TORTS.

The Tort of Negligence—Contributory Negligence.

Undoubtedly the most significant recent development in the law of torts in Queensland has been the enactment of Part III of the *Law Reform (Tortfeasors Contribution, Contributory Negligence and Division of Chattels) Act of* 1952 which introduced the rule that in a case where the plaintiff has been guilty of contributory negligence his claim shall not be defeated but the damages suffered are to be apportioned having regard to the plaintiff's share in the responsibility for the damage. The provision follows the form of the English Act of 1945 and no doubt its application in this State will bring to the surface the same problems as those with which the Courts have grappled in England. It should be noticed that it applies not only to the tort of negligence in its common law sense, but also to the action for breach of statutory duty and in fact to any tort where contributory negligence is, apart from the Act, a relevant defence.[1]

In view of the passing of this enactment, the very lucid exposition of the common law position by Fullagar J. in the High Court in *Alford* v. *Magee*[2] may possibly be now only of academic interest. To put the matter very briefly, Fullagar J. considered that the Courts in order to overcome the injustice which the old common rule that contributory negligence completely defeated the plaintiff's claim worked in many instances, had evolved a qualification to that rule. That qualification might be stated in the terms of a "last clear chance" available to the defendant or in the form stated in *Radley* v. *London and North-western Railway Co.*[3] and *Tuff* v. *Warman*[4] or in terms of "decisive cause." In which way it should be put to the jury depended on the circumstances of the case. There was no magic in the so-called rule of last opportunity; it was not a rule of law but a particular way of phrasing the qualification when the circumstances made it necessary to put the qualification to the jury. The High Court, however, stressed that in cases of collision between fast-moving vehicles it was but rare that any qualification of the common law "stalemate" rule should operate at all.

Whether the application of the apportionment statute is excluded by some such consideration as that the defendant's act was the "direct" or "proximate" cause or that he had the last clear chance is far from clear. There is support in England for the view that *Davies* v. *Mann* would still be decided in the same way to-day by reason of the consideration that defendant's negligence in that case was the proximate

1. See Act s. 4 (definition of " fault ").
2. 85 C.L.R. 437.
3. (1858) 5 C.B. N.S. 573, 585; 141 E.R. 231, 236.
4. (1876) 1 A.C. 754, 759.

cause of the accident[5] and Professor Goodhart[6] considers that the rule of last clear chance still holds good in cases where defendant realized he had the opportunity. In view, however, of the High Court's characterisation of the so-called last clear chance rule and other enunciations as being merely ways of phrasing a qualification to the stalemate rule it is difficult to contend that it would hold that they remain when the stalemate rule itself has gone.

The Tort of Negligence—Occupier's Liability to Contractual Entrants.

The usual way of putting the duty of an occupier towards a person who enters under contract is in the language used by McCardie J. in *Maclenan* v. *Segar*,[7] viz., that there is an implied warranty that the premises are as safe for the contemplated purpose of entry as reasonable care and skill on the part of anyone could make them. However, the Court of Appeal in *Bell* v. *Travco Hotels Ltd.*[8] demonstrated that this may not be the appropriate test in all cases. Here the injured plaintiff was a paying guest at a hotel who slipped on the stones of the hotel drive a quarter of a mile away from the hotel and hurt her ankle. It was held here that the test was simply whether the hotel proprietors *had taken reasonable care* to see that the premises were reasonably safe for the purpose for which the entrants were permitted to enter.

Law of Negligence—Child Licensees and Trespassers.

It is trite law that slighter evidence of acquiescence by the occupier is required to constitute a child entrant a licensee than in the case of an adult. The House of Lords in *Edwards* v. *Railway Executive*,[9] a case in which children had been accustomed to climb through a fence on to a railway embankment by the expedient of removing the fence wire, entered into an examination of the nature of the evidence required. It was pointed out that the onus lay on those asserting the existence of the licence to show either that the occupier had given express permission or had so conducted itself that it could not be heard to say that it did not assent to the use of the premises by the children. Mere knowledge of the intrusion was not enough nor was the occupier bound to take every possible step to keep out intruders. If it appeared that the occupier took steps to show that it resented and would try to prevent the intrusion so far as it could no tacit licence could be inferred.

The Tort of Negligence—Liability to Occupiers Exercising Statutory Powers.

The significance of the decision of the High Court in *Thompson* v. *Municipality of Bankstown*[10] is that it shows that sometimes the limitations of the "entrant" categories may be ignored. In this case where a

5. *Davies* v. *Swan Motor Co.* [1949] 2 K.B. at 317, 318. This is what the statement that the plaintiff was *functus officio* really comes to.
6. 65 L.Q.R. 237; but see Glanville Williams: *Joint Torts and Contributory Negligence* pp. 270-280, and Wright 13 Mod. L.R. 2.
7. [1917] 2 K.B. 325 at 332-3.
8. [1953] 1 Q.B. 473.
9. [1952] A.C. 737.
10. [1953] A.L.R. 165.

boy on the highway climbed to reach a bird's nest in the rotten part of a wooden pole supporting overhead electric wires and sustained severe injuries owing to the bicycle frame on which he stood being energised by contact with a vertical wire hanging loose, the boy was obviously a trespasser, but the Court held the low degree of obligation owed to a trespasser was not in this case applicable. The rule of law defining that obligation did not govern the position where an occupier, in addition to being an occupier, stands in some other relation to a trespasser so that a "neighbour" relationship within the meaning of Lord Atkin's enunciation in *Donoghue* v. *Stevenson*[11] exists. Here the matter must be viewed in the light of a duty of care which lies upon those who carry on in the exercise of statutory powers an undertaking involving the utilisation of a very dangerous agency. It was held that the defendant should reasonably have foreseen the possibility of such an accident, so that it was liable.

The Tort of Negligence—Liability for Nervous Shock.

In *King* v. *Phillips*[12] the test of foreseeability was once more used as the gauge of the existence of a duty of care in circumstances where the injury sustained came about through nervous shock. In this case the plaintiff suffered shock when from an upstairs window in her house she saw the defendant taxicab driver back his taxicab negligently into a tricycle which was being ridden by her small son and heard him scream though she did not see him. The majority of the Court of Appeal, applying *Bourhill* v. *Young*,[13] held that no duty of care was owed because the defendant could not reasonably have foreseen that if he backed his taxicab in such manner he might cause nervous injury to the mother. Denning L.J., repelled by reasoning which would create one type of duty in respect of damage arising from physical impact and a different one in respect of emotionally caused illness, held that there was a duty and the defendant was in breach of it, but the shock constituted damage which was too remote because it would not reasonably have been foreseen. It is doubtful whether an analysis in terms of remoteness instead of "no duty" really serves any useful purpose. It is obvious that no notion of causation in the scientific or physical sense is involved and the term "too remote" is merely used to convey a decision that the plaintiff *should* not recover. In any case, assuming that the "remoteness" approach is correct, what of *Re Polemis* ?[14]

Joint Tortfeasors.

Part II of the *Law Reform (Tortfeasors Contribution, Contributory Negligence and Division of Chattels) Act of* 1952 does two things. Firstly, it removes the effect of *Brinsmead* v. *Harrison*[15] by providing that

11. [1932] A.C. at 580.
12. [1953] 1 Q.B. 429.
13. [1943] A.C. 92.
14. [1921] 3 K.B. 560.
15. (1871) L.R. 7 C.P. 547. The rule applied only to *joint* tortfeasors.

judgment recovered against one wrongdoer shall not be a bar to action against another person who if sued would have been liable as a joint tortfeasor in respect of the same damage, though it does not touch the old effect of a release given to one of several joint wrongdoers. Secondly, it provides for contribution between two or more tortfeasors liable in respect of the same damage whether they are joint tortfeasors in the strict sense or not. The enactment follows the model of the English legislation of 1935 save that the effect of the decision in *Chant* v. *Read*,[16] viz., that contribution cannot be sought by a defendant against the husband of the plaintiff in view of the inability of the plaintiff herself to sue the husband (unless the action is for the protection and security of the wife's separate estate) has been removed by a special provision (s. 7). Otherwise the requirement that the person against whom contribution is sought "is or would if sued have been liable" remains unimpaired. The removal of the rule in *Brinsmead* v. *Harrison* is qualified by a provision that if more than one action is brought by the plaintiff the sums recoverable under the judgments given in those actions shall not in the aggregate exceed the amount of the damages awarded by the judgment first given and in any later action the plaintiff is not entitled to costs unless the Court is of opinion that there was reasonable ground for bringing the action.

The question in contribution proceedings of the subsistence of a right of action by the injured person against the party against whom contribution has been sought has given much trouble in England. *Morgan* v. *Ashmore*,[17] though only a case at Assizes, is immensely significant as indicating a trend away from *Merlihan* v. *Pope*.[18] The latter case would seem to indicate that if the second defendant (against whom contribution is now sought) could not at the time of the launching of the proceedings for contribution himself have been sued by the plaintiff owing to the existence of a limitation statute then the contribution proceedings do not lie because of the words in the Act "any other tortfeasor who is, or would if sued have been, liable in respect of the same damage." Donovan J., however, decided in the instant case that the proper reference was to a joint tortfeasor who if sued *in time* would have been liable. The section compelled one to make the assumption that the other tortfeasor had been sued in the past. The view espoused in *Merlihan* v. *Pope* that the test was whether the third party could presently be sued by the plaintiff was regarded by the learned judge as being not necessary to the decision in that case which could rest on the basis that the contribution proceedings themselves were out of time. A contrary view of the effect of one tortfeasor being protected by a limitation Statute was taken by Parker J. in *Littlewood* v. *Wimpey*[19] and the topic seems to be in the way of developing into a difficult problem.

16. [1939] 2 K.B. 346.
17. [1953] 1 All E.R. 328.
18. [1946] K.B. 166.
19. [1953] 1 All E.R. 583.

Master and Servant.

The decision of the Court of Appeal in *Broom* v. *Morgan*[20] has been described as representing a collision of concepts, viz., husband-wife and master-servant.[21] What was actually decided was that an employer was liable for the negligence of his employee occurring in the course of employment even though by reason of the plaintiff being the wife of the employee no action could have been brought against the latter. It does not seem that this decision warrants us in extending it to any case where the employee would not be liable personally to the injured person. The boldest of the judges was as usual Denning L.J., who asserted that the master's liability for the torts of his servant was not a vicarious liability but a direct liability attaching to the master by reason of his failure to see that the work was properly and carefully done. On this reasoning the liability remains notwithstanding the immunity of the servant. However, the other two judgments, and in fact the reserve reasoning of Denning L.J., proceed on the basis of the merely procedural character of the husband's immunity from action at the suit of the wife. There can be a tort as between husband and wife, but owing to a rule of procedure neither is entitled to sue the other.

Jones v. *Manchester Corporation*[22] bears on the obscure question whether an employer who has been held liable for the tort of his servant is entitled to an indemnity from the servant. Denning L.J. expressed the view that there was no such rule, although its existence had always been assumed by text-book writers on torts. In his view the master's claim if any could only be for damages for breach of contract. In the instant case it was not necessary to decide the point as the employer (a hospital authority) had contributed to the damage by its negligence in leaving the administration of a dangerous anaesthetic to an inexperienced doctor without proper supervision so that the usual rule of contribution between joint wrongdoers applied.

Per Quod Servitium Amisit.

In *The Commonwealth* v. *Quince*[23] the High Court by a majority had refused to allow to the Crown a right of action *per quod* based on the loss of the services of a member of the armed forces of the Crown. In *Attorney-General for N.S.W.* v. *Perpetual Trustee Co. Ltd.*[24] this refusal was extended to the case of an action in respect of loss of the services of a policeman. The majority held that the position was similar to that arising in *Quince's Case* and they refused to review *Quince's Case*. Their attitude was in general based on the dissimilarity between the type of service rendered to a private employer by his employee and that rendered by an airman or a policeman to the Crown. The airman or

20. [1953] 1 Q.B. 597.
21. See 27 A.L.J. 323.
22. [1952] 2 Q.B. 852.
23. 68 C.L.R. 227.
24. 85 C.L.R. 237.

policeman was engaged in *public* service which was outside the ordinary relationship of master and servant. The dissent of Williams J. was consistent with his attitude in *Quince's Case*. Dixon J. delivered a judgment disagreeing with *Quince's Case* on the score that neither the fact that a person employed has independent responsibilities of a public character nor the lack of a true contract of service negatived the existence of the relationship of master and servant. However, he thought that the reasoning of the majority in *Quince's Case*, if correct, applied just as much to the case of a member of the police force as to a member of the armed forces of the Crown, and he thought the proper course was to follow that decision in spite of his opinion that it was incorrectly decided. The general result of the decision seems to be that the outcome of future possible litigation concerning the services of Crown employees of a less "public" nature than servicemen or policemen is dubious.

Loss of Consortium.

The House of Lords decision in *Best* v. *Samuel Fox and Co.*[25] may be taken as conclusively establishing that a wife has no claim on the score of loss of *consortium* against a person who *negligently* injures her husband. The right of a husband to sue in the converse case was regarded as anomalous, but so firmly established that it could be uprooted only by statute. It was unnecessary then for the Lords to pronounce upon the Court of Appeal's decision that *consortium* was one and indivisible and destruction of sexual capacity did not amount to a loss of it, but certain opinions were expressed. Lord Goddard was in favour of the Court of Appeal's view; Lords Reid and Oaksey were against it, and Lords Porter and Morton were content to express no opinion. The matter may at some future time arise in a husband's action.

Liability of Married Women.

The *Married Women (Restraint upon Anticipation) Act of* 1952 providing (*inter alia*) that a married woman shall be capable of being rendered liable in respect of any tort, contract, debt or obligation and shall be subject to the law relating to the enforcement of judgments as if she were a *feme sole* has brought the law upon this matter into line with that in force in England.

EDWARD I. SYKES

TRUSTS.

Variation of Trusts.

The Court of Appeal in dealing with the application in *Re Downshire Settled Estates*[1] had largely to consider section 57 of the English *Trustee Act* 1925, a provision which does not exist in Queensland, but an argument was also founded on the Court's inherent jurisdiction to order the variation of a trust and on this aspect the Court's remarks are of most

25. [1952] A.C. 716.
1. [1953] Ch. 218.