THE MOTORIST AND THE LAW

INTRODUCTION

I rather fear that your Committee may have been misled by the title of this lecture. For I gather from an item in your newspapers that it is expected that I shall discuss in detail what are the rights and duties of motorists and pedestrians, how the law requires them to behave at intersections, how fast motorists may drive and so forth. The discussion of such things would take the form of an exposition of the terms of the Motor Vehicle Act, with which most of you are, or may easily become, sufficiently familiar.

My purpose, however, is to discuss a much more vital aspect of motoring -- it is to explain to you what a great problem motor traffic is for the law and how in this - as in all matters - it is seeking the two-fold objective of individual freedom and social security. It is the technique of the law in dealing with problems arising out of modern traffic, the merits and defects of that technique, the changes which the law is making in itself the better to grapple with such problems and some basic alterations which are in prospect - which form my theme.

It is unavoidable that much of what I have to say will be technical in nature and not too easy of comprehension, but I shall simplify the matter so far as simplification does not distort the truth.

I propose, as simply as possible, to set before you the general principles of the law of negligence, to remind you of the statutory changes which have been made in relation to that

law, and, in particular, to indicate the principles of law, both written and unwritten, which today apply to one very prevalent type of action, namely, that for personal injuries sustained in an automobile accident. My hope is, that viewing these commonplace things in their relation to one problem, we may acquire a better knowledge of what the law is, of the tendencies implicit in its development, of the influences at work upon it, of its deficiency, and, mayhap, some idea as to how the law may be improved.

Outline of General Principles of Negligence

Negligence consists of three basic elements - duty to the plaintiff, breach of duty, and harm to the plaintiff resulting from that breach - the onus of proving all of which is on the plaintiff. A brief mention of these concepts is necessary in order to appreciate the burden which every plaintiff assumes.

(a) The Duty of Care.

This must be one imposed by law; and may find its source either in common law or statute law.

At common law the plaintiff must show that the defendant's act or omission was attended with peril to himself, or to a class of persons including himself, in the sense that a Reasonable Man would have perceived the risk and the necessity of taking care to avoid it. If to the eye of reasonable vigilance there is nothing to suggest the need of care there is then no duty of care. Cite Palsgraf Case. Again the duty of care is personal and applies only to protect such persons as are within the area of foreseeable peril.

(b) Breach.

The standard for the performance of the duty so created is one of reasonable care according to the circumstances. This, again, is an objective standard personified in the judgment and activity of an ideal Reasonable Man, who is a fiction "designed to present to the jury's mind in concrete form the conception of an external as distinguished from a personal standard" of conduct. The person must take the degree of care the Reasonable Man would take and not merely what he thinks appropriate. The fact that the relationship between the parties is gratuitous makes no difference in the standard of care required.

(c) Causation.

The plaintiff must show that the breach of duty to him was the "decisive" cause of the injury or loss he sustained; not merely in the sense of showing a factual sequence; but of showing a chain of causation of such a nature that the law will recognize it, as sufficiently cogent to afford a basis of liability. If the chain is not of such a nature, the damages (albeit in fact caused by the breach) are said to be too "remote". There is no criterion for discovering when the law will regard damage as sufficiently decisive on the one hand or as too remote on the other. It is a question of fair judgment of a rough sense of justice, of practical politics rather than of logic.

(d) Proof of Negligence.

The burden of proof of the breach of duty and of a causal connection between the breach and the harm complained of, is upon the plaintiff, who must give some reasonable evidence upon each of these issues or he fails. Indeed he may not get to the jury at all; for, if in the opinion of the Judge there is no

reasonable evidence upon which the jury could find in his favour, his case must be taken from the jury. This is as true of causation as it is of the breach itself; for if the cause of the accident is left in the realm of conjecture, as opposed to that of reasonable inference, the case must be taken from the jury; as it must also, if the evidence is equally consistent with one state of facts as another. Example of conjecture. Man is found dead near railway track with marks showing he was struck by train - this causation in fact but no more evidence that the train negligently struck him than that he negligently got in front of train.

STATUTORY NEGLIGENCE

An action of negligence also lies for breach of a duty of care imposed by Statute, for the protection or benefit of a class of the public in respect of certain types of risks, regarded by the Legislature as unreasonable. The duty may be imposed expressly, or implied from the enactment of positive rules of conduct to be observed, or of prohibitions to be heeded, under penal sanctions. The cause of action for such statutory negligence is the ordinary action for damages for breach of a right; for, a statute creating a duty creates as well, a correlative right of action for its breach.

In such an action the first two elements, viz. the existence of a duty and the standard of conduct, are conclusively ~~established~~ by reference to the statute alone, and reference to the common law standard of the Reasonable Man is unnecessary and futile; but the causal connection between the breach of duty (i.e. the ~~violation~~ of the statute) and the injury must always be shown e.g. failure to have a license will not constitute actionable negligence unless the absence of a license helped to cause the accident.

Defence of Contributory Negligence.

In the majority of cases the Plaintiff will be met by the plea of Contributory Negligence which, if established is a complete bar to his success; but which he may destroy by proof that though his own negligence was a contributing cause, yet the real and effective cause, was the Negligence of the defendant.

Conclusion as to Common Law.

Even this cursory outline of the common law of negligence, indicates that it is characterized by very technical doctrines and subtle distinctions permitting great scope for error in the various stages of an action. In this right of action for negligence, persons injured on the highway are afforded a legal remedy; but its practical value to them, turns upon the truth of the assumption, that witnesses are available who really know the facts, (a matter of difficulty owing to the speed of motor vehicles) that the damages can be assessed with accuracy, and that they can be collected when awarded. Again, though the number of motor vehicles accidents is enormous,(882,000 in 1934 in the United States in which 36,000 were killed and 954,000 persons injured) and increasing, and they engage a third of the time of the Courts; and though highway traffic has changed radically in the number, speed and character of vehicles, yet the common law must grapple with the problems thereby created, with the aid only of the ancient doctrines and technical distinctions I have outlined. Accordingly it is not hard to see why the unprecedented strain thus put upon the law has produced much questioning as to its efficiency, and attempts to improve it, as well as suggestions that an entirely new basis should be supplied, or such traffic cases removed entirely from the Courts to the administrative sphere.

Legislation Affecting Automobile Accident Actions.

I now propose to consider the manner and extent to which the Legislature has intervened, in the attempt to supply changes in the substance and technique of the law, so as to equip it more adequately to deal with the problems arising out of the negligent operation of motor vehicles.

(1) Statutory Rules of Conduct.

The motor traffic Acts of the Provinces contain many provisions regulating the conduct of motorists, pedestrians, etc. in respect of various matters and situations; for example, as to the equipment of motor vehicles such as lights, brakes, etc., rates of speed, rules of the road as to the right of way, parking, etc.

Some of these have been held to impose an absolute liability; but in most cases liability turns on negligence.

All such statutory duties are imposed in the form of prohibitions, to which penalties by way of fine or imprisonment, are attached as sanctions. Most of the Acts (including N.S. - S. 190) expressly preserve the common law remedy, or provide that no peanlty imposed by the Act shall be a bar to the recovery of damages., and by various provisions make it reasonably clear that the Acts contemplate actions for damages for negligence; and - apart from the question of the effect of penal provisions - it is clear that the terms of the Acts may be invoked as evidence of the standard of care which should have been observed.

(2) Extension of Vicarious Liability.

In most of the provinces the owner is vicariously liable, civilly, for the negligence of the driver of his car. This liability has been extended far beyond the limits of the common law liability for the acts of servants and agents, by provisions applying to all persons having possession of the car with his consent, and imputing such consent and authority in the case of members of his family, and placing the burden of disproof thereof upon the owner (N.S. - secs. 180-1).

(3) Gratuitous Passenger.

Animated, in part, by the feeling that it was unjust that a gratuitous passenger or guest should be able to recover from the Good-Samaritan motorist who gave him a "lift"; in part by the collusion prevalent in cases in which the motorist was insured against "liability imposed by law"; in part by the practical necessity requiring motorists to insure against such liability to their guests, and the mounting premium cost of acuiring such "passenger hazard" protection - the Legislatures of Alberta, New Brunswick and Ontario have abolished the common law liability in the case of private cars.

The legislatures of Nova Scotia (s.183) and Manitoba have restricted the right of action to cases of "gross negligence or wilful, wanton misconduct" onthe part of the driver.

Such abrogation or restriction of the common law liability constitutes another example of the importance of the influence which the twin factors of the automobile and insurance are exerting in the statutory modification of the law. Like all legal problems it presents a conflict of interests in the financial interest of the motorist in getting rid of a vexatious liability and of the need of insuring against it and the interest of the guest in securing payment of an honest claim. The legislation will inevitably defeat some meritorious claims. One can only hope that this essay in the readjustment of social interests may prove expedient in the long run.

(4) Reversal of Onus of Proof.

One of the features of modern legislation has been the tendency to reverse the common law burden of proof, e.g. Liquor Control Acts, Customs Acts, etc. Such legislation betokens recognition of the fact that when the common law presumption of innocence, or other evidentiary or procedural rule, operates so as to embarrass the administration of justice a better balance must be obtained.

Both in this penal and civil aspects this tendency is illustrated in our motor traffic legislation. Thus, in seven Provinces (including N.S. ~~?~~ S. 180) there are provisions literally or substantially in these terms:

> "When loss or damage is sustained by any person by reason of a motor vehicle upon a highway the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver shall be upon the owner or driver".

The object of these provisions is to ease the plaintiff's burden of proving that the actual injury was caused by negligence by creating a presumption thereof in his favour.

The effect of such a provision has been pronounced by the Privy Council to be, that it "creates as against the owners and drivers of motor vehicles in the conditions therein laid down, a rebuttable presumption of negligence. The onus of disproving negligence remains throughout the proceedings. If, at the conclusion of the evidence, it is too meagre or too evenly balanced, to enable the tribunal to determine this issue as a question of fact, then, by force of the statute the plaintiff is entitled to succeed".

It seems evident, that the intended effect of such a provision is to reverse, exactly, the common law onus on the compound issue of negligent-causation, and to call upon the defendant to tip the scales in his favor by evidence, of lack of fault, or that his fault was not the legal cause, which would preponderate over the evidence afforded by the presumption, in exactly the same way and to the same degree, that in the ordinary case, the plaintiff's evidence of the defendant's fault and its causal effectiveness, must preponderate over the defendant's evidence in negation.

(5) Contributory Negligence Acts.

The common law operates to disentitle a plaintiff to any relief when guilty of contributory negligence which, in a comparative sense, may have been no greater, or even less, thanthat of the defendant who got off free; for the law asked the single question: Who was the cause? and if it could not be answered that it was the defendant, then the plaintiff failed; for he had failed to establish that affirmative issue as to the causal responsibility. In the result the plaintiff was forced to bear his loss without any contribution from the guilty defendant.

The remedy was thought to lie in the adoption of the principle of division of loss according to the respective degrees of culpability, already to be found in Admiralty law and in the law of Quebec, whereunder a contributorily negligent plaintiff is not debarred thereby from all recovery, but the quantum of his recovery is abated, according to the degree to which his negligence contributed to the injury. It was this principle which was embodied in the model Contributory Negligence Acts adopted in British Columbia and New Brunswick in 1925 and by Nova Scotia in 1926 and is still in force in those Provinces. In 1924 Ontario enacted a similar Act in different form.

Accordingly the Acts, so adopted and enacted, sought to mitigate the harshness of the common law by directing the tribunal of fact to answer another question: "To what degree was each of the parties in fault", with the further direction that "liability to make good the damage" should be in proportion to the degree in which each was in fault, and in case no such degrees could be ascertained, then that liability should be apportioned equally.

The Supreme Court of Canada early evolved the doctrine that the Acts only apply to concurrent negligence, i.e. to cases of pure contributory negligence; that they do not apply to cases of negligence in sequence, in which one party had a later chance than the other of avoiding the accident, and was therefore The Cause of it by his ultimate negligence.

Within the restricted area to which they have been so confined, the Acts have worked well, and in (roughly) half of the cases. They have proven themselves adaptable to case of pure contributory negligence, and sufficiently flexible to enable the apportionment of damages in varying percentages. When it is recalled that in each of the cases in which they have been applied, the plaintiff at common law would have recovered nothing, the conclusion must be that the Acts have justified themselves.

There is, however, general dissatisfaction with the restricted scope of the Acts, and there have been various methods suggested to procure an extension of the area of the operation of the Acts so as to bring their principle of division of damage into play in more cases, or, more specifically, to make them apply to case of successive as well as concurrent negligence.

Contributory Negligence at Common Law.

In the trial of a negligence action "the question is not one of desert or the lack of it, but of the cause legally responaible for the injury.....The object of the inquiry, is to fix upon some wrongdoer the responsibility for the wrongful act which has caused the damage".

The defence of contributory negligence is simply, that the defendant says that the plaintiff was also guilty of negligence, and it was that negligence, alone or in combination with that of the defendant, and not that of defendant alone which caused the accident. The problem is then, to determine which of these two acts of negligence, (each of which played a part in the causation of the accident) was so much more important in causing the accident that it can be isolated and labelled as the Decisive Cause.

In determining which of the two negligent parties is to be regarded as the sole cause of the resultant injury, regard has to be had to two general types of situation, into one of which the accident must come:

1. The negligent act of one of the parties may have followed that of the other in point of time, i.e. there were successive acts of negligence; the situation is one of negligence in sequence; or

2. The negligent acts may have accompanied one another, have occurred simultaneously or contemporaneously in point of time, and operated in conjunction to bring about the injury. Such negligence is called concurrent or contemporary negligence.

In the first situation the governing rule is the "last clear chance rule", which presupposes that there is a perceptible interval of time between the two acts of negligence - that one was subsequent to and severable from the other.

In the second situation, however, the negligent acts are simultaneous or contemporaneous. To this situation the last clear chance rule can have no application, because there is no sufficient severance in point of time. Accordingly, the determinant is the onus of proof;and the plaintiff fails entirely, because he has not proved the defendant to have caused his injury and, therefore the loss lies where it falls.

And since sole cause can only be found under our system in cases of sequential negligence, and then by virtue of our doctrine of ultimate negligence, it is clear that the construction of our Acts as applying only to concurrent negligence is correct.

To attempt to secure quantification of damage in cases of successive negligence is to attempt to ignore these fundamental distinctions and to extend the Acts to situations to

which they have no application.

It was on such reasoning that the Conference of Commissioners on Uniformity of Legislation in 1934 found the curtailment of the Acts due, to the judicial application of the doctrine, to too many cases.

Attitude of Courts: Necessity of Common-Sense Approach.

In applying a rule which made causality depend upon the time--sequence of events, the Courts had become increasingly technical, and habitually found liability to turn, upon what was, very often, an unreal, fictitious chance. The result was, that in practice many cases in which the negligent acts were substantially contemporaneous, were treated as if they were cases of ultimate negligence.

It was in protest against this over-technicality of approach, that in 1922, the House of Lords in the Volute Case, laid down the rule, that in order to apply the last chance doctrine, the separation in point of time must be substantial, that "the question of contributory negligence must be dealt with broadly and upon common sense principles".

This judicial attitude and practice of trial and appellate courts has continued in Canada, notwithstanding the frequent lip homage done to the "common-sense" rule; and it is this practice - rather than any doctrine - which has so largely restricted the scope of the Contributory Negligence Acts.

The remedy being a curtailment in the number of findings of ultimate negligence, it seems, therefore, that the crucial point at which the stream of findings of ultimate negligence can best be

controlled, is at the point, where the judge decides upon the sufficiency of the evidence to go to the jury on the issue of ultimate negligence.

Accordingly in 1935 the Conference made recommendations seeking to force the judges to adopt the "common-sense" approach of the Volute rule, and to refrain from submitting to the jury any question as to ultimate negligence, when the acts of the parties are substantially contemporaneous.

It is to be hoped that this or some other formula will be found to extend the benefits of these Acts to more parties - litigant; for they undoubtedly operate to give more exact justice to the individuals concerned, e.g. in automobile accidents.

(6) Financial Responsibility Laws.

The common law and statutory changes I have outlined merely deal with matters leading to a judgment for damages, but do nothing to provide successful palintiffs with financially responsible judgment debtors. Accordingly, most of the motor traffic Acts (N.S. - Part 6) now contain provisions relating to the financial responsibility of owners and drivers - directed to the two-fold object: of removing careless operators from the highway, and of increasing the number capable of paying compensation for future negligence, and compelling others to pay for past negligence. The chief provisions "are those which provide for the mandatory suspension of the owner's permits and operator's license of all persons found guilty of serious violations of the motor vehicle statutes and of all persons who fail to satisfy a final judgment (up to specified amounts) against them arising out of a motor vehicle accident. The legislation definitely bars such persons from the road until they furnish satisfactory proof of their ability to

compensate financially for any future damage caused by them and, in addition, in the case of a suspension arising out of failure to meet a judgment, the suspension may not be lifted until such judgment is satisfied".

In line with such legislation compelling the careless motorist to insure are the provisions of the uniform Automobile Insurance statutes (including N.S.) giving the successful plaintiff in an action against a motorist insured against motor vehicle liability, a direct right of action against the insurer, for the application of the insurance money to satisfy his judgment.

CONCLUSION.

At this stage certain things should be apparent from our hasty survey of the common law and its legislative modification:

1. That the common law governing actions for negligence (including those arising out of automobile accidents) is one of great subtelty of doctrine, fraught with difficulty and uncertainty or application.

2. That law is predicated on the assumption that an order for judgment for damages is equivalent to actual compensation; whereas common experience and statistical data prove that it is not; for a judgment is an empty glory if directed against an irresponsible debtor. As a recent Report states "a man injured by the car of a poor or uninsured motorist has little chance of receiving compensation".

3. The law, notwithstanding some statutory exceptions, remains one of liability for fault, with all its concomitant difficulties of proof.

4, The law imposes liability on the individual held to be at fault, in his pursuit of a necessary modern activity, in which accidents are numerous and inevitable.

Accordingly it is not surprising that much thought, discussion and legislation have been directed to these points.

1. Thus Contributory Negligence Acts and the statutory reversals of the burden of proof have attempted to give a more just apportionment of liability as between the parties, and to aid plaintiffs in making their proof.

2. Attempts have been made to provide more responsible judgment debtors, by extending the owner's vicarious liability, and by the Financial Responsibility provisions (N.S. Act, Part 6). Elsewhere e.g. Massachusetts and England, the bolder step has been taken by compulsory insurance laws.

3. The principle of liability for fault, which is the inescapable premise of the common law, has provied a progressively less apt instrument; and there is a broadening tendency in the lgislation and jurisprudence of Europe to apply a stricter rule of liability independent of negligence in the matter of motor accidents. It may well be that modern conditions may require, that in the interest of all, those who choose to participate in such a potentially dangerous activity as motoring, should bear the loss, except in defined exceptional cases.

4. The recognition of the inevitability of automobile accidents, has suggested that the loss thereof should fall not upon the individuals concerned, but upon the state, or upon automobile users as a class, upon the lines of Workmen's Compensation Acts for industrial accidents.

The moral of my story is this. Law is an instrument made for certain social ends. In this day, as never before, the conditions under which we live, are forcing us to look at the law functionally. We are less concerned with what it is than with how it works. No moral grandeur, nor rational greatness, justifies socially inconvenient results. The great need of the day, is that the law be scrutinized anew, its defects discovered and removed. I have said enough to point to the necessity of this, in the field of the negligence action for injuries received in automobile accidents.

I may conclude with the observation that though the legal profession is conscious of the defects in our law which modern conditions are revealing and accentuating the real remedy lies in appropriate and curative legislation and that this will be facilitated best by the pressure of an informed public opinion.