never held shares in the company. In fact, their prime function was to act as watchdogs over the company's activities on behalf of the City of Calgary.

As regards the statutory provision, it is submitted that the word "director" in scetion 98(2) is very much open to a narrow construction. Since section 98(2) is based upon the equitable rule, the Legislature could not in the absence of clearer language have intended the section to extend the rule to the special facts before the court. The words of O'Halloran, J. A. in *Waugh and Esquimalt Lumber Co.* v. *Pedneault* (Nos. 2 and 3)[41] are in point, *viz*:

> An enactment of the legislature, subject as it is to the limitations which beset all things human, cannot possibly have in view every situation which may arise. A combination of circumstances may arise which on its face appears to come within the strict language of the enactment yet cannot be so included, because obviously the Legislature would not have included it, if it had such a situation in mind when the enactment was made. That is one reason, in my opinion, why it is said in *Stradling* v. *Morgan*[42] that statutes 'which comprehend all things in the letter' may be expounded 'to extend but to some things according to that which is consonant to reason and good discretion.'[43]

Starr v. *City of Calgary* then, might be regarded as an example of the fourth type of case.

—ALASTAIR R. LUCAS*

41 [1949] 1 W.W.R. 14 (B.C.C.A.).
42 (1558), 1 Plowd 199, 205, 75 E.R. 305.
43 *Ante*, n. 41, at 16.
* Alastair R. Lucas, B.A., LL.B. (Alta.).

THE DOCTRINE OF INCOMPLETE PRIVILEGE—APPLICATION IN THE UNITED STATES—THE CANADIAN VIEW—THE CONCEPT OF FAULT IN THE LAW OF TORT—*MANOR & CO.* v *M.V. "SIR JOHN CROSBIE"*

It is a well known fact that the common law does not generally allow intentional invasions of the property rights of others. Yet it has long been an equally accepted principle of American and English jurisprudence that one may intentionally trespass on the property of another in order to preserve one's own property. This concept is known as the defence of private necessity or, as it is more commonly called in the United States, the doctrine of incomplete privilege.

The American Restatement on Torts uses the word "privilege"

> . . . to denote the fact that conduct which under ordinary circumstances would subject the actor to liability, under particular circumstances does not subject him to such liability.[1]

This definition seems clear and complete and yet it leaves totally unresolved the basic problem—is the individual so privileged entitled to invade the property of another with impunity or does the law impose upon him a duty of compensation to the injured party? It is this problem and how it has been met by the American Courts which forms the subject matter of this comment.

In February, 1965, the Exchequer Court of Canada in *Manor & Co.*

1 *Restatement of Torts 2d*, No. 10.

v. *M. V. "Sir John Crosbie"*[2] held that not only is a ship's captain not negligent in deciding to remain in port during a storm, he is also under no liability to the plaintiff dock-owner for the loss occasioned by that decision. The facts may be stated briefly. A storm blew up just as the "Crosbie" was finishing unloading. The captain considered the roughness of the weather and the lightened condition of his ship and decided to remain in port, moored to the plaintiff's wharf, rather than risk the safety of the boat and her crew by attempting to leave port. During the course of the storm, it became necessary to put out additional ropes and, as a result of the "Crosbie" being thus moored firmly against the dock, damage was done. The plaintiff dock-owner brought action against the defendant ship alleging that the captain had been negligent in remaining in port during the storm and that the resulting damage could be traced directly to his negligence.

The Exchequer Court, however, took the stand that the captain of the "Crosbie" had acted reasonably and in accord with his responsibility as captain, for the welfare of the ship and her crew. Although the plaintiff called, as witnesses, other experienced captains who testified that it would not have been dangerous for the "Crosbie" to have left port, the court chose to accept the evidence of the "Crosbie's" own captain as he alone had been "Johnny on the spot". As a result of this finding of no negligence on the part of the defendant, the plaintiff was precluded from recovery for his damaged property.

In substance, this decision by the Exchequer Court was correct. However, while not referring specifically to the defence, Puddester, D. J. A. was, in effect, holding that the defendant's acts did not amount to negligence because the circumstances made them privileged. In further denying to the plaintiff any compensation for his loss, he was holding that privilege to be *complete*. In American jurisdictions, however, the "privilege" to trespass has always been coupled with a "duty" to compensate the innocent plaintiff for any damage resulting to his property. It follows that the "privilege" is only truly *complete* when no actual physical damage is done; otherwise, it is only *incomplete*.

The American decision most often quoted for its eloquent discussion of the rationale of incomplete privilege is *Vincent* v. *Lake Erie Transportation Co.*[3] whose facts are virtually identical to those in the *Manor* case. Once again, the captain decided, in view of the stormy weather, to remain docked to the plaintiff's wharf. Once again, additional lines were put out and the plaintiff's dock was damaged by the boat banging up against it in the storm. The crucial difference between the two decisions lies in the fact that although the Minnesota Court also held the captain not negligent, it allowed to that plaintiff the very compensation which was denied to Manor & Co. Ltd. fifty-five years later. O'Brien, J. of the Minnesota Supreme Court held that a distinction must be made between damage caused by bad weather and damage caused by the deliberate (although justified) acts of the defendant. Had the storm blown the ship into port and against the plaintiff's dock, then clearly no liability could attach to the defendant since any damage done would be the re-

2 *Manor & Co. v. M. V. "Sir John Crosbie"* (1966), 52 D.L.R. (2d) 48.
3 *Vincent v. Lake Erie Transportation Co.* (1910), 124 N.W. 221.

sult of an Act of God and not of any conscious act of the defendant. However, here the damage was solely the result of the defendant's having secured his ship to the dock, thus intentionally setting (however rightly) the safety of his own property above that of the plaintiff's.

In view of these findings, the Court held that while the common law must not be so rigid and intolerant as to deny a man the right to invade another's property in order to save his own from destruction, that right was not so absolute as to preclude an innocent plaintiff from recovering for the loss thereby occasioned. In the words of O'Brien, J.:

> Theologians hold that starving man may, without moral guilt, take what is necessary to sustain life; but it could hardly be said that the obligation would not be upon such person to pay the value of the property so taken when he became able to do so. . . . Let us imagine in this case that for the better mooring of the vessel those in charge of her had appropriated a valuable cable lying upon the dock. No matter how justifiable such appropriation might have been, it would not be claimed that, because of the overwhelming necessity of the situation, the owner of the cable could not receive its value.
>
> This is not a case where life or property was manaced by any object or thing belonging to the plaintiff, the destruction of which became necessary to prevent the threatened disaster. Nor is it a case where, because of the Act of God or unavoidable accident, the infliction of the injury was beyond the control of the defendant, but is one where the defendant prudently and advisedly availed itself of plaintiff's property for the purpose of preserving its own more valuable property and plaintiffs are entitled to compensation for the injury done.[4]

It appears, therefore, that on virtually the same set of facts, the Exchequer Court and the Supreme Court of Minnesota have reached opposite conclusions as to the right of an injured plaintiff to recover in the absence of negligence on the part of the defendant. It is necessary, then, to examine both the doctrine of incomplete privilege itself, on which the American decision was founded, and some of the possible reasons why that doctrine was not raised in the Exchequer Court decision.

The *American Restatement on Torts*[5] sets out the scope of the defence in the following manner:

> (1) One is privileged to commit an act which would otherwise be a trespass to the chattel of another or conversion of it, if it is or is reasonably believed to be reasonable and necessary to protect the person or property of the actor, the other or a third person from serious harm, unless the actor knows that the person for whose benefit he acts is unwilling that he shall do so. (2) Where the act is for the benefit of the actor or a third person, he is subject to liability for any harm caused by the exercise of the privilege.

As to the existence of a corresponding duty of compensation, it is stated that if the actor acts to protect another the privilege is complete and the actor is subject to no liability. However, if he acts to protect his own interest, the privilege is incomplete and the actor must indemnify the plaintiff for any actual harm done to his property, the rationale being that: "Since the actor thus avoids harm in no way threatened by the conduct of the other, he is not entitled to commandeer the use of the other's goods for his own protection, or that of a third person without making good any loss thus caused."[6]

When this analysis is considered along with the numerous cases

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4 *Id.*, at 222.
5 *Restatement of Torts 2d*, No. 263.
6 *Id.*, at 497.

which have applied the doctrine, four fundamental principles of incomplete privilege clearly emerge:

(A) The interest the actor is seeking to protect must be either that of himself, a third party, or the plaintiff. If it is the plaintiff's interest, the privilege is complete; and if it is not, the privilege is only incomplete.

(B) The interest intended to be protected must be equally valuable or more valuable than the interest intended to be sacrificed. It seems only reasonable that if society's interests are to be invaded, the good intended to result should at least equal the harm likely to be done. For this reason, the Supreme Court of Michigan in *Tucker* v. *Burt*[7] held that a landlord could eject a sick tenant from his apartment since the possible risk to the woman's health if she were moved was far outweighed by the risk to the health of the other tenants if she were allowed to remain. While, in *Bradshaw* v. *Frazier*[8] the court held that the health of a child suffering from measles was more valuable than a landlord's right to immediate occupancy of the property of his dispossessed tenant. This weighing of relative values is essential to the defence for it is only in action *after* deciding one's own interest is more valuable or at least as valuable as the other's that the act becomes reasonable and therefore privileged.

(C) Once the actor has determined that the value of his interest outweighs that of the plaintiff's, not only may he intentionally trespass but the plaintiff is not entitled to offer resistance. Thus in *Ploof* v. *Putnam*[9] defendant dock-owner was held to be liable to plaintiff for the damage done when he unmoored the boat plaintiff had tied to his dock during a storm.

(D) Whether or not the actor knew damage would result and even though he acted reasonably, he is liable to the plaintiff for any loss resulting from his acts.

It is this last element, the one most disputed, which is at the very root of incomplete privilege. But for this element, the defence would not appear to differ materially from the other well-established defences of Act of God and self-defence; with this element, the fundamental difference becomes apparent.

The duty to compensate the injured plaintiff is such an integral part of incomplete privilege that it is accepted almost without question by the majority of cases, as well as by most of those writers who have discussed the doctrine. O'Brien, J. in *Vincent* v. *Lake Erie Transportation Co.* raised the issue when he asked, in his analysis of the decision in *Depue* v. *Flatau*.[10]

> If, however, the owner of the premises had furnished the traveller with proper accommodation and medical attendance, would he have been able to defeat an action brought against him for their reasonable worth?[11]

and again, in his discussion of *Ploof* v. *Putnam*:

> If, in that case, the vessel had been permitted to remain and the dock had suf-

7 *Tucker* v. *Burt* (1908), 115 N.W. 722.
8 *Bradshaw* v. *Frazier* (1901), 85 N.W. 752.
9 *Ploof* v. *Putnam* (1909), 71 AtL 188.
10 *Depue* v. *Flatau* (1962), 111 N.W. 1.
11 *Id.*, at 222.

> fered an injury, we believe the ship owner would have been held liable for the injury done.[12]

While the general English view has been that the privilege in such circumstances is complete rather than incomplete, there are a few judicial comments which would seem to favour the American interpretation, such as the remarks of Devlin, J. in the trial decision of *Esso Petroleum Co. Ltd.* v. *Southport Corporation*:

> I am not prepared to hold, without further consideration, that a man is entitled to damage the property of another without compensating him, merely because the infliction of such damage is necessary in order to save his own property.[13]

Nevertheless, it must be admitted that despite such limited recognition by the English bench, the doctrine of incomplete privilege remains almost totally a product of American jurisprudence. It has, thus far, received no support in Canadian courts and it may well be that our courts would deny the duty to compensate and in so doing, reject the doctrine of incomplete privilege as it presently exists.

It is submitted that the difficulty experienced with the doctrine by its critics is of a two-fold origin. Firstly, there is a misconception as to the nature of the act which may be no more than a question of semantics, namely, the common characterization of incomplete privilege as a *justification* for a tort. The obvious ambiguity in such terminology is clear and has led to criticism such as that levelled by Vice-Chancellor Stevenson in *Booth* v. *Burgess*[14] where he stated:

> There is no justification for a tort. The so-called justification is an exceptional fact which shows that no tort was committed.

Such confusion has arisen because the term "justification" implies a complete immunity from liability, on the supposed reasoning that under the circumstances, no trespass was committed at all. That is to say, it implies that by merely having a more valuable interest to protect, the defendant may do any amount of damage to the plaintiff's property with impunity. It was this interpretation which Devlin, J. rejected in his trial decision in *Esso Petroleum Co. Ltd.* v. *Southport Corporation*, where he stated:

> I doubt whether a court in such circumstances can be asked to evaluate the relation of the damage done to the property saved by inquiring, for example, whether it is permissible to do 5,000 £ worth of damage to a third party in order to save property worth 10,000 £.[15]

The American view is that the element of necessity does not change the essential character of the defendant's act from a trespass, and that such trespass is actionable if damage results. Following this interpretation, the term "incomplete privilege" which is the one commonly used in the United States, is more accurate than "private necessity" since it implies merely a right which need not be absolute.

There is, however, another more fundamental difficulty with the doctrine and it may be stated simply: a trespasser motivated by private necessity differs in only one respect from an ordinary trespasser, and that is that because of the circumstances "necessitating" his trespass, no

12 *Ibid.*
13 *Esso Petroleum Co. Ltd.* v. *Southport Corporation* (1956), A.C. 218 at 227.
14 *Booth* v. *Burgess* (1907), 65 AtL. 226.
15 *Id.*, at 227.

moral culpability can be said to attach to his acts. A difficulty rises at this point since many eminent jurists hold that liability in tort must be based solely on moral culpability, which is to say, "fault". Such jurists stress the intention of the actor rather than the act itself, a position not too unlike that of their criminal law brethren who demand proof of a mens rea before they will hold that a crime has been committed. They regard those who advocate compensation in circumstances where fault is lacking, as reactionaries, attempting to resurrect the Dark Ages of tort law when every man acted at his peril.

J. W. Salmond expressed the views of such theorists most eloquently when he stated:

> When a man does harm to another without any intent to do so and without negligence, there is, in general, no reason why he should be compelled to make compensation. The damage done is not thereby in any degree diminished. It has been done and cannot be undone. By compelling compensation, the loss is merely shifted from the shoulders of one man to those of another but it remains equally heavy. Reason demands that a loss should lie where it falls unless some good purpose is to be served by changing its incidence; and in general, the only purpose so served is that of punishment for wrongful intent or negligence. There is no more reason why I should insure other persons against the harmful results of my own activities, in the absence of a mens rea on my part, than why I should insure them against the inevitable accidents which result to them from the forces of nature, independent of human relations altogether.[16]

Salmond based his interpretation on an historical study of the criteria of tort liability from earliest Anglo-Saxon times to his own and most jurisprudents would agree that his reasoning is historically sound. However, there are those such as Thayer who would exhort us not to be too closely bound by history since the law of negligence is modern and has rendered much of what was thought before obsolete.[17]

Nor has Salmond's historical interpretation completely escaped challenge. It has been argued that the concept of fault was never so essential to the law of torts as Salmond would have had us believe, and that the history of torts would more accurately be described as continual attempts to reconcile strict liability with fault liability.[18] Some meagre authority may be found even in England, denying the validity of "fault" as the sole criterion in determining tortious liability. In 1681, in *Lambert* v. *Bessey*,[19] it was stated: "In all civil acts, the law doth not so much regard the intent of the actor as the loss and damage of the party suffering", and again, almost 300 years later in *Bollinger* v. *Costa Brava Wine Co.*,[20] the court replied to the proposition placed before it that culpability must always precede liability: ". . . the law may be thought to have failed if it can offer no remedy for the deliberate act of one person which causes damage to the property of another."

It has, as well, been argued that the modern trend in the law of torts is to emphasize not so much who was at fault, as who is better able to withstand the loss. As Denning, L. J., put it: "Recent legislative and judicial developments show the criterion of liability in tort is not so much culpability as on whom the risk should fall."[21]

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16 Salmond, *On Tort;* 13th ed., 23.
17 Thayer, "Liability Without Fault", (1916), 29 Harv. Law Rev. 801.
18 Seavey, "Principles of Tort," 1942, 56 Harv. Law Rev., 72.
19 *Lambert* v. *Bessey*, 88 Eng. Rep. 421.
20 *Bollinger* v. *Costa Brava Wine Co.* [1960] 1 Ch. 262.
21 Salmond, *On Tort*, 13th ed. at 24.

The proponents of this view argue that in Salmond's day the "fault" involved in tortious liability was still largely a *moral fault,* while today, our concern is almost completely with what Prosser terms "social fault"; that is to say, "the failure to live up to a standard of conduct which may be beyond the knowledge or capacity of the individual."[22] Such an interpretation, if accepted, leads naturally to the conclusion that rather than a regulator of human conduct, the real function of torts is "the adjustment of losses."[23] Holmes, J., writing before the turn of the century realized that even in his day the law was moving away from moral shortcoming to failure to meet an external and often non-moral standard as the basis for liability in tort. The reality of this view was quickly felt in the United States after the decision in *Rylands* v. *Fletcher* began to make itself felt. Following that decision, numerous statutes were introduced which made liberal use of such terms as "presumed negligence" and "constructive fraud", terms repugnant to staunch supporters of Salmond's views, who referred to them as "mere euphemisms" for "liability without fault".[24] Nathan Isaacs, writing at the time, commented:

> It may be said, for example, that where public policy shifts a loss from him on whom it falls originally, to another who is equally blameless, it may do so without imputing any fault to anyone; and that even if we go through the phraseology of imputing such fault, we are resorting to an empty fiction.[25]

By 1948, the admonitory function of the law of torts had all but disappeared. Fleming James defined the "principle job of tort law" as dealing with human losses resulting from a modern, industrialized society.[26] He disputed the validity of torts law as a deterrent to dangerous conduct because he felt society had other, more effective controls. He also urged that torts no longer be considered a mere adjunct of the criminal law. While few modern writers would go so far as to entirely reject the concept of fault, most regard it as not only frequently inadequate but as sometimes even a direct hindrance to the functioning of otherwise beneficial legislation. Such writers share the view of an earlier jurisprudent, J. B. Ames, who stated "The law is utilitarian. It exists for the realization of the reasonable needs of the community."[27]

It must be pointed out that while most American jurists would now accept such a pragmatic approach to tortious liability, the opposition to such ideas was very great when they were first introduced. Many viewed such concepts as an attempt to bring back a strict liability era which seemed out of place in the still largely laissez-faire, free-enterprise economy which existed in the United States at the turn of the century. There were those, too, who regarded these ideas as the product of an unmoral and unhistorical outlook on the law of torts and its function in American society. There were only a few progressive thinkers, such as Nathan Isaacs, who were able to appreciate this attempt to make the law more in tune with the modern world and his views are as valid today in Canada as they were in the United States then:

> A new problem faces us and we instinctively feel that a rough solution now is

22 Prosser, *The Law of Torts*, 3rd ed. at 17, 18.
23 Wright, "The Law of Torts", 26 Can. Bar Rev. 46.
24 Smith, "Surviving Fictions", 27 Yale L.J. 147 at 155.
25 Isaacs, "Fault and Liability", 31 Harv. Law Rev. 954 at 976.
26 James, "Accident Liability Reconsidered: The Impact of Liability Insurance", 57 Yale L.J. 549.
27 Ames, "Law and Morals," 22 Harv. Law Rev. 97, at 110.

> better than a deferred solution in which the ethics of the individual cases will be more nicely measured.[28]

A dispute concerning the basis of liability in tort may seem at first glance far removed from a single decision of the Exchequer Court that an injured plaintiff may not recover since no fault was established but, it is submitted, the latter is but an illustration of the former. Canada has thus far failed to recognize the doctrine of incomplete privilege largely because the concept of liability without fault is, at least in some areas of our law, as unpalatable to us now as it was to American jurists fifty years ago. However, even the most conservative among us have realized that no system of law can afford to stay rooted in the past. Our philosophy of law must be one in accord with the other standards and ideas of our society or legal principles will cease to have much influence over the Canadians of today.

The acceptance of liability without fault in American jurisprudence has made way for still newer inroads in the law of torts. One of these has been the development of the "prima facie tort" doctrine whereby an injured plaintiff may have a cause of action despite the fact that the defendant's conduct cannot be neatly pigeonholed into one of the rigid compartments of torts law so revered by Salmond.[29] It is submitted that if Canadian courts accept the American view of torts as a form of social arbitration in which moral culpability is of only minor significance, then it will follow as an almost inevitable second step that we, too, will abandon many of the rigid classifications still found in our torts law. Dean Wright has for many years spoken out in favour of this approach, just as he has urged that we revise our thinking on the role of torts in Canadian society. As he, himself, has put it: "The law is stated in terms of past conclusions—not present problems."[30]

The decision in the *Manor* case is an example of a decision of a respected Canadian court which can only be described as unrealistic and unjust. It cannot be said that the *Manor* case was an actual rejection of the doctrine of incomplete privilege in Canada since it would not seem that the defence was ever pleaded; in itself, a significant fact. However, our courts will in the near future be obliged to re-examine many torts concepts to see if they are still compatible with current ideas of justice. Some modification will undoubtedly be required and in this task, great care must be exercised for, in the words of Nathan Isaacs:

> If the moral notion that links fault with liability must, to some extent, be violated, our position must not be interpreted as the abandonment of an ideal; it is but a new recognition of a human limitation from which human law cannot be free.[31]

—(Mrs.) J. B. Dumont*

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28 Isaacs, "Fault and Liability", 31 Harv. Law Rev. 954 at 978.
29 Notes, "The Prima Facie Tort", 52 Col. L. Rev. 503.
30 Wright, "The Law of Torts", 26 Can. Bar Rev. 46.
31 Isaacs, "Fault and Liability", 31 Harv. Law Rev. 954 at 978.

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