MacLACHLAN & MITCHELL HOMES LTD. v. *FRANK'S RENTALS & SALES LTD.* A LIBERAL APPLICATION OF *RES IPSA LOQUITUR*

*WITTOLD GUTTER**

I. INTRODUCTION

In the past, our courts have applied the maxim *res ipsa loquitur* with great caution. This has resulted in a rigid and limited application of the rule. However, the unanimous decision of the Alberta Court of Appeal in *MacLachlan & Mitchell Homes Ltd.* v. *Frank's Rental Sales* [1] signals a new liberal approach to the maxim. Consequently, it is important to examine the facts of the case and the reasoning of the Alberta Court of Appeal.

II. THE FACTS AND THE ISSUE

This action arose as a result of damage caused by fire which originated in a television set. The television set was designed and manufactured by Canadian Admiral Corporation Ltd. at its plant in Ontario. Upon completion of manufacture, the set was shipped to Canadian Admiral's warehouse in Calgary and placed in storage. It remained there until bought by Frank's Rentals & Sales Ltd., at which time it was shipped by Canadian Admiral to the former's premises. Frank's Rentals stored the television for several months until it was transferred to their Capilano district branch. At the Capilano store, the set was for the first time unpacked from its original factory shipping carton. The factory carton appeared to be undamaged and a visual inspection of the set yielded no sign of damage. There was no internal inspection of the television.

During a period of one year, between December of 1971 and 1972, the set was leased seven times. Prior to each lease, the set was subjected to a cursory inspection. On December 23, 1972 the television was leased to the plaintiff, Johnston, for one month. Up until January 11, 1973 the television had been subjected to normal use by the Johnston family. It appeared to be working normally. On January 11, 1973 a fire occurred in the suite of the Johnston family. Although the fire was found to have originated in the television set, the actual cause could not be determined due to the extensive damage done to the set. The fire also caused damage to the Johnston family's personal property and to the premises owned by the plaintiff landlords MacLachlan & Mitchell Homes Ltd.

At trial the defendant, Canadian Admiral, adduced evidence by way of expert testimony that established reasonable care in the design and manufacture of the set. Furthermore, this defendant provided evidence that over the years, very few fires have been proved to have originated by electronic failure of a television set. The trial Judge refused to invoke *res ipsa loquitur* against this defendant on the basis that control of the set had passed from the defendant.[2]

* *Student of the Faculty of Law, University of Alberta.*

1. (1979) 10 C.C.L.T. 306 (Alta. C.A.).

2. The trial Judge adopts the exposition of the maxim in *Charlesworth on Negligence* (6th ed.) page 264.

With regard to the defendant, Frank's Rentals, the learned Judge invoked the maxim but dismissed the plaintiff's claims on the grounds that:[3]

> . . . the actions of Frank's T.V. in handling and rentals of these sets were accepted or were equal to the accepted standards in the industry, that what they did was proper, that there was no derogation from the normal, prudent operator and I accept this again as a reasonable explanation negativing negligence on their part.

The above, then, is a summary of the facts which were established at trial and with which the Alberta Court of Appeal were faced. The issues to be decided by the Court of Appeal were whether the maxim *res ipsa loquitur* should be applied against the defendant Canadian Admiral and whether the defendants were liable for the damages.

III. THE JUDGEMENT OF THE COURT OF APPEAL

Mr. Justice Clement, delivering the judgement of the Court, first establishes that the maxim *res ipsa loquitur* is a rule of evidence and not a rule of law. After a review of the authorities,[4] the Honorable Justice explains the difference:[5]

> By this is meant that when the circumstances of the case warrant the application of the maxim the formal burden of proof then shifts to the defendant to show that he was not negligent. Support for this contention was sought in some English authorities antedating *Henderson* v. *Henry E. Jenkins & Sons.*[6] It is discussed by Lieff J. in *Westlake* v. *Smith Jpt. Ltd.*,[7] wherein he concluded on the authority of *United Motors Service Inc.* v. *Hutson* [8] that *the maxim has no effect on the burden of proof and that the plaintiff had to establish negligence on the balance of probabilities. I take this to be the law of Alberta. To hold otherwise would effect a change in substantive law not contemplated in the judgement of Erle C.J. and would run contrary to the basic principle of common law that it is for a plaintiff to prove his claim.* (Emphasis added).

Mr. Justice Clement then goes on to consider the element of control with regard to the defendant Canadian Admiral. In doing so, the learned Justice adopts the words of Furlong C.J. in *Wylie* v. *R.C.A. Ltd.*:[9]

> The plaintiff . . . has established one all-important fact and that is that the television set caught fire without the intervention of any outside agency.

Thus, the doctrine of *res ipsa loquitur* need not require "control" in the sense of physical possession and control, but rather in the sense that no outside agency intervened.[10] On the evidence adduced at trial, Clement J.A. concludes that the element of control is established with respect to both Frank's Rentals and Canadian Admiral — both defendants having control at the same time.

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3. *Supra* n. 1 at p. 316.
4. The authorities referred to were: *Scott* v. *London Dock Co. supra* note 39; *United Motor Service Inc.* v. *Hutson* (1937) S.C.R. 294, 4 I.L.R. 91, (1937) 1 D.L.R. 737; *Hellensius* v. *Lees* (1972) S.C.R. 165, 20 D.L.R. (3 ed.) 369; *Voice* v. *Union S.S. Co.* (1953) N.2.L.R. 176; and quoted extensively from *Henderson* v. *Henry E. Jenkins & Sons* (1970) A.C. 282, 1969 3 All E.R. 756 (H.L.).
5. *Supra* n. 1, p. 318.
6. *Supra* n. 4.
7. (1973) 2 O.R. (2d) 258, 42 D.L.R. (3d.) 502 (Ont. H.C.).
8. *Supra* n. 4.
9. (1973) 5 N. & P.E.I.R. 147 (Nfld. S.C.).
10. In coming to this conclusion, Mr. Justice Clement also refers to the following authorities: *Westlake* v. *Smith Ltd. supra* n. 7; *Kirk* v. *McLaughlin Coal and Supplies Ltd.* (1968) 1 O.R. 311 (C.A.); Fleming, *Law of Torts* (6 ed.) 1983.

At this point, the Court is forced to deal with the issue of whether the maxim is applicable against two or more defendants where the accident implicates no one specifically. Before addressing this issue, Mr. Justice Clement points out that some legal scholars are of the view that where two or more defendants are implicated, but neither are specifically indicated, and these defendants are not legally responsible for each other's actions, the maxim does not apply.[11] The learned Justice then reviews several authorities which are distinguished on the basis of vicarious liability.[12]

While still considering the applicability of the doctrine, Justice Clement finds it necessary to distinguish between the concepts of "several" tortfeasors and "joint" torteasers, the latter of which incorporates the notion of vicarious liability.[13] Joint tortfeasors, it is said, refers to a situation where the same injury is attributable to the negligence of two or more wrongdoers. In this way, the wrongdoers are responsible for the same tort and the same damage. In this type of situation, there is but one cause of action. In contrast to this, "several" tortfeasers are responsible only for the same damage. Consequently, there are as many causes of action as there are tortfeasors.

Mr. Justice Clement then concludes that:[14]

> In my opinion the evidence in no way establishes joint liability on the part of the two defendants. If both should be found at fault, their liability would be "several" and the applicability of the maxim to such circumstances must be determined.

Having established that the two defendants, if liable, are in fact "several" fortfeasors, the Honorable Justice then asserts that the maxim of *res ipsa loquitur* is indeed applicable. As the learned Justice explains:[15]

> For myself, I do not have difficulty in the application of the maxim if it is kept in mind that in the case of 'several' tortfeasors the hypothetical fault of each is independant of that which may be inferred against the others, and so raises a separate cause of action not linked to the others as in the case of joint tortfeasors. This leads inevitably, in my view, to the separate consideration of the evidence relating to each alleged tortfeasor to determine first, whether it supports an inference of negligence within the maxim and, if so, whether that alleged tortfeasor has met it acceptably. *On this approach, if on a reasonable view of the evidence the application of the maxim is warranted against two or more alleged tortfeasors, one or more may repel the inference of negligence raised against him or them and so be absolved. If neither or none can, I do not see any strain on justice ot hold both culpable, presumably in such proportions as may be determined* . . . (Emphasis added).

Thus, where the defendants are not legally responsible for each other's actions, a separate and distinct inference of negligence is raised against each respective defendant.

Having applied the maxim in this manner, Justice Clement then considers the evidence in determining whether the defendants have effective-

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11. Justice Clements specifically refers to a passage which reflects this view taken from *Salmond on Torts* (17th ed.) at p. 239.

12. The authorities distinguished on the basis of vicarious liability are: *Roe* v. *Ministry of Health*; *Wooley* v. *Ministry of Health* (1954) 2 Q.B. 66, (1954) 2 All E.R. 131 (C.A.); *Walsh* v. *Holst & Co.* (1958) 3 All E.R. 33 (C.A.).

13. In support of this proposition, Justice Clement relies on Fleming, *supra* n. 10 and illustrates by reference to *Cook* v. *Lewis* (1951) S.C.R. 830.

14. *Supra* n. 1 at p. 324.

15. *Id.*

ly rebutted the inference raised. In doing so, the learned Justice re-asserts that the ultimate burden of proof remains with the plaintiff. To interpret the rule in a manner which shifts this burden to the defendant would be tantamount to holding the defendant "strictly liable" which, in turn, results in rendering the defendant an insurer. Such a proposition cannot be maintained and the court must determine whether, on a balance of probabilities, the defendant is negligent.

On the evidence before the court, the specific cause of the fire could not be determined due to the extent to which the television set was destroyed. The maxim *res ipsa loquitur* was applied to each defendant giving rise to two distinct inferences of negligence. However, each defendant effectively rebutted respective inferences of negligence by establishing that they took such reasonable care as the law would impose on their respective activities. Hence, the Honorable Justice Clement, while applying the maxim *res ipsa loquitur* against each defendant, dismissed the appeal. (Prowse, J.A. and Moir, J.A. concurring).

IV. ANALYSIS OF THE JUDGEMENT

In the course of his judgement, the learned Justice makes several crucial points in justification for invoking *res ipsa loquitur.* Specifically, Justice Clement:

(a) finds that the element of control is established — both defendants having control at the same time;

(b) distinguishes between "joint" tortfeasors and "several" tortfeasors; and

(c) applies the maxim against each defendant separately.

Each of these points are important to the novel and liberal approach alluded to and therefore deserve some comment.

A. BOTH DEFENDANTS HAVING "CONTROL"

In considering this finding of the court, we might first note that the defendants are not legally responsible for each other's actions. Thus, the concept of vicarious liability is inapplicable in the facts of this case. In addition to this, a finding that both defendants are in control at the same time precludes notions of "exclusitivity". Therefore, the Alberta Court of Appeal clearly rejects the dubious proposition that where there is more than one defendant the doctrine is precluded by reason that control cannot be established.

However, the question is begged — what does the court mean by "control"? Certainly, where more than one independant defendant is implicated, control cannot be established in the traditional sense. Webster's dictionary defines control as:[16]

> the act or fact of controlling; power or authority to guide or manage; directing or restraining domination.

In accordance with the facts of this case, can it be asserted that both defendants are in control?

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16. Webster's Third International Dictionary.

Adding more confusion to its meaning is the fact that both defendants are found to be in control *at the same time*. This seems to contradict the facts of the case. It will be recalled that the defendant Canadian Admiral, having designed, manufactured, and stored the television set for a period of time, had possession of the television to the exclusion of Frank's Rentals. Conversely, Frank's Rentals took possession for a period of time during which Canadian Admiral had no authority or control over the set. Quite clearly, these facts indicate that the defendants each had control over the set at *separate and distinct times* and not at the same time. In view of these facts, it is suggested that the use of the word "control" is both misleading and inappropriate. What Justice Clement apparently meant in stating that both defendants were in control at the same time, was that during a specific time period, either one or the other was in control of the "thing". During this time period, from the time of manufacture until the fire occurred, no other agency had intervened. In this way, the accident is linked to the defendants. To repeat Justice Clement's words:[17]

> The plaintiff . . . has established one all-important fact and that is that the television set caught fire without the intervention of any outside agency.

Essentially, what the Court of Appeal has stated is that more than one independant defendant may be in control at the same time *or* at different times without precluding the operation of *res ipsa loquitur*. All this is necessary to invoke the operation of the doctrine is that the plaintiff establish that no other agency intervened during a specified time period. Perhaps, having regard to the element of control, it would be more accurate and less confusing to state that the defendant need only link the accident to the defendant.[18] Or, as one author has postulated:[19]

> . . . it would surely be at once more accurate and less confusing to abandon all reference to "control" and postulate simply that the apparent cause of the accident must be such that the defendant would most probably be responsible for any negligence connected therewith.

B. "JOINT" AND "SEVERAL" TORTFEASORS

In considering the actual application of the doctrine, Justice Clement found it necessary to distinguish between joint and several tortfeasors. Joint tortfeasors refers to the situation where two or more defendants are responsible for the same act and the same damage. The concept incorporates the notion of vicarious liability wherein the maxim *res ipsa loquitur* is readily available to the plaintiff. However, the court does not address the issue of the application of the maxim where there are joint tortfeasors but no vicarious liability. As will be seen below, in view of Mr. Justice Clement's reasoning, this issue is of no concern to prospective plaintiffs.

Support for this proposition finds its basis in the Court of Appeal's finding that the maxim is readily applicable against "several" tortfeasors. It may be recalled that the several tortfeasor concept refers to

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17. *Supra* n. 1.
18. This terminology is adopted by Picard *infra* n. 21.
19. Fleming, *supra* n. 10 at p. 292.

situations where the defendants are responsible for different acts which result in the same damage. Mr. Justice Clement finds that in the context of this case, the maxim is readily applicable against both defendants as the evidence "in no way establishes joint liability."[20]

With respect, this author finds it difficult to distinguish between "joint" and "several" tortfeasors in the context of a *res ipsa loquitur* situation. A universally accepted pre-requisite to the application of the rule is that the cause of the accident must be unknown. If the cause is unknown, how is it possible to distinguish between "several" or "joint" tortfeasors in any given civil suit? The act complained of, the cause-in-fact, is a mystery and it is this mystery which gives rise to the maxim *res ipsa loquitur.*

In each and every case in which the cause is unknown and more than one defendant is implicated, there exists the potential of several or joint tortfeasors. Such a determination cannot be made until the cause becomes known, or all the defendants but one have effectively rebutted their respective inferences of negligence, or the vicarious liability concept is applicable.

To make a determination of joint or several liability where the cause is unknown is to engage in mere speculation. It is submitted here that such speculation cannot be maintained and therefore, determinations of joint or several liability are inappropriate where the cause of the accident is a mystery.

Nonetheless, the court's decision to apply the maxim *res ipsa loquitur* in situations of "several" tortfeasors cannot be ignored. However, given that where the cause remains a mystery there exists the potential for joint or several liability, the maxim must be applicable in both situations. Therefore, subject to other pre-conditions, in accordance with the decision of the Alberta Court of Appeal, the maxim *res ipsa loquitur* is applicable wherever the cause is unknown as there is always a potential "several" tortfeasor situation.

C. THE APPLICATION OF THE MAXIM

After determining that the necessary element of "control" is established and finding that the defendants are "several" tortfeasors, Justice Clement then goes on to explain how the doctrine is to be applied. In his view, the doctrine raises a separate and distinct inference of negligence against each defendant. Thus, each defendant has the opportunity to rebut their respective inference. Of course, this is a sensible approach in the case of "several" tortfeasors where each defendant is responsible for a different cause of action.

Of some importance to this application of the doctrine is the previous discussion with respect to the distinction between "joint" and "several" tortfeasors. Specifically, due to the potential of "several" tortfeasors in all circumstances where the maxim *res ipsa loquitur* applies, the only logical conclusion that can be drawn is that a separate inference of negligence is raised against each defendant in every case where the maxim

20. *Supra* n. 9.

is invoked. The only possible exception occurs where there is vicarious liability. Thus, in each case each defendant would be required to rebut the inference raised.

Justice Clement then asserts that should none of the defendants choose to rebut the inference, or is unable to, the damages would be apportioned in accordance with the inferences raised. From this, it is deduced that in situations where the rule is invoked, any number of defendants may be found liable or be absolved of liability. Just who will be found liable and to what degree, will be contingent upon the strength of respective inferences raised and evidence led in rebuttal. In turn, the inferences and rebuttal vary from case to case and therefore it logically follows that liability will be determined in accordance with the merits of each case.

At this point, it is noted that a hallmark characteristic of the negligence concept is that each case must be considered in accordance with its individual merits. Of course, the maxim *res ipsa loquitur* is considered in the context of negligence and consequently, this proposition should not be especially surprising. Yet, the conclusion reached seems to contrast sharply with the rigorous approach noted by Justice Clement and alluded to at the outset of this paper. Taken together, the three points made in the course of the *MacLachlan* decision have far-reaching implications for negligence actions, which are especially pertinent to medical negligence actions.[21] Consequently, it becomes necessary to consider the effect of this decision.

V. THE EFFECT OF THE *MacLACHLAN* DECISION

Essentially, the effect of this judgment is to greatly increase the availability of *res ipsa loquitur* through a liberal and flexible application. This approach is achieved primarily through modification of the condition of "control", leaving the conditions of "unknown cause" and the "accident speaking of negligence" intact. The modification referred to is to transform the condition of "control" into one of "linking the accident with the defendant".[22]

However, in establishing this formulation, certain qualification must be made in view of the *McFadyen* v. *Harvie* [23] and *Morris* v. *Winsbury White* [24] decisions. In both instances, the plaintiff was not allowed to rely upon the maxim *res ipsa loquitur* as the condition of "control" had not been established. As a result, these cases are often cited as authority for the proposition that the doctrine is precluded where more than one defendant is implicated.

A closer examination of these decisions reveals that this interpretation is misleading and the use of the word "control" is as confusing as it is inappropriate. In both cases, several individuals were implicated by an accident. Despite this, in each case the plaintiff chose not to name all the in-

21. Picard, *Legal Liability of Doctors and Hospitals in Canada* (2 ed.) soon to be published, Chapter 6.

22. This terminology is adopted by Picard, *supra* n. 21.

23. (1941) O.R. 90 (C.A.): affd., 1942 S.C.R. 390.

24. (1937) 4 ALL E.R. 494.

dividuals implicated by the accident as defendants. Therefore, it is apparent that failure to name all those implicated is fatal to the operation of *res ipsa loquitur*. To restate this in the terms of Justice Clement, the plaintiff must establish that, no agency other than the defendants intervened with the "thing", in order to avail himself of the doctrine.

Policy considerations seem to support the preceding conclusion. Surely, where the case of the accident is unknown and two or more persons are implicated, it would be absurd to allow the plaintiff to single out any one individual. To do so would allow the plaintiff to choose the defendant on the basis of considerations which might have no bearing on actual blameworthiness.

In addition to this, it must be noted that the maxim *res ipsa loquitur* operates as a result of an inexplicable occurrence. Once invoked, the defendants, who are in a position such that they know or ought to know the cause of the accident, are given the opportunity to explain the occurrence. However, where several defendants are implicated, any combination of defendants may be required to explain the accident. Therefore, in some circumstances, allowing the plaintiff to choose one of several defendants may also result in rendering inexplicable what is otherwise explicable, thereby imposing liability with no fault.

Consequently, in view of the *MacLachlan*, *McFadyen* and *Winsbury* decisions, it is asserted that the maxim *res ipsa loquitur* is applicable where the following conditions have been met:

i) The cause-in-fact is unknown.
ii) The accident bespeaks of negligence.
iii) The negligence inferred could only have occurred during a specified time period.
iv) During the specified time period, no individual or agency other than those named as defendants intervened.

In essence, this reformulation effectively destroys a recurring obstacle with which a plaintiff is often faced — the conspiracy of silence. In accordance with the *MacLachlan* decision and the reformulation of conditions set out, it can no longer be said that the operation of the doctrine is precluded "because the accident occurred while a patient was in hospital under the care of more than one person."[25] The doctor, nurse, orderly, etc., can no longer rely on the silence of his associates for his defence. Silence will only serve to apportion the liability in accordance with the merits of the case under consideration.

The *MacLachlan* decision appears to have achieved the same results as a much earlier decision in the United States,[26] albeit in a much more subtle manner. In that case, the plaintiff underwent an appendix operation during which he suffered a severe shoulder injury. Eight persons had been involved in the operation. The plaintiff was unable to determine the cause of the injury. As a result, the plaintiff sued all individuals who could be implicated. At trial, the plaintiff was unable to avail himself of *res ipsa loquitur* due to the fact that no specific individual was im-

25. Picard, *supra*, n. 21.
26. *Id.*

plicated. All eight defendants chose to rely upon the defendant's ignorance rather than to testify and establish their innocence. On appeal, however, the court allowed the plaintiff to rely upon the maxim and apportioned the liability equally amongst the defendants. As one learned authority so eloquently stated:[27]

> the court in effect said that by invoking the doctrine of *res ipsa loquitur* he might have judgments against all of the group unless some of the individuals came forward and identified the negligent person.

This same author then criticizes this judgment:[28]

> This is, indeed, guilt by association with a vengeance, and, if the decision be sound, in situations of this kind, as Seavy had said, it behooves us to pick our friends rather carefully. Obviously, there is no rational theory of liability by which all of these persons could be held, and . . . the case can be categorized as "wrong".

With respect to this noted authority, it is hereby submitted that there is a rational theory by which all parties could be held liable. This theory finds its basis in the defendant's choice in refusing to proclaim their innocence in the face of a reasonable inference of negligence. In choosing instead to rely on a victim's ignorance, these defendants choose to be guilty by association. Their silence in effect precludes the operation of law in situations where no one except individuals in their position could possibly explain the mystery. In effect, defendants who choose to remain silent also choose to protect the negligent actor and thereby add to the suffering of a victim. Defendants who choose to remain silent also choose to protect the negligent actor and if this amounts to "guilt by association", it is rightfully so!

VI. CONCLUDING REMARKS

The preceding portion of this paper has outlined a new and flexible approach to the application of *res ipsa loquitur*. In contrast to the rigid application noted earlier, this novel approach appears to be more consistent with the flexibility so characteristic of negligence. In adopting this application, defendants, especially in the medical treatment situation, can no longer rely upon rigid, inflexible and inappropriate technicalities for their defence. Rather, as in negligence actions generally, this rule can now be applied liberally and in accordance with the merits of each individual case.

Defendants who choose to rely on the "conspiracy of silence" will now do so at their own peril. The new approach, which has been adopted in two other cases,[29] serves to increase the accountability of esteemed professionals. No doubt, this approach will most certainly spark criticism. However, in the long run it will effectively compel recognition among the medical profession, that if an individual suffers at the hands of a negligent actor, he has a right to the compensation that the law affords him. This approach serves in no way to prevent the innocent from establishing their innocence. Rather, it serves to encourage the innocent

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27. Wright, *Res Ipsa Loquitur* in *Studies in Canadian Tort Law* 41 (1st ed., Linden, 1968) at page 53-54.

28. *Id.* at p. 54.

29. *See Cosgrove* v. *Goudreau* (1981) 33 N.B.R. (2d) 523 (N.B.A.B.) and *Goldsworthy* v. *Catalina Agencies Ltd.* (1983) 142 D.L.R. (3d) 281.

to proclaim their innocence, while at the same time compelling the negligent actor to recognize his fault. Surely, in the tight-knit circles of the professional, the person who is at fault would be ill-advised to inculpate his colleagues.

The liberal approach espoused in the *MacLachlan* decision goes one step further — it also impliedly recognizes the "*McGhee*" or "material contribution"[30] test of cause-in-fact. In doing so, the Court of Appeal recognizes what most persons have long recognized — that in many instances several acts may result in the same damage. Although this implication lends support to the novel approach, elaboration on it is left for another day.

Perhaps the most significant aspect of the new approach is a return to the "world of common sense". The rigid approach traditionally espoused is one which seems to ignore the common sense rationale which first gave rise to the doctrine.[31] In some cases, the rule was bound up by technical rules which often ignored the aims of tort law in precluding the operation of the doctrine.

In contrast, the new approach is based on the very roots of the maxim and requires the trier of fact to consider the case on its merits. This flexibility, although somewhat ambiguous, is recognized as an essential and necessary characteristic for the continued utility of the negligence concept. In adopting a rigid approach to the maxim *res ipsa loquitur*, one necessarily precludes the utility of the negligence concept in situations that require the operation of the maxim. To do so would be to render the concept of negligence ineffective and outdated in the very circumstances where it is demanded.

30. *See McGlee* v. *National Coal Board* (1972) 3 ALL E.R. 1008 (H.L.).

31. *See Byrne* v. *Boadle* (1963) 2 H & C 722; 159 E.R. 299 (Ex).