 1905)). Similarly, it has been held that a man has no right of action under *Art. 1056* for damages resulting from the death of his adopted son. *(Dionne vs Cie des Chars Urbains*, 7 C.S. 449 (1895)).

It is well settled law that in actions under *Art. 1056* no damages can be recovered for mental anguish or *solatium doloris*. See:—

> ***Daly vs McFarlane*, 55 K.B. 230 (1933); *Town of Mtl. West vs Hough*, (1931) S.C.R. 113; *Leboeuf vs Mtl. Cottons*, 34 R.J. 321 (1928); *McAthey vs Redpath*, 69 C.S. 26; *Dupont vs Remillard et al.*, 66 C.S. 130 (1928); *C. P. R. vs Robinson*, 14 S.C.R. 105 (1887); *Girard vs Tremblay*, 40 R.J. 467 (1934).**

In *Hunter vs Gingras*, 33 K.B. 403 (1921) *Martin, J.* stated as follows, at p. 412:

> **"I think it must now be accepted as the settled jurisprudence of this province that nothing can be accorded by way of *solatium doloris*. What is the basis upon which compensation can be estimated and allowed? Article 1056, C. civ., says that the parents have a right to recover from the person who committed the offence all damages occasioned by such death. In other words the right to recover is restricted to the actual pecuniary loss. What is appellant's actual pecuniary damage? What amount would he have received of his daughter if she had survived? Has appellant grounds for having a reasonable expectation of deriving future pecuniary benefit from his child?"**

In *Town of Mtl. West vs Hough*, (1931) S.C.R. 113, *Anglin, C.J.C.* discussing the *basis for estimating damages* under *Art. 1056* said, in part, at p. 116:—

"...the plaintiff's claim being under art. 1056 C.C., of which Lord Campbell's Act was the prototype (*Robinson v. Canadian Pacific Ry. Co.*, (1892) A.C. 481, at 486), *prima facie* at least, the basis for estimating the damages recoverable in this action (common fault having been excluded) should be the same as under the English statute (*City Bank v. Barrow*, (1880) 5 A.C. 664, at 679)."

He went on to say that there were, of course, in other respects differences between the provisions of *Art. 1056* and Lord Campbell's Act (see *Robinson vs C.P.R.*, (1892) A.C. 481) and continued:—

"...but we do not find anything in art. 1056 C.C. to justify our treating it as affording, to a plaintiff in Quebec, only some basis on which his damages must be estimated less liberal than that afforded by Lord Campbell's Act. Under that statute in England, and as adopted in Ontario, it is well settled that, while there can be no recovery for anything except actual loss susceptible of pecuniary appraisal sustained by the plaintiff and those whom he represents (*Jennings vs Grand Trunk Ry. Co.*, (1888) 13 A.C. 800), 'a reasonable expectation of pecuniary benefit' from the continued life of the deceased is all that a plaintiff need show in order to found a claim for damages, a legal right on his part against the deceased to alimentary support or otherwise, being unnecessary. (Mayne on Damages (10th Ed.), p. 516, note (b)).

"The jurisprudence under art. 1056 C.C. is to the same effect. Thus, it was early settled that damages recoverable under that article do not include anything by way of compensation for *solatium doloris* as distinct from pecuniary loss... and it is equally well established that a reasonable expectation, on the part of the plaintiff, of advantage from the deceased, the worth of which is estimable in money, suffices in an action against a wrongdoer responsible for the death of the victim of his fault (*Canadian Pacific Ry. Co. vs Lachance*, (1909) 42 Can. S.C.R. 205; *Canadian Pacific Ry. Co. vs Robinson*, (1887) 14 Can. S.C.R. 105; *Bernard vs Grand Trunk Ry. Co.*, (1896) Q.R. 11 S.C. 69; *Hunter vs Gingras*, (1921) Q.R. 33 K.B. 403 at 409, 412;

***Dumphy vs Montreal L. H. & Co.*, (1905) Q.R. 28 S.C. 18, at 27."**

In *Daly et al. vs McFarlane*, 55 K.B. 230 (1933) it was held that the parents of a boy aged 23, killed in an accident, were entitled to recover an amount for the natural and reasonable expectation of deriving future pecuniary benefit from their son, irrespective of the fact that he had not contributed to the household expenses prior to his death. In *Mtl. Tramways et al. vs Turgeon*, 26 K.B. 496 (1917) *Cross J.* stated (p. 503) that the death of a healthy child nine years of age "represents the loss to the parent of an asset upon which he had a right to count." For leading cases on damages resulting from death of child see also:—

***Mtl. Tramways Co. vs Crépeau*, 35 K.B. 102 (1922); *McAthey vs Redpath*, 69 C.S. 26; *Mason vs Dom. Transport Co. Ltd.*, 67 C.S. 73 (1929); *Delisle vs Goodwins Ltd. et al.*, 62 C.S. 335 (1924), see *Rinfret J.* at p. 341; *Laflamme vs Levis Ferry Co.*, 47 C.S. 291 (1915); *Joleaud vs Fortier*, 37 R.L. 210 (1931); *Cie de Chemin de fer Urbain de Mtl. vs Brialofsky*, 19 K.B. 336 (1909), see *Carroll J.* at p. 339; *Fortier vs Gregoire*, 43 R.L. 355 (1937); *Lefebvre et al. vs Bergeron*, 65 C.S. 240 (1927); *Leboeuf vs Mtl. Cottons*, 34 R.J. 321 (1928); *Langlais vs Ste-Marie* 68 K.B. 64 (1939).**

In an action for damages resulting from a child's death damages claimed for loss of time, and for the expenses of a doctor for attendance on the child's mother, are too remote and are not recoverable. (See *Howard vs The King*, (1924) Ex. C.R. 143, *Audette, J.* at p. 146; *Beaudet vs W. Grace Co.*, 7 Q.P.R. 82 (1904)).

See also *M. T. C. vs Crépeau*, 35 K.B. 102; *Filiatrault et al. vs C. P. R.*, 18 C.S. 491 (1900) (damages for nervous shock caused by death of mother held too remote).

In *Bahen vs O'Brien*, 65 K.B. 64 (1938) a widow sued for damages resulting from the death of her husband in

an automobile accident. On account of his bad habits the plaintiff had not lived with her husband for several years, and he had not been contributing to her support. The Appeal Court (K.B.) held she was entitled to a sum of $1,000. for loss of possible future support, as there was a possibility that her husband might have reformed and contributed, had he lived. (See judgment of *Rinfret J.* in *Lasalle vs Rivest*, 62 C.S. 26 (1923) as to basis of award to widow).

In the *Bahen* case it was held that *funeral expenses* are chargeable to the heirs and not to the widow: there was no claim made by the widow as heir and moreover *Art. 1056* C.C. gives no right of action to heirs as such. The same rule, it was held, applied to *mourning* and, in any event, no claim could be made for the children's mourning as this was not even chargeable against the estate.

The right of action under *Art. 1056,* being against "the person who committed the offence or quasi-offence or his representatives", is not affected by the death of the party at fault. (See *R. vs Desrosiers*, 41 S.C.R. 71 (1908) pp. 76, 77).

Death following action under 1053 C.C.

A *suit may be continued* by the heirs or representatives of a deceased party. *(Art. 270 (1)* C.P.). See *Art. 1031* C.C. as to continuation of action by creditors.

Lemelin vs Ladrie et al., 59 C.S. 456 (1920). Held, in part (R.H.) :—

> **"Lorsque la victime d'un délit ou d'un quasi-délit décède en conséquence après avoir intenté contre l'auteur du délit ou du quasi-délit une action en recouvrement des dommages soufferts, son conjoint ne peut, en reprenant l'instance comme légataire universel du défunt, exercer**

par voie de demande incidente dans la cause le recours de l'article 1056 C. civ."

In *Pratt vs Beaman,* (1930) S.C.R. 284 the judgment in *Lemelin vs Ladrie* was discussed and was considered to be an authority against allowing in an action commenced before the death of the victim any damages occasioned by such death. (See *Anglin, C.J.C.* at p. 286).

In the Ontario case of *Major vs Bruer; Hanrahan vs Bruer* (1937) 4 D.L.R. 760 the *Ontario Court of Appeal* (referring to the *Trustee Act, R.S.O. 1927 C. 150 S. 37)* held (R.H.) :—

"In an action for personal injuries which on the death of plaintiff is continued by his administrator, damages for pain and suffering of the deceased as well as for the shortening of his life by the injuries are recoverable in addition to out-of-pocket expenses, the evidence showing that although the deceased was 70 years old he was in sound health and had a normal expectancy of life of about 10 years."

See *Rose vs Ford* (1937) A.C. 826 (Eng.); *Roach vs Yates,* (1937) 3 All E.R. 442 (Eng.); *Sershall vs Toronto Transportation Commission,* (1938) 4 D.L.R. 369, (1939) S.C.R. 287.

Effect of insurance benefits on damage awards.

Reference should be made to *Duplication of Indemnities (supra* p. 257) and to the cases cited under that heading.

It is clear from the judgments already cited *(supra,* p. 300) that the damages awarded under *Art. 1056* C.C. must be limited to the actual pecuniary loss sustained by the plaintiff and those whom he represents. For that reason it has been contended that the damages should be reduced by the amount of any insurance moneys paid to the plain-

tiff on account of the death with which the action is concerned. For instance, in *Dominion Bridge Co. vs Konwaketasion,* 7 Q.P.R. 232 (K.B. 1903) the Court of King's Bench (reversing the Superior Court judgment) decided that the jury could take into consideration the insurance money paid to the plaintiff. (See also *Bouchard vs Gauthier,* 20 K.B. 487 (1911) reversing judgment of Court of Review; *Can. Northern Que. Ry. Co. vs Johnston,* 22 K.B. 63 (1912) reversing 39 C.S. 263).

It is also worth noting that in *Laflamme vs Levis Ferry Co.,* 47 C.S. 291 (1915) and *Que. Central Ry. vs Gillanders,* 15 K.B. 414 (1906) the respective defendants were not permitted to make evidence of insurance moneys received by the plaintiffs on the ground that they had failed to raise that issue in their pleas.

However, the jurisprudence, while somewhat contradictory, has shown a marked tendency to admit duplication in such cases. [5] In so far as life insurance is concerned a rule was laid down by the Judicial Committee of the Privy Council in *G.T.R. vs Jennings,* 13 A.C. 800 (P.C. 1888) to the following effect:—

Where the widow of deceased is plaintiff and her husband had made provision for her by a policy on his own life in her favour, the amount of such policy is not to be deducted from the amount of damages previously assessed irrespective of such consideration. She is benefitted only by the accelerated receipt of the amount of the policy, and that benefit being represented by the interest or use of the money during the period of acceleration, may be compensated by deducting future premiums from the estimated future earnings of the deceased.

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5. "...The jurisprudence, if not yet definitely established, shows a strong tendency to admit cumulation and duplication in all cases of insurance, save that of insurance of things which is strictly a contract of indemnity." — *Proceedings of Canadian Bar Association* (1935) Vol. 20, *Vallée,* p. 159; see *Weens, Traité de l'Assurance des Choses* (1927) p. 424; *Laverty, The Insurance Law of Canada,* 2nd Ed. pp. 16, 413.

In *Miller vs G.T.R.* (1906) A.C. 187 (P.C.) it was decided (see *Lord Davey*, p. 194) that life insurance money which does not proceed from the tort-feasor is not "indemnity or satisfaction" within the meaning of *Art. 1056* C.C.

In *G.T.R. vs Beckett*, 16 S.C.R. 713 (1887) which was an Ontario case, the company was found liable and condemned to pay damages, but the trial judge deducted an amount paid for insurance from that awarded by the jury. This ruling of the trial judge was reversed on appeal to the Divisional Court which held that the verdict should stand for the full amount as found by the jury, without taking account of the insurance. This judgment was affirmed first by the Court of Appeal and again by the Supreme Court. In *Cameron vs Royal Paper Mills Co.*, 31 C.S. 273 (39 S.C.R. 365, 1907) it was held by the Court of Review that a defendant liable for damages resulting from death has no right to a reduction of this amount by reason of a policy, whether accident or straight life, on the life of the deceased paid to the plaintiff. *Mathieu J.* stated in part, at p. 287:—

> **"A contracts to pay B in case of his death by accident a sum of two thousand dollars. The event takes place through the fault or negligence of C and is C, the only party to blame, to get the benefit of the contract?**
>
> **"It seems enough to state such a case, to show its absurdity.**
>
> **"Insurance contracts are electory contracts which have the sanction of the law in the interest of both insurers and insured. The risk for either of them, in the case of an 'accident' policy, depends on a future and uncertain event; but that risk is assumed by the contracting parties alone, and a third party through whose fault the benefits accrue to one of them, can have no claim, I think, to share such benefits."**

In the comparatively recent case of *Bahen vs O'Brien*, 65 K.B. 64 (1938, see *supra* p. 302) it was decided that the proceeds of an insurance policy, payable to the plaintiff on her husband's death, which stipulated a *double indemnity* in case of accidental death, should be taken into account in calculating the damages, as well as the saving of premiums (which plaintiff had been paying) for a period equivalent to the deceased's reasonable expectation of life as shown by the mortality tables.

The argument in favour of "duplication" is expressed by *Mathieu, J.* in the *Cameron* case *(supra)*. While the question is admittedly a difficult one, it would seem only right that the offender should not be permitted to benefit by the wisdom and foresight of the accident victim in providing himself with insurance, to which the offender has never contributed.

"Another" in Art. 1053 C.C.

An important interpretation of the word "another" in *Art. 1053 (supra* p. 9) was applied in *Mtl. Tramways Co. vs Léveillé*, (1933) 4 D.L.R. 337 (S.C.C.) in which an injury to a pregnant woman was alleged to have resulted in her child being later born with deformed feet. The Supreme Court held as follows:—

> **"Although a child was not actually born at the time a company by its fault created the conditions which brought about deformity to its feet, yet under the civil law it is deemed to be so if for its advantage. Therefore when the child was subsequently born alive and viable it was clothed with all the rights of action which it would have had if actually in existence at the date of the accident to the mother. Being an existing person in the eyes of the law it comes within the meaning of 'another' in art. 1053 C.C. and the existence or non-existence of the mother's contract is entirely irrelevant, the action being in tort."**

It has been held that an insurance company after paying its insured the amount of a loss in an automobile accident may, under *Art. 1053* C.C., sue the party responsible in its own name, whether or not it has been "subrogated". (See *supra* p. 254).

In *Regent Taxi Cab & Transport Co. vs Congr. des Petits Frères de Marie etc.*, (1929) S.C.R. 650; (1932) A.C. 295 the question arose as to whether the word "another" should be limited in application to the immediate victim of the accident, or whether a direct and distinct right of action also arose in favour of others who had been affected prejudicially as a result of the injury suffered by him. *Anglin, C.J.C., Lamont and Smith, JJ.* in the *Supreme Court* took the latter view, *Mignault and Rinfret, JJ.* dissenting. In the *Privy Council* (1932), A.C. 295, also rep't'd. in 53 K.B. 157) it was unfortunately considered unnecessary to decide this point as the appeal was maintained on another ground, namely, that the action was one for bodily injuries under *Art. 2262 (2)* C.C. and was, therefore, prescribed in one year — the action having been taken twenty-three months after the date of accident. See also *Roberge vs Hopital St. Sacrament*, 77 C.S. 287 (1939).[6] In *Gosselin vs Dalpé*, 43 R.L. 163 (1937) a father-in-law was held to be entitled to claim expenses incurred by reason of an accident to his minor son-in-law.

Damage to automobile.

See *Aubertin vs Northern Ass'ce Co.*, 37 K.B. 349 (1924) *supra* p. 282; *Viner vs Union Ins. Society of Canton*, 62 C.S. 308 (1924) *(supra* p. 282). In *Reeves vs Western Ass'ce Co.*, May 17th, 1924, (unrep'd, but referred to in the *Viner* case) *Archer J.* held that evidence of a general nature as to the value of second-hand cars similar to the

6. The judgment maintaining plaintiff's partial inscription-in-law was reversed by K.B. (No. 3214, 27th Nov. 1939).

one destroyed was of little or no value against the evidence of those who knew the condition of the car in question before the loss.

Tremblay vs Hudon, Hébert & Co. Ltd., 47 K.B. 214 (1928). Held (R.H.) :—

> **"Where an accident occurs following which a motor car is wrecked beyond repair, the owner is entitled to recover from the responsible party the real or actual value to him as distinguished from its sale value before the mishap.**
>
> **"The method of calculating the value of a car by deducting from its original price an amount for depreciation based upon a purely arbitrary scale is neither a legal nor a just method of valuation and a theoretical market value calculated in that way cannot be accepted."**
>
> **See also *Mtl. Tramways Co. vs Rosenbloom*, 54 K.B. 75 (1932), *Hall J.* at p. 77.**

The automobile owner is entitled to recover not only the cost of repairs but also for *depreciation* in the value of the car. (See *Walter vs Seibel*, (1927) 2 D.L.R. 1005 (Sask. C.A.); *Copley vs Finkelstein*, (1928) 3 D.L.R. 671). He is also entitled to recover the expenses occasioned by a complete examination of his car. *(Sears vs Gourre*, 52 C.S. 186 (C.R. 1917)).

Action by borrower.

It has been held that the borrower of an automobile has sufficient interest to allow him to sue the party who has damaged it, as he has the care of the car and is obliged to return it intact to its owner. *(St. Pierre vs Lambert*, 42 Q.P.R. 393 (C.S. 1936) : see also *Perreault vs Therrien*, 74 C.S. 481 (C.C. 1936)).

Loss of salary.

Vaillancourt vs Cater et al., 74 C.S. 297 (1936) :

In assessing the amount of damages to be awarded to the victim of an automobile accident which occurred in the City of Montreal the Court should deduct what the victim has received from public funds under the system of relief in force in the city.

At p. 299 *Mackinnon, J.* stated:—

"The Courts of this Province have refused to allow plaintiffs the amount of salary claimed by them during the period of their temporary total incapacity when such salary has been paid by their employers."

And at p. 298:

"A fundamental principle of law is that reparation is due only for the damages caused."

Pratt vs Beaman, (1930) S.C.R. 284. Held (R.H.):—

"In an action for damages for *loss of wages* resulting from an accident, events which happened between the date of the accident, such as the death of the victim, and the time of the trial must be taken into account in estimating such damages."

It was held in the *Pratt* case that the principle laid down in *Findlay vs Howard*, 58 S.C.R. 516 (1919), which concerned breach of contract, is equally applicable when the claim is for damages in tort under *Arts. 1053, 1054* and *1055* C.C.

Loss of vacation by an accident victim does not constitute direct and immediate damage. *(Piché vs Scott,* 37 R.L. 400 (1931)).

Recovery of sum paid to injured party.

DeLuxe Cab (Mtl.) Ltd. vs Wilson, 70 C.S. 61 (1932):

The proprietor of a taxi, who, following a collision, pays compensation to his injured passengers and is subrogated in their rights against the party responsible for the accident, may include in an action for damages against the latter the amount of compensation so paid. The Court may

reduce the amount so claimed, depending upon the proof made.

Drolet vs Demers, (1937) 4 I.L.R. 360:

A plaintiff cannot recover a sum paid to a third person for damages for which he would only be responsible if he were in fault himself; in making such a claim he is pleading the rights of another.

Promise to pay damages.

Dick vs Couturier, 65 K.B. 249 (1938):

The evidence revealed that defendant was not the owner of the car which caused the damage but that in fact it belonged to his wife. Nor, at the time of the accident, was the car being driven by any one for whom the defendant was responsible. Under these circumstances oral testimony relating to an undertaking by the defendant to pay the damages, being an attempt to prove verbally an obligation to pay more than $50.00, should not be admitted. Defendant's appeal was allowed — action dismissed.

Nantel vs Les Héritiers de Feu Wilfrid Hotte, 33 R.L. 148 (1927). Held, in part (R.H.):—

"...La déclaration suivante: 'Je serai assez monsieur pour payer les dommages' faite par le propriétaire d'une automobile, à la suite d'un accident dont seule la victime est responsable, engage son auteur. Cependant celui-ci ne peut alors être tenu de payer plus que les frais pécuniaires prévus lors de sa déclaration, c'est-à-dire les déboursés réellement faits par la victime ou ses parents."

Hospitals.

By the *Charitable Institutions Injured Persons Costs Payment Act, 1935, 25-26 George V, C. 85*, certain provisions were made for the payment of services of physicians and the cost of maintenance of injured persons in public charitable institutions:

Any institution recognized by the Lieutenant-Governor in Council as a public charitable institution[7] may benefit under the provisions of the Act, but, in order to do so, must file a written declaration with the Prothonotary of the Superior Court in the manner and within the delay set forth in *S. 5* of the Act. *S. 3* provides that the Act shall apply "to any person the victim of an accident admitted to the institution in virtue of the provisions of the *Quebec Public Charities Act,* or treated in the public wards of the institution although he does not come within the scope of the said act owing to his domicile." *S. 4* contains important provisions regarding the necessity of including the accounts of the institution and of the physicians attached to the staff in a claim made by the accident victim (or, in case of his death, by the consort, ascendants and descendants) for damages resulting from an offence or quasi-offence.

S. 6 provides:—

"No settlement of any such claim for damages may be effected between the parties unless the amounts of such accounts allowed by the said settlement be paid directly to the institution or to the physicians on the staff or attached to the staff of such institution.

"Any amount granted by a judgment for hospitalization and medical costs must be paid directly to the institution and to the physicians on the staff or attached to the staff of such institution and the judgment shall mention the same. Such amounts shall be limited to the treatment necessitated by the accident.

"In each case where there is common fault on the part of the injured person and the person responsible, the latter shall be bound to pay such accounts only in proportion to his responsibility as fixed by the judgment or by the terms of the settlement between the said parties, as the case may be."

S. 8 provides:—

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7. See also 1939, 3 Geo. VI C. 82.

"Public charitable institutions in which the injured person was treated, operated on or cared for, and the physicians on the staff or attached to the staff of such institution rendering such services for these purposes, may individually or in a joint action bring suit for the amount due them, as well against the victim of the accident or his representatives, as aforesaid, as against the person who effected a settlement without having conformed to the provisions of section 6 of this act, and in such suit the question of liability for the offence or the quasi-offence cannot be raised."

S. 10 provides that for the purposes of the Act the tariff of the Workmen's Compensation Act, 1931 *(21 Geo. V, C. 100)* and its amendments, shall apply, *mutatis mutandis*, to the accounts of the physicians and of the hospitals. Thus, in *DeGruchy vs Miller*, C.S. No. 166607, 10th Dec. 1938 *(unrep'd) Lazure, J.* reduced the hospital and medical expenses to conform to the Workmen's Compensation Tariff. Again, in *Dupont vs Brière et al.*, 77 C.S. 127 (1939) it was held that a hospital which has placed its claim in the hands of the Prothonotary in accordance with the Act, and has given notice to the owner of the motor vehicle concerned, can only collect from the party responsible for the accident the sums allowed by the said tariff for doctors' fees, professional services, and care. (See, however, *St. Michel vs Ville de Mtl. Nord*, 77 C.S. 177, 1939, appeal to K.B. pending).

Although there may be a custom according to which nurses in hospitals are not compelled to pay for hospitalization when they require the same, the hospitals are not thereby deprived of their right to charge them, more especially when the hospitalization is due to the fault of a third party, and when such free hospitalization would not benefit the nurse herself but the party responsible for the accident which rendered it necessary. (See *MacIntyre vs Binder et al.*, 76 C.S. 6 (1937)).

See ***Hôpital St-Luc vs Gagné et al.***, 76 C.S. 89 (1937) in which it was held, in part, that there is ordinarily no *lien de droit* between a hospital and the author of a quasi-delict, but that the latter may engage his responsibility by requesting the hospital to render services to the accident victim.

Joint and several responsibility.

Art. 1106 C.C. provides:—

"The obligation arising from the common offence or quasi-offence of two or more persons is joint and several."

It follows that if an innocent party is injured through the common offence or quasi-offence of two or more other persons he has a joint and several claim against each and all of them, and may collect the full amount of his damages *from any one of them*. There may be joint and several responsibility of two different parties for the consequences of an accident caused by independent acts of negligence committed by both at the same time and contributing directly to that accident. (See *G.T.R. Co. et al. vs McDonald*, 57 S.C.R. 268 (1918) distinguishing *Jeannotte vs Couillard*, 3 Q.B. 461 (1894)). Thus, when an innocent party, C, is injured as a result of a collision between two automobiles driven respectively by A and B, and brings action against A alone, C is entitled to recover the full amount of his damages from A if A was guilty of *any* fault contributing to the accident. It matters not to C that B may have been *more* at fault than A. See:

Osborne et al. vs Bramsons Auto Service Ltd. et al., 64 C.S. 344 (1926) and authorities cited in report; ***Langevin vs Beauchamp***, 44 K.B. 569 (1928). See also ***Brosseau vs Chartier***, 46 K.B. 479 (1929); ***Dupont vs Remillard et al.***, 66 C.S. 130 (1927); ***Schaefer vs Greenspon et al.***, 73 C.S. 298 (1935); ***Lalumière et vir vs Durocher et al***, 37 R. L. 388 (1931); ***Trepanier vs Canadian Pacific Railway***, 31

R.L. 119 (1925); *Green et vir vs Shaver et al,* 68 C.S. 499 (1930); *Gauthier vs Pesant et al.,* 64 C.S. 47; *Napierville Junction Ry. Co. vs Dubois,* (1924) S.C.R. 375; *Vallée vs Shedden Forwarding Co.* 40 C.S. 454 (C.R. 1911); *Scholnick vs Ideal Paper Box Co. et al,* 43 R.L. 277 (1936).

For *prescription* in case of joint and several responsibility see *infra,* p. 322.

In *Smith vs Diamond Taxi Cab Assoc. Ltd et al.,* 67 C.S. 203 (1929) *Bond, J.* held that an association of owners of taxi cabs should be held jointly and severally liable with the owner of an automobile, member of such association, for the damages resulting from an accident due to the fault of such member or his employee, by reason of the proprietor and the driver being allowed to hold themselves out as forming part of the association. (Compare *Stevens vs Diamond Taxi Cab Assoc. Ltd.,* 68 C.S. 327).

The responsibility of joint owners of a property, for damages caused by permitting a sidewalk to remain in a dangerous condition through want of repair, is joint and several, and not joint. *(Paquet vs Crépeault et al.,* 67 K.B. 381 (1939)).

Where joint tort-feasors are sued in the same action the jury cannot apportion the damages between them, and, if it does so, a new trial may be ordered. *(Gay Co. Ltd. vs Trick,* (1927) 1 D.L.R. 1091, Ont. S.C., A.D.). In *Legault vs Mtl. Terra Cotta Co.,* (1914) 20 D.L.R. 388 (C.R.) it was held (R.H.) :—

"The obligation of tort-feasors in respect of negligence is joint and several as between them and the person injured but as between themselves the damage is apportionable under Quebec law, so where three parties were equally in fault but only one is sued by the injured person that one on bringing in the others to answer as defendants in warranty is entitled to indemnity for two-thirds of the amount, one third against each of the other tort-feasors..."

Art. 1056a C.C.

Art. 1056a C.C. provides:—

> "When a workman is injured by reason of an accident contemplated by the Workmen's Compensation Act, 1931, no one may, by reason of such accident, exercise against the employer of such workman the recourse provided by this chapter.
>
> "Nevertheless, if, under the provisions of this chapter, such workman or his representatives have recourse against any person other than the employer of the injured workman, he or they may, notwithstanding any law to the contrary, either exercise against such person the recourse provided by this chapter, or claim from the employer under the Workmen's Compensation Act, 1931."

S. 2 1 (o) of the *Quebec Workmen's Compensation Act 1931* [8] provides:—

> "The word 'workman' shall mean a person who works under a contract of service or apprenticeship, written or oral, express or implied, whatever the nature of his work; but such word shall not include an outworker, or an executive officer of a corporation."

In *Donnacona Paper Co. Ltd. vs Cannon*, 63 K.B. 525 (1937) *Barclay, J.*, after referring to several definitions in the *Workmen's Compensation Act*, stated (p. 536):—

> "All these definitions taken together make it quite clear that the term 'ouvrier' or 'workman', used in the Act, is not limited to those employees who are working in the industrial as distinguished from the commercial part of any industry or undertaking, but extends to all employees in the classified industries, whatever the nature of their work."

See also *S. 9 Ss. 1 & 2* of the *Workmen's Compensation Act*. *S. 9 (3)* of the same Act provides:—

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8. 21 Geo. V, c. 100, amended by 23 Geo. V, c. 98; 25-26 Geo. V, c. 80; 1 Ed. VIII (2nd sess.) c. 39.

> **"If the workman or his dependants elect to claim compensation under this act, the employer, if he is individually liable to pay it, or the Commission, if the compensation is payable out of the accident fund, as the case may be, shall be subrogated *pleno jure* in the rights of the workman or his dependants and may, personally or in the name and stead of the workman or his dependants, institute legal action against the person responsible,[9] and any sum so recovered by the Commission shall form part of the accident fund.**
>
> **"Agreements or compromises effected between the parties respecting such action or right of action shall be null and void, unless approved and ratified by the Commission."**

S. 9 (a) of the same Act (added by *1936, 1 Ed. VIII (2nd Sess.) c. 39)* provides—

> **"Notwithstanding any provision to the contrary and notwithstanding the fact that compensation may have been obtained under the option contemplated by subsection 3 of section 9, the injured workman, his dependants or his representatives may, before the prescription enacted in the Civil Code is acquired, claim, under common law, from any person other than the employer of such injured workman any additional sum required to constitute, with the above-mentioned compensation, an indemnification proportionate to the loss actually sustained."**

Art. 1056b C.C., releases.

Art. 1056b C.C. was designed with the object of preventing certain practices resulting in unnecessary and un-

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9. See for example *Commission des Accidents du Travail vs Can. Cartage & Storage Co.* C.S. 167332, Sept. 1937, *Duclos, J. (unrep'd)*. Reference may also usefully be made to *Toronto Ry. Co. vs Hutton*, 59 S.C.R. 413 (1919) and *McIver vs Tammi*, 62 D.L.R. 534 (Ont. S.C. App. Div. 1921) which dealt, inter alia, with an almost similar provision in the Ontario Workmen's Compensation Act, 4 Geo. V, C. 25, S. 9 (3), now contained in S. 8 (3) of R.S.O. 1937 C. 204. See also *Cooper vs C. Northern Ont. Ry. Co.*, 55 O.L.R. 256 (1924).

just profits by unqualified intermediaries at the expense of accident victims. It provides as follows:—

> **"Saving the provisions of the Bar Act (Revised Statutes, 1925, chapter 210), in recovering any indemnity exigible under this Chapter Third, no mandatary or intermediary can receive as remuneration, or cause to be transferred to himself as collateral security or otherwise, the indemnity, in whole or in part, which the person injured or his representatives may claim, or in any way acquire any personal interest in the amount of such indemnity.**
>
> **"Every arrangement, verbal or written, express or implied, entered into in violation of this article, is null, *pleno jure*, and the person paying any part of the indemnity under such arrangement has a right of recovery against the person who receives the same.**
>
> **"At the time of exercising any recourse provided by this chapter, the court, upon the application of any party in the case, may allow proof of the existence of an arrangement made in violation of this article.**
>
> **"In the case of a recourse in damages for bodily injuries, the releases and settlements and the written declarations obtained, within fifteen days after the date of the offence or quasi offence, from the person injured, can not be set up against him if he suffer harm thereby."**

The last paragraph was added by *3 Geo. VI, c. 95 (1939)* and affords relief to injured parties who, during the fifteen day period, may have committed themselves to settlements etc. without then appreciating the extent of their injuries.

The British Columbia case of *Sloan vs Roxby*, 7 I.L.R. 16 (S.C. 1939) is an example of the prejudice which a party may suffer by signing a release without fully realizing the extent of his injuries. Some two weeks after the accident the plaintiff, who was seriously injured, was visited at the hospital by defendant's adjuster. The adjuster paid two more visits during the course of the next

few days, and on the third occasion the plaintiff, apparently contrary to his doctor's advice, accepted $2,000.00 in settlement of his claim and signed a release therefor. In due course he sued the defendant for his damages, and the issue was whether or not the release was binding so as to prevent the success of the action. The Court held that, assuming there was no contributory negligence, the amount of the settlement was inadequate. However, as the plaintiff was an adult of average intelligence, knew what he was doing, and insisted on bargaining for himself he "could not go behind the settlement" and was accordingly bound by the release he had signed.

In *Gosselin vs Beland*, C.S. 176498, Jan. 1940 *(unrep'd* to date) plaintiff's automobile was struck and damaged by defendant's automobile when the latter swerved across the street. A few days after the accident (and prior to the above cited addition to *Art. 1056b)* the plaintiff signed a declaration in the office of the defendant's insurers to the effect that "the defendant could not do otherwise than swerve to the left", and that a third party was responsible for the accident. *Curran, J.* nevertheless maintained the action, holding that the declaration made by the plaintiff, while mischievous, did not settle the responsibility of the parties, and "did not take from the court's hands the duty of declaring who was responsible for the accident."

Prescription.

By *Art. 2261 (2)* C.C. actions for damages resulting from offences or quasi-offences are prescribed by two years *whenever other provisions do not apply.* By *Art. 2262 (2)* CC. actions for bodily injuries are prescribed by one year, saving the special provisions of Art. 1056 and cases regulated by special laws. An action under *Art. 1056* C.C. is prescribed by one year from the death of the victim (see *supra* p. 298). Actions against municipal corporations are prescribed by six months (see *supra* p. 230).

In *Regent Taxi & Transport Co. vs Congr. des Petits Frères de Marie etc.*, (1932) A.C. 295 the *Judicial Committee of the Privy Council* held that the words "actions... for *bodily injuries*" in *Art. 2262* C.C. may include actions in which the plaintiff was not the immediate victim of the accident and had not himself sustained bodily injuries.

Prescription runs from the date of the act which caused the damage, if the damage resulted from such act and not from a new fault. *(City of Mtl. vs McGee,* 30 S.C.R. 582 (1900)). Prescription is reckoned by days and not by hours; it is acquired when the last day of the term has expired; the day on which it commenced is not counted *(Art. 2240* C.C.).

By *Art. 2267* C.C. it is provided that in the cases mentioned in *Arts. 2261, 2262* "the debt is absolutely extinguished and no action can be maintained after the delay for prescription has expired." By virtue of that Article and *Art. 2188* C.C. the Court will of its own motion supply the defence resulting from prescription. Hence in cases under *Arts. 2261* and *2262* prescription need not be specially pleaded. (See *City of Mtl. vs McGee,* 30 S.C.R. 582 (1900)).

An action for damage to property resulting from a *legally authorized act*, e.g. change in a water course made by a contractor during the process of repairing a highway in virtue of a contract with the Minister of Roads, is not prescribed by two years. *(Rousseau vs Hon. J. E. Perrault es qual.*, 71 C.S. 315 (1932)).

As to *amendment to declaration after prescription period,* see *MacKenzie vs Meyers,* 57 K.B. 357 (1934) which held, (R.H.) :—

> **"Lorsqu'un passager dans une automobile conduite par le propriétaire de la voiture réclame à ce dernier la réparation du préjudice causé par un accident, il doit alléguer une faute productrice de responsabilité. Si lors**

des débats, alors que la prescription annale était acquise, une motion pour amender la déclaration est présentée au tribunal aux fins d'invoquer l'élément de faute, un amendement de ce genre a pour effet de changer la nature de la demande: il ne peut être permis."

Interruption of prescription.

Causes which interrupt prescription are set forth in *Arts. 2222-2231* C.C. inclusive. Causes which suspend the course of prescription are included in *Arts. 2232-2239* inclusive.

Institution of the main action will interrupt prescription in favour of an incidental demand. Thus supplementary damages for personal injuries, claimed by an incidental demand, are prescribed by one year from the institution of the original action. (*Beauchemin vs Dooner,* 51 K.B. 177 (1931). See also *Hall vs O'Rourke,* 42 Q.P.R. 65 (1938); *Magid vs Diamond Truck Co.,* 37 R.J. 250 (1931)).

Art. 2227 provides:—

"Prescription is interrupted civilly by renouncing the benefit of a period elapsed, and by any acknowledgment which the possessor or the debtor makes of the right of the person against whom the prescription runs."

Thus payments made by an employer to an employee who has been injured in the course of his employment have been held to imply an admission of liability in principle, and to interrupt prescription of the employee's right of action for damages against his employer in virtue of the compensation law in force in 1913. (*Que. & Lake St. John Ry. Co. vs Forgues,* 24 K.B. 538 (1915). See, *contra,* the old case of *Martial vs The Queen,* 3 Ex. C.R. 118). In *Bousquet vs City of St. Hyacinthe,* 77 C.S. 118 (1939) it was held that prescription was not interrupted by payment

of plaintiff's hospital and medical expenses for several months after he had been dismissed for cause.

In an action for damages for bodily injuries an *unaccepted offer of settlement* does not interrupt the one year prescription. *(Gohier vs Smith,* 23 Q.P.R. 65 (C.S. 1921)).

Interruption of prescription in cases of joint and several responsibility.

See *Art. 2231* C.C. which provides, in part:—

> **"Every act which interrupts prescription by one of joint and several debtors, interrupts it with regard to all."**

The joint responsibility between the perpetrator of an offence and the perpetrator of a quasi-offence, resulting from an act common to both, has the effect of rendering efficacious in favour of both the suspension or interruption of prescription which applies in favour of one or the other. *(Beaubien vs Laframboise,* 40 K.B. 194 (1925)).

Parents' right to recover damages from child, etc.

> **There is no provision of law which takes away from the parent the right to recover from his child the damages caused to him by such child's offence or quasi-offence — *Williams vs Lobenstine et vir,* 45 R.J. 138 (1934). See *The Fidelity and Casualty Co. of N. Y. vs Marchand,* (1924) S. C.R. 86 (*supra,* p. 284) (father guilty of actionable negligence against his minor son).**

Seizure of automobile before judgment.

Art. 931a C.P. provides:—

> **"In the case of a motor vehicle causing loss or damage for which the owner is responsible, such vehicle may be seized before judgment." (25-26 Geo. V, c. 104).**

In *Majeau vs Sparrow,* Joliette C.S. 6575, Jan. 1940 *(unrep'd* to date) plaintiff availed himself of the provision of *Art. 931a* to seize a truck which defendant had purchased under a contract of conditional sale, and on which there was still a balance owing of some $840.00. According to the terms of said contract the title to the truck did not pass to the defendant until the full purchase price had been paid, and the General Acceptance Corporation intervened to set aside the seizure on the ground that it, and not the defendant, was the owner. This intervention was maintained by *J. Demers, J.* who stated, in part, as follows:—

> **"...pour juger du sens qu'il faut donner au mot 'propriétaire' dans le dit article 931a du C.P.C., il faut s'inspirer des dispositions du Code civil, quant à ce qui constitue le droit de propriété, et non de celles de la Loi des véhicules-moteurs."**

SECTION 16

CONFLICT OF LAWS

It is now settled that in an action brought in the Province of Quebec for damages in respect of personal injuries due to a tortious act committed outside that province, the plaintiff's right to recover is governed by a rule similar to that in force in England: i.e. First, the act must not have been justifiable according to the law of the place where it was committed; Secondly, the wrong must be actionable as a tort according to Quebec law; or, in other words, must be an act which if done in Quebec would be a tort: see:—

> ***C. N. Steamships Co. Ltd vs Watson,*** **(1939) S.C.R. 11, *Sir L. Duff C. J.* at p. 13; *C. P. R. vs Parent,* (1917) A.C. 195; Dicey's Conflict of Laws 5th Ed. p. 771; *O'Connor vs Wray* (1930) S.C.R. 231, *Anglin C.J.C.* at p. 236, *Newcombe J.* at p. 249; *Carr vs Fracis Times & Co.,* (1902) A.C. 176 at p. 182; *Phillips vs Eyre,* L.R. 6 Q.B. 1 (Eng.).**

The word "justifiable" in the foregoing rule refers to *legal* justification. Thus *Lord Cave,* in rendering the judgment of the Judicial Committee of the Privy Council in *Walpole vs Canadian Northern Ry. Co.,* (1922) 128 L.T.R. 289, at p. 293, stated:—

> **"...It is unnecessary for the purposes of this appeal to consider the precise meaning of the term 'justifiable', as used by Willes, J." (in *Phillips vs Eyre*); "but, at all events, it must have reference to legal justification, and an act or neglect which is neither actionable nor punishable cannot be said to be otherwise than justifiable within the meaning of the rule..."**

In *C.N. Steamships Co. Ltd. vs Watson (supra) Sir L. Duff C.J.* after citing the *Walpole* and *O'Connor* cases continued, at p. 13, as follows:—

> **"It is essential that the plaintiff prove an act or default actionable by the law of Quebec. While it is also part of his case to establish that the tort charged is non-justifiable by the *lex loci delicti* in the sense mentioned, he is entitled to pray in aid a presumption which is a presumption of law, viz.: that the general law of the place where the alleged wrongful act occurred is the same as the law of Quebec.[1] Where a defendant relies upon some difference between the law of the locality and the law of the forum the onus is upon him to prove it. (*The Parchim* (1918) A.C. 157, at 161); *Dynamit Actien-Gesellschaft v. Rio Tinto Co. Ltd.* (1918) A.C. 260, at 301.**
>
> **"In practice, it appears to have been treated as matter of defence for the purposes of pleading as well as proof. (*The M. Moxham* (1876) 1 P-D. 107; *Carr Times & Co. v. Fracis* (1902) A.C. 176, at 184, per Lord Lindley). Statements of textwriters of a seemingly contrary import must be read in light of this consideration e.g., Cheshire, Private International Law, 306.)"**

Machado vs Fontes.

In *Machado vs Fontes,* (1897) 2 Q.B. 231 the English Court of Appeal held that the act complained of *need not be actionable in the place where it is committed,* and that it is sufficient if it is not legally justifiable and is *punishable* there. The doctrine resulting from that decision has been a subject of considerable discussion. It does not appear to have been accepted in Scotland *(Naftalin vs London Midland & Scottish Ry. Co.,* 1933 Scots L.T.R. 193) and has apparently been disapproved by the Supreme Court of Victoria, Australia *(Varawa vs Howard Smith Co. Ltd.,* (1910) Vict. L.R. 509). It was referred to by *Lord Haldane* in *C.P.R. vs Parent,* (1917) A.C. 195 (P.C.)

1. See *Lacombe vs Legault,* 76 C.S. 11 (1937).

who stated it was "not necessary to consider whether all the language used by the English Court of Appeal in the judgments in Machado vs Fontes was sufficiently precise." In the same case in the Supreme Court (51 S.C.R. 234 at p. 257) *Duff J.* observed that it was "not obvious" that the judgment furnished the rule of decision governing the Courts of Quebec in similar cases. However, in *Howells vs Wilson,* K.B. 1072 June 9th, 1936 (see 1937 I.L.R. 236) it was cited and applied by *Hall J.* who rendered the majority judgment. In *Lieff vs Palmer et vir.,* 63 K.B. 278 (1937) *Barclay J.* after referring to the full extent of the doctrine (p. 290) remarked that it was "very much open to question" whether or not it could be applied as between two provinces in the same country.

It has been urged, not without reason, that strict application of the Machado-Fontes doctrine would, in certain sets of circumstances, be inconsistent with the general principles of justice. However, it appears to have been followed up to the present time by the Courts both in England and in Canada.

Guest laws.

The facts in *Howells vs Wilson,* (cited above) afford a typical example of the conflict of guest laws:

> **Plaintiff's minor daughter, a gratuitous passenger in defendant's automobile, was injured when the automobile turned over immediately after overtaking another car in the State of Vermont. The action was instituted in the Province of Quebec where the defendant resided. According to Vermont law the defendant would not have been liable in such a case in the absence of "gross or wilful negligence". By Quebec law, of course, any degree of negligence suffices to make the driver liable for injury to a gratuitous passenger. *Greenshields, C. J.,* refused to put the law of Vermont to the jury as a question of fact, and**

held that the defendant's conduct amounted to gross negligence and that what he did was both actionable and punishable in Vermont. In fact the defendant had entered a plea of "*nole contendere*" (equivalent to "guilty") to a Vermont Municipal Court charge of dangerous driving. Accordingly the *lex fori*, i.e. the law of Quebec, was applied. This judgment was affirmed by a majority of the Court of Appeal (K.B.) in which *Hall J.* stated that, while he was disposed to agree with the trial judge that defendant's conduct amounted to gross negligence, the Quebec Courts had jurisdiction by reason simply of the fact that the act was not justifiable in Vermont, and that once it was admitted the Quebec law applied the question of gross negligence became irrelevant. An appeal from the K.B. judgment to the Supreme Court was abandoned.

In *Lieff vs Palmer et vir.*, 63 K.B. 278 (1937) the defendants invoked the law of Ontario where the accident happened and where all three parties to the action were domiciled:

Miss Lieff was injured in Ontario while riding as a gratuitous passenger in the defendant Palmer's automobile. Under *Article 41a (par. 2)* of the *Ontario Highway Traffic Act 1935* the defendants were not liable for damages suffered by a gratuitous passenger, and the plaintiff accordingly sought to recover her damages in Quebec where the action was personally served upon the defendants. The trial judge dismissed the action, holding that as the accident happened in Ontario the *Ontario Highway Traffic Act* applied. On appeal the plaintiff invoked certain provisions of the *Criminal Code* and the *Highway Traffic Act* with the object of proving that the defendants had infringed the law in certain respects so as to make the action maintainable in Quebec notwithstanding the Ontario Statute. The appeal was unanimously dismissed, but as there was no proof in the record which would have justified a conviction under any of the provisions cited by plaintiff it was unnecessary definitely to decide whether the *lex fori* or the *lex loci* applied. However both *Rivard, J. (p. 286)* and *Letourneau J. (p. 288)* expressed opinions that the *lex loci* was applicable.

Further discussion here of the question of conflict of laws would probably be out of place, and reference should be made to the authorities on that subject. See:

Lafleur, Conflict of Laws, p. 200 et seq.; Johnson, Conflict of Laws 1937 Vol. 3 p. 357 et seq.; Canadian Bar Review 1935 Vol. 13 p. 201 — "Problems in Conflict of Laws relating to Automobiles". For *American* law see ***Huddy's Cyclopedia of Automobile Law, 9th Ed. Vol. 3-4 p. 43, sec. 19; 12 Corpus Juris, p. 452.***

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