COMMENTS ON THE ADDRESS OF
E. F. BELTON
TO THE CANADIAN INSTITUTE FOR THE ADMINISTRATION OF JUSTICE

THURSDAY, OCTOBER 30, 1986

AT THE HYATT REGENCY HOTEL IN VANCOUVER

BY

J. VINCENT O'DONNELL, Q.C.

LAVERY, O'BRIEN

MONTREAL

CONFERENCE IN VANCOUVER, B.C.

OCTOBER 29, TO NOVEMBER 1, 1986

FOR

THE CANADIAN INSTITUTE FOR THE ADMINISTRATION OF JUSTICE

THE PRINTED PROGRAMME PREPARED FOR THIS NATIONAL SEMINAR ON PROFESSIONAL LIABILITY BY THE CANADIAN INSTITUTE FOR THE ADMINISTRATION OF JUSTICE CONTAINS A BRIEF THREE PARAGRAPH INTRODUCTION, WHICH SETS OUT THE PURPOSE OF THE SEMINAR; THE FIRST PARAGRAPH OF THAT INTRODUCTION INVITES US TO RECALL THE 1932 DECISION OF THE HOUSE OF LORDS IN THE MATTER OF DONOGHUE vs STEVENSON.(1) IN COMMENTING ON THE REMARKS OF MR. BELTON, I WILL, BRIEFLY, ACCEPT THAT INVITATION.

AS EVERYONE LISTENING TO ME WELL REMEMBERS, THE PLAINTIFF IN THAT CASE DRANK PART OF THE CONTENTS OF A BOTTLE OF GINGER BEER BEFORE DISCOVERING THAT IT CONTAINED THE DECOMPOSED REMAINS OF A SNAIL. AS A RESULT, SHE SUFFERED SEVERE DISAPPOINTMENT AND OTHER DAMAGES FOR WHICH SHE SOUGHT TO SUE THE MANUFACTURER OF THE GINGER BEER. THE QUESTION BEFORE THE HOUSE OF LORDS WAS WHETHER THE PLAINTIFF, THE ULTIMATE CONSUMER, COULD SUE THE MANUFACTURER OF AN ARTICLE ON THE GROUNDS OF NEGLIGENCE. OF THE FIVE LORDS WHO HEARD THE CASE, THREE WERE OF THE OPINION THAT SHE COULD AND TWO WERE OF THE OPINION THAT SHE COULD NOT.

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(1) 1932 AC 562

AS THE OPINION OF THE TWO DISSENTING LORDS PROBABLY REPRESENTED THE CURRENT OF LEGAL THINKING UP TO THAT TIME, I REFER YOU TO THE FOLLOWING PASSAGE FROM THE OPINION OF LORD BUCKMASTER, ONE OF THE DISSENTING JUDGES: (2)

> "In MULLEN vs BARR & CO., a case indistinguishable from the present excepting upon the ground that a mouse is not a snail, and necessarily adopted by the Second Division in their judgment, Lord Anderson says this: "In a case like the present, where the goods of the defenders are widely distributed throughout Scotland, it would seem little short of outrageous to make them responsible to members of the public for the condition of the contents of every bottle which issues from their works. It is obvious that, if such responsibility attached to the defenders, they might be called on to meet claims of damages which they could not possibly investigate or answer".

THE FOLLOWING EXTRACT FROM THE OPINION OF LORD MACMILLAN EXPRESSES THE POSITION OF THE THREE MAJORITY JUDGES WHICH MARKED AN IMPORTANT POINT IN THE EVOLUTION OF THE MODERN LAW OF NEGLIGENCE. (3)

> "The burden of proof must always be upon the injured party to establish that the defect which caused the injury was present in the article when it left the hands of the party whom he sues, that the defect was occasioned by the carelessness of that party, and that the circumstances are such as to cast upon the

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(2) at page 578

(3) at page 622

> defender a duty to take care not to injure the pursuer. There is no presumption of negligence in such a case as the present, nor is there any justification for applying the maxim, res ipsa loquitur. Negligence must be both averred and proved. The appellant accepts this burden of proof, and in my opinion she is entitled to have an opportunity of discharging it if she can."

CONTRAST, IF YOU WILL, THAT PASSAGE FROM LORD MACMILLAN WITH THE FOLLOWING REMARKS OF THE TRIAL JUDGE IN THE DECISION OF THE SUPREME COURT OF ONTARIO IN **BIANCALE vs PETRO-LON CANADA LTD.:** [4]

> "In my opinion, the time has come to extend the policy of the law so that the plaintiff is not obliged to prove negligence on the part of the defendant which may be a difficult and costly burden to discharge; in such circumstances, negligence becomes virtually a presumption if not a judicial fiction."

THE WORDS OF THE MR. JUSTICE HENRY IN THE BIANCALE vs PETRO-LON DECISION (WHICH WERE "OBITER" IN THAT CASE) ARE SIMPLY A FRANK EXPRESSION OF THE UNSTATED PRINCIPLE UNDERLYING AN INCREASING NUMBER OF JUDGMENTS IN MATTERS IN CIVIL LIABILITY; IT IS THE EFFECT OF THIS UNDERLYING AND USUALLY UNSTATED PRINCIPLE WHICH IS REFLECTED IN THE PHENOMENON WHICH MR. BELTON HAS DESCRIBED.

MR. JUSTICE ALLAN LINDEN, SOME YEARS AGO WHEN HE WAS A PROFESSOR OF LAW AT OSGOODE HALL, WROTE AS FOLLOWS: [5]

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(4) March 19, 1986 (1986) ILR 92-544

(5) Canadian Negligence Law

> "The rational for shifting accident costs to the producers or other enterprises is that they are better able to spread them, either through insurance or through price increases to their customers, who after all secure the major benefit of the activity."

THE SAME PHILOSOPHY IS FOUND IN THE FOLLOWING PASSAGE FROM THE DISSENTING OPINION OF THE LATE MR. JUSTICE LASKIN IN THE CASE OF **RIVTOW MARINE LTD. vs WASHINGTON IRON WORKS.** SPEAKING OF A MANUFACTURER'S LIABILITY, HE SAYS: [6]

> "That liability rests upon a conviction that manufacturers should bear the risk of injury to consumers or users of their products when such products are carelessly manufactured because the manufacturers create the risk in the carrying on of their enterprises, and they will be more likely to safeguard the members of the public to whom their products are marketed if they must stand behind them as safe products to consume or to use. They are better able to insure against such risks, and the costs of insurance, as a business expense, can be spread with less pain among the buying public than would be the case if an injured consumer or user was saddled with the entire loss that befalls him."

WHILE THE FOREGOING PASSAGES RELATE TO THE LIABILITY OF MANUFACTURERS, THE SAME PHILOSOPHY HAS BEGUN TO COLOR DECISIONS IN MATTERS OF PROFESSIONAL LIABILITY.

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(6) 40 DLR (3d) 530 (at 551-552)

IS THIS SIMPLY THE EVOLUTION OF THE LAW OF NEGLIGENCE, THE CONTINUATION OF THE PROCESS ILLUSTRATED IN THE DIFFERENCE BETWEEN THE OPINIONS OF THE MINORITY AND MAJORITY JUDGES IN DONOGHUE vs STEVENSON, A DECISION WHICH WAS SURELY VIEWED WITH CONSTERNATION BY THE MANUFACTURERS IN ENGLAND IN 1932 ?

OR IS IT THE EXPRESSION OF A PRINCIPLE DIFFERENT AND DISTINCT FROM THE TRADITIONAL PRINCIPLES OF THE LAW OF NEGLIGENCE ?

THE CLEAR LANGUAGE USED BY MR. JUSTICE LASKIN AND BY PROFESSOR LINDEN AS HE THEN WAS LEADS ME TO CONCLUDE THAT IT IS THE LATTER. THIS CONVICTION IS STRENGHTENED BY THE RAPIDITY WITH WHICH SO-CALLED NEGLIGENCE SUITS AND AWARDS ARE INCREASING, BOTH IN NUMBER AND IN QUANTUM.

PERMIT ME TO ADD A FEW STATISTICS TO THOSE GIVEN TO YOU BY MR. BELTON.

IN THE UNITED STATES, IN 1974, THERE WERE APPROXIMATELY 1.5 MILLION CIVIL SUITS; IN 1984, THE NUMBER HAD RISEN TO 10.5 MILLION. IT IS ESTIMATED THAT IN THAT YEAR, ONE AMERICAN IN FIFTEEN INSTITUTED A CIVIL ACTION SUIT OF SOME KIND.

THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS ESTIMATES THAT 73% OF ITS MEMBERS HAVE BEEN SUED, AT LEAST ONCE. IN CALIFORNIA, IN THE LAST TEN YEARS, THE CALIFORNIA COURT OF APPEAL WAS SEIZED OF MORE DAMAGE ACTIONS AGAINST LAWYERS THAN IN THE PRECEDING 200 YEARS.

ADMITTEDLY, THOSE STATISTICS COME FROM THE UNITED STATES. MR. BELTON HAS OBSERVED THAT, TO DATE, OUR COURTS HAVE NOT BEEN QUITE SO ELASTIC AS THOSE IN THE UNITED STATES IN THEIR DEFINITIONS OF NEGLIGENCE AND OF DAMAGES. IN GENERAL, SUBJECT TO SOME EXCEPTIONS, I BELIEVE HE IS RIGHT IN THAT OBSERVATION.

HOWEVER, AS MR. BELTON POINTED OUT, THE CANADIAN LIABILITY INSURANCE MARKET WITH ONLY $600 MILLION A YEAR IN PREMIUM INCOME IS RELATIVELY SMALL. PROFESSIONAL LIABILITY INSURANCE IS PART OF WHAT MR. BELTON REFERRED TO AS THE HIGH RISK END OF THE LIABILITY MARKET AND IT IS NECESSARILY SMALLER AND THEREFORE EVEN MORE DEPENDENT ON REINSURANCE IN THE INTERNATIONAL MARKETS, IN LONDON, IN OTHER EUROPEAN MARKETS AND IN NEW YORK. THE CANADIAN PROFESSIONAL LIABILITY RISK IS PERCEIVED BY OVERSEAS UNDERWRITERS AS BEING PART OF THE NORTH AMERICAN PROFESSIONAL LIABILITY RISK AND THAT PERCEPTION HAS A SERIOUS IMPACT ON INSURANCE PREMIUMS FOR CANADIAN PROFESSIONALS.

BUT, RAPID CHANGES ARE OCCURRING ON THE CANADIAN JUDICIAL SCENE AS WELL, NO DOUBT INFLUENCED BY AMERICAN DECISIONS AND BY THE SOPHISTICATED APPROACHES DEVELOPED BY THE PLAINTIFFS' BAR IN THE UNITED STATES.

IN AN ARTICLE PUBLISHED IN THE MAGAZINE "CANADIAN INSURANCE" IN JULY OF 1986, ACTUARY E. R. KEEN ANALYZED THE STATISTICS OF AVERAGE COURT AWARDS IN CANADA OVER THE 55 MONTH PERIOD FROM SEPTEMBER 1981 TO MARCH 1986. HE FOUND THE TREND IN TOTAL JUDGMENTS TO REACH 48% PER ANNUM OVER THE 55 MONTH

PERIOD. ADMITTEDLY, THIS TREND IS INFLUENCED BY SOME VERY LARGE AWARDS. EXCLUDING, THEREFORE, THE EFFECT OF VERY HIGH AWARDS, IT IS FOUND THAT THE AVERAGE AWARD TREND FOR AWARDS UNDER $1 MILLION OVER THE SAME PERIOD IN ONTARIO, WAS IN EXCESS OF 20% PER ANNUM, COMPARED TO THE CONSUMER PRICE INDEX INCREASE OF 5.5% ANNUALLY.

I HAD THE PLEASURE A FEW MONTHS AGO TO BE PART OF A PANEL BEFORE THE ONTARIO MEDICO-LEGAL SOCIETY WHERE ONE OF MY FELLOW PANELLISTS WAS A JUSTICE OF THE ONTARIO SUPREME COURT. HIS MESSAGE TO THAT AUDIENCE OF DOCTORS AND LAWYERS WAS THAT THE TORT SYSTEM WAS STILL HEALTHY AND FUNCTIONING ON TRADITIONAL GROUNDS, THAT THE COURTS WERE PREPARED TO DISMISS ACTIONS WHEN NO LIABILITY WAS FOUND AND TO MAINTAIN DAMAGE AWARDS WITHIN REASONABLE AMOUNTS. I AM CONVINCED THAT HIS MESSAGE REFLECTS THE REALITY IN THE MAJORITY OF CASES.

UNFORTUNATELY, THE CASES WHICH ATTRACT ATTENTION AND ARE KNOWN TO THE PUBLIC ARE GENERALLY THOSE WHERE THE AWARDS ARE LARGE OR WHERE LIABILITY IS BASED ON GROUNDS WHICH DEPART FROM TRADITIONAL PRINCIPLES. THE MEDIA HAS NO INTEREST IN PUBLICIZING ORDINARY AWARDS ON ORDINARY GROUNDS.

THE RESULT IS A PUBLIC PERCEPTION THAT IS FORMED BY THE MORE "PROGRESSIVE" NOT TO SAY SENSATIONAL JUDGMENTS AND, FOR MOST PEOPLE, PERCEPTION IS REALITY.

THE EFFECT OF THIS PERCEPTION IS AN INCREASED INCLINATION TO LITIGATE BASED ON AN INCREASED EXPECTATION ON THE PART OF PLAINTIFFS AND THEIR LAYWERS AS TO THEIR CHANCES OF SUCCESS AND THE AWARDS WHICH THEY MIGHT RECEIVE.

IN QUEBEC, THIS INCREASED INCLINATION TO LITIGATE IS EVIDENCED BY THE FACT THAT THE NUMBER OF CIVIL SUITS AGAINST DOCTORS INCREASED BY 500% BETWEEN 1972 AND 1982 AND APPEARS TO HAVE DOUBLED AGAIN BETWEEN 1982 AND 1986.

BECAUSE VERY FEW CASES GO TO JUDGMENT AND OVER 90% OF ALL CASES ARE SETTLED, LARGE DAMAGE AWARDS OR JUDGMENTS BASED ON NEW THEORIES OF LIABILITY HAVE AN EFFECT FAR BEYOND THAT WHICH IS VISIBLE IN THE CASE BOOKS. THOSE FEW DECISIONS INFLUENCE THE EXPECTATIONS OF PLAINTIFFS AND THEIR LAWYERS AND MODIFY THE THINKING OF DEFENDANTS AND THEIR INSURERS TOWARDS THE <u>SETTLEMENT</u> OF CASES SO THAT THE EFFECT IS GREATLY MULTIPLIED BY THE TIME IT FINDS ITS WAY BACK TO THE CONSUMER OF GOODS OR SERVICES IN THE FORM OF INCREASED PREMIUMS OR INCREASED COST OF GOODS AND SERVICES.

MR. BELTON HAS RAISED THE QUESTION: DO THE COURTS REFLECT SOCIETY'S VALUES AND EXPECTATIONS OR DO THEY CREATE THEM? I SUGGEST, THAT BY THE PROCESS WHICH I HAVE JUST DESCRIBED, THE COURTS PLAY A LARGE ROLE IN <u>CREATING</u> SOCIETY'S EXPECTATIONS. BY RENDERING MILLION DOLLARS AWARDS ON SLIM GROUNDS OF RESPONSIBILITY, THE COURTS INVITE EVERY PERSON WHO HAS BEEN INJURED, OR WHO PERCEIVES THAT HE HAS BEEN

INJURED, TO SEEK SOMEONE TO SUE IN THE HOPE OF BECOMING ONE OF THE BIG WINNERS IN LITIGATION LOTTERY.

WHAT COURTS REFLECT IN DAMAGE AWARDS IS NOT THE EXPECTATIONS OF SOCIETY AT LARGE BUT THE EXPECTATIONS OF INJURED PLAINTIFFS AND INJURED PLAINTIFFS, FORTUNATELY, REPRESENT ONLY A TINY FRACTION OF SOCIETY.

IN THE UNITED STATES, THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS REPORTS THAT ALMOST 12% OF THEIR MEMBERS HAVE CEASED TO PRACTISE THAT SPECIALITY RATHER THAN FACE THE EXORBITANT COST OF INSURANCE PREMIUMS AND THE HIGH PROBABILITY OF BEING SUED. I AM NOT CONVINCED THAT COURT DECISIONS IN MATTERS OF PROFESSIONAL LIABILITY REFLECT THE EXPECTATIONS OF THE MEDICAL PROFESSION NOR OF THEIR PATIENTS IN GENERAL.

IN RECENT YEARS, A NUMBER OF USEFUL PRODUCTS HAVE BEEN WITHDRAWN FROM THE MARKET BECAUSE THE MANUFACTURERS OF THOSE PRODUCTS COULD NOT CONTINUE TO BEAR THE COST OF DEFENDING AGAINST CLAIMS, FOUNDED OR UNFOUNDED, WHICH RENDERED THOSE PRODUCTS ECONOMICALLY IMPOSSIBLE TO PRODUCE. I AM NOT SURE THAT COURT JUDGMENTS IN MATTERS OF PRODUCT LIABILITY REFLECT THE EXPECTATIONS OF MANUFACTURERS NOR OF THE CONSUMING PUBLIC AT LARGE, WHO SEE USEFUL PRODUCTS WITHDRAWN FROM THE MARKET OR THE PRICE OF EXISTING PRODUCTS INCREASED FOR ALL CONSUMERS TO THE BENEFIT OF A VERY FEW.

ACCORDING TO MR. ARTHUR DESPARD, A SENIOR VICE-PRESIDENT WITH ONE OF CANADA'S LARGEST INSURANCE BROKERAGE HOUSES, 90% OF THE COST OF A PARTICULAR CHEMICAL PRODUCT MANUFACTURED IN CANADA REPRESENTS LIABILITY INSURANCE COSTS, 30% OF THE COST OF EVERY LADDER THAT IS SOLD REPRESENTS INSURANCE COSTS AND AT LEAST ONE SUBSTANTIAL PROFESSIONAL FIRM NOW RANKS INSURANCE COSTS AS ITS SECOND LARGEST EXPENSE, MORE IMPORTANT THAN RENTAL AND SECOND ONLY TO PAYROLL.

THERE IS LITTLE DOUBT THAT, IN RECENT YEARS THERE HAS BEEN A CONSIDERABLE TENDENCY TO TREAT THE TORT SYSTEM AS A COMPENSATION SYSTEM. THIS IS REFLECTED IN THE JUDGMENTS AND THE WRITINGS OF SOME EMINENT JURISTS; I HAVE CITED PASSAGES FROM THE LATE MR. JUSTICE LASKIN, FROM MR. JUSTICE LINDEN AND MR. JUSTICE HENRY. DOCTOR SLATER, IN HIS REPORT TO THE ONTARIO TASK FORCE ON LIABILITY INSURANCE, TO WHICH MR. BELTON REFERRED EARLIER, MAKES THE ASSUMPTION THAT THE TORT SYSTEM IS A COMPENSATION SYSTEM. IT IS PRECISELY THIS ASSUMPTION ON THE PART OF DOCTOR SLATER WHICH PERMITS HIM TO CONCLUDE THAT THE TORT SYSTEM SHOULD BE ABOLISHED.

VERY HUMBLY AND WITH GREAT RESPECT FOR THOSE WHO THINK DIFFERENTLY, I SUGGEST THAT THIS IS A FALLACY.

THE LAW OF NEGLIGENCE IS CENTERED ON THE ACT AND CONDUCT OF THE TORT FEASOR. A COMPENSATION SYSTEM IS CENTERED ON THE NEEDS OF THE VICTIM. THE PRINCIPLES WHICH GO TO ASSESS ONE AND THE OTHER ARE DISTINCT.

THE UNDERLYING REASON, THE RATIO, FOR THE DECISION OR THE GRANT OF COMPENSATION IS THEREFORE DIFFERENT: THE ACT OR CONDUCT OF THE TORT FEASOR IN ONE CASE, THE NEED OF THE VICTIM IN THE OTHER.

IN THE MOVE TO TREAT THE TORT SYSTEM AS A COMPENSATION SYSTEM, WE ARE THEREFORE WITNESSING NOT JUST AN EVOLUTION OF THE PRINCIPLES OF NEGLIGENCE BUT THE SUBSTITUTION OF A COMPLETELY DIFFERENT PRINCIPLE.

THE VERY PURPOSE OF A COMPENSATION SYSTEM IS TO COMPENSATE VICTIMS. A SYSTEM OF CIVIL LIABILITY BASED ON NEGLIGENCE, BY DEFINITION, ENDS UP AT LEAST HALF THE TIME IN NO COMPENSATION. THEREFORE, TO USE THE TRADITIONAL TORT SYSTEM AS A COMPENSATION SYSTEM IS NOT ONLY HIGHLY INEFFICIENT, AS THE SLATER REPORT POINTS OUT, BUT INVITES THE POSSIBILITY OF INTELLECTUAL DISHONESTY THAT HAS BEEN SO HOTLY DEBATED IN SOME CANADIAN LEGAL CIRCLES RECENTLY.

THERE IS A FURTHER REASON FOR NOT USING THE TORT SYSTEM AS A COMPENSATION SYSTEM. ALL TRUE COMPENSATION SYSTEMS, BE THEY STATE OR PRIVATE, NECESSARILY FIX ARTIFICIAL PRE-DETERMINED LIMITS TO THE COMPENSATION BECAUSE OF THE NEED TO CALCULATE THE ULTIMATE COST AND TO MAKE A CHOICE GOVERNED BY WHAT SOCIETY OR THE SYSTEM CAN AFFORD.

THE TORT SYSTEM PLACES NO SUCH LIMITS ON THE DAMAGES TO BE AWARDED.

THE SUPREME COURT OF CANADA HAS HELD THAT THE ABILITY TO PAY OF THE DEFENDANT (AND PRESUMABLY OF SOCIETY ?) IS NOT A RELEVANT

CONSIDERATION IN THE ESTABLISHING OF DAMAGE AWARDS BASED ON NEGLIGENCE [7] AND HAS SHOWN A CLEAR RELUCTANCE TO CONSIDER THE SOCIAL COST OR SOCIAL CONSEQUENCES OF DAMAGE AWARDS. [8]

MR. BELTON OBSERVED, AS A NUMBER OF OTHERS HAVE OBSERVED IN RECENT YEARS, THAT THERE IS A GROWING TENDENCY TO EXPECT A NO-RISK SOCIETY, AN EXPECTATION THAT EVERY PERSON WHO EXPERIENCES A LOSS OR DAMAGE OF ANY KIND SHOULD BE ABLE TO TURN TO SOMEONE ELSE TO SUPPORT THE BURDEN OF HIS LOSS.

I AGREE WITH MR. BELTON THAT SOCIETY WILL HAVE TO DECIDE WHAT FORM OF COMPENSATION SYSTEM IT WISHES AND TO WHAT DAMAGES IT EXTENDS. HOWEVER, THAT DECISION SHOULD BE MADE IN AN ORDERLY FASHION, BASED ON ANALYSIS OF THE COST SO THAT SOCIETY WILL ONLY UNDERTAKE A COMPENSATION SYSTEM WHICH IT CAN AFFORD.

TO ATTEMPT TO REACH A NO-FAULT COMPENSATION SYSTEM BY THE HAPHAZARD USE OF THE TORT SYSTEM, WITH NO PLANNING AND NO ATTEMPT TO ESTIMATE THE COST OR THE SOCIAL IMPACT, IS TO DISTORT THE TORT SYSTEM. IT CAN ONLY HAVE THE EFFECT OF EVENTUALLY DESTROYING IT, AS THE SLATER REPORT CONTEMPLATES.

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(7) Andrews vs Grand & Toy Alberta Ltd., 83 DLR (3d) 452, at 463, and Thornton vs Board of School Trustees, 83 DLR 480, at 485

(8) Andrews, at pages 466 & 467

PERMIT ME TO CONCLUDE WITH A MODEST ALLEGORY.

TWENTY-FIVE YEARS AGO, A YOUNG LAWYER, WHOM WE SHALL CALL O'DONNELL, MOVED WITH HIS WIFE AND YOUNG FAMILY TO A HOUSE WITH A NICE PLOT OF LAND ON WHICH THERE WERE FOUR APPLE TREES. NOTWITHSTANDING HIS FOUR YEARS AT THE FACULTY OF LAW OF MCGILL UNIVERSITY AND THE FINE LEGAL TRAINING THAT IT GAVE HIM, IT NEVER OCCURRED TO O'DONNELL THAT TO OWN AN APPLE TREE WAS A TORT.

THE YEARS GO BY AND THE TREES GROW, THEY MUST BE AT LEAST 20 FEET HIGH NOW.

IT IS OF COURSE KNOWN OR KNOWABLE TO O'DONNELL THAT CHILDREN LIKE TO CLIMB APPLE TREES. IT IS ALSO FORESEEABLE THAT A FALL FROM A HEIGHT OF 20 FEET COULD RESULT IN SERIOUS INJURY.

O'DONNELL IS NOW IN THE WITNESS BOX BEING QUESTIONED BY A CLEVER PLAINTIFF'S ATTORNEY UNDER THE STERN GAZE OF ONE OF HER MAJESTY'S JUSTICES, A DEFENDANT IN A SUIT ON BEHALF OF SOME UNFORTUNATE YOUNGSTER WHO WOULD HAVE FALLEN FROM THE APPLE TREE. THE PLAINTIFF'S LAWYER APPROACHES THE WITNESS BOX: "TELL ME O'DONNELL, HOW MUCH WOULD IT HAVE COST TO CUT DOWN YOUR FOUR APPLE TREES? "

"WELL", O'DONNELL REPLIES, "I SUPPOSE FOR ABOUT $100. I COULD HAVE HAD A FELLOW COME AND CUT THE TREES DOWN."

AND THE PLAINTIFF'S LAWYER CONTINUES: "YOU MEAN TO TELL THIS COURT O'DONNELL, THAT YOU WERE NOT PREPARED TO SPEND $100. TO AVOID THESE TERRIBLE INJURIES TO THIS UNFORTUNATE CHILD?"

ALL THE ELEMENTS ARE THERE: ATTRACTIVE NUISANCE, FORESEEABILITY OF THE ACCIDENT AND OF THE DAMAGE AND POSSIBILITY TO AVOID THE DAMAGE.

MR. BELTON HAS RIGHTLY POINTED OUT THAT THE PRESENT CRISIS ARISES BECAUSE WE ARE TRYING TO RUN A COMPENSATION SYSTEM WITHIN THE FRAMEWORK OF THE TORT SYSTEM AND THUS HAVE THE WORST OF BOTH WORLDS. HE SUGGESTS THREE POSSIBLE CHOICES.

I SUGGEST TO YOU THAT UNTIL SOCIETY MAKES A RATIONAL AND ORDERLY DECISION AS TO WHAT SORT OF COMPENSATION SYSTEM IT WANTS AND CAN AFFORD, WE HAVE ONLY TWO CHOICES: THE FIRST CHOICE IS TO RESPECT WITHIN THE TORT SYSTEM THE TRUE PRINCIPLES OF LIABILITY BASED ON NEGLIGENCE AND CAUSALITY. THE SECOND CHOICE MAY WELL BE TO CUT DOWN ALL THE APPLE TREES.