VICARIOUS LIABILITY IN TORT*

A. EMPLOYERS, SERVANTS AND INDEPENDENT CONTRACTORS**

I. INTRODUCTION

It is difficult to imagine how it would be possible for a man to exist in a modern fashion in our fast-moving modern world if he had to do all things alone, without the aid of others. Today we take for granted the fact that, if we need something to be done, its doing is only as remote as our telephones, or the local community business center. Most of the things we do in our daily lives are done at least in part through the help of employees, or other agents.

This, of course, is especially true in the highly specialized and mechanized oil industry. No man unaided could carry out all the operations required to secure from the earth its petroleum treasures, store them, process them, and market them. He would need many agents to complete such tasks.

The convenience of having others do one's work on one's behalf, is, however, fraught with pitfalls. Among them is the possibility that the people one employs will not do the work sought to be done with all the care and attention that one would take, were one to do the job himself; that injury to third parties and their property will result; and that one may be held responsible for such injury.

In the oil industry, where values are measured not in dollars and cents, but in thousands and hundreds of thousands of dollars, such a possibility is of considerable significance. It is, in fact, one of the important considerations behind the phenomena in this highly integrated industry of the existence of free-lance or "independent" seismic and drilling contractors—the word "independent" being used in its popular sense.[1]

The purpose of this paper will be, firstly, to ascertain what factors are relevant in determining whether an employer's agent acts as a servant or as an independent contractor, and, secondly, to describe the differences in the employer's liability for each type of agent. It is hoped, by such an examination, to reach the position of being able to answer, with such degree of exactitude as the law permits, the questions: Are the typical seismic contractors, drilling contractors, and water-flooding contractors, in the typical contracts they obtain from oil operators, ser-

1 Another, and probably the governing consideration is the economic advantage, from the point of view of cost of operation and apart from vicarious or other liability for injury, of having seismic and drilling operations done by agents not permanently employed by the oil operator: Masterson, W. D., *The Legal Position of the Drilling Contractor*, First Annual Institute on Oil and Gas Law and Taxation (Southwestern Legal Foundation 1949) 183, 183-184.

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vants of the operators or are they independent contractors, and what is the liability of the operator for their acts?[2]

These two questions are, of course, related, for liability varies in accordance with the nature of the employer-employee relationship as either a master-servant relation or an employer—independent contractor relationship. To what extent it varies, as we shall see, is an extremely difficult question to answer.

II. MASTER-SERVANT RELATIONSHIP AS OPPOSED TO EMPLOYER-INDEPENDENT CONTRACTOR RELATIONSHIP

If one were to describe all persons whom one employs to do work for oneself as an agent, then such agent will be either a servant or an independent contractor.[3] Which the agent will be is often a very difficult question to answer. Clearly, where the agent is more-or-less continuously employed by one employer, possesses no professional or special technical skills and is subject to the minute control of the employer, he is a servant of the employer. On the other hand, where the person is employed to do only one job, possesses special skills, does work for other employers, and is subject to no control by the employer as to the manner of doing the work, that person cannot be said to be a servant. Even where the employment is not continuous, the agent employed may be a servant, as is indicated by the United States Supreme Court in *Standard Oil Co.* v. *Andersen:*[4]

> It sometimes happens that one wishes a certain work to be done for his benefit and neither has persons in his employ who can do it nor is willing to take such persons into his general service. If that other furnishes him with men to do the work and places them under his exclusive control in the performance of it, those men become *pro hoc vice* the servants of him to whom they are furnished. But, on the other hand, one may prefer to enter into an agreement with another that that other, for consideration, shall himself perform the work through workmen of his own selection, retaining the direction and control of them. In the first case, he to whom the workmen are furnished is responsible for the negligence in the conduct of the work, because the work is his own work and they are for the time this workmen. In the second case, he who agrees to furnish the completed work through servants over whom he retains control is responsible for their negligence in the conduct of it, because, though it is done for the ultimate benefit of the other, it is still in its doing his own work. To determine whether a given case falls within the one class or the other, we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of the work.

(a) The Control Test

The test of control referred to in the above passage is, notwithstanding certain recent cases to be referred to later on in this paper, still the primary test for determining whether an employed agent is a servant or an independent contractor. Salmond[5] refers to control as the essential

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2 It is not the purpose of this paper to discuss the difference between the principal-agent relationship and the master—servant relationship. Suffice it to say that a servant may act as his master's agent, just as may an independent contractor, and that a servant may or may not necessarily act in all cases as the agent of his master; see Powell *The Law of Agency* (2nd ed. 1961), at 9-10; and note also *Salmond on Torts* (14th ed. 1965), at 648.
Nor is it the writer's intention to discuss the liability of a principal for the acts of his agent as such. Suffice it to refer the reader to *Percy* v. *Corporation of the City of Glasgow*, [1922] 2 A.C. 399, 406, and cases cited therein; *T. G. Bright & Co.* v. *Kerr*, [1938] S.C.R. 63; and to *Katz* v. *Consolidated Motors Ltd.*, [1930] 1 W.W.R. 305 (Sask. C.A.). Neither is it the purpose of this paper to discuss the duty of a contractor not to disclose or to personally gain profit from the results of his findings made during the course of his work for his employer - - i.e., the problems dealt with in cases such as *Pre-Cam Exploration & Development Ltd.* v. *McTavish* (1965), 55 D.L.R. (2d) 69.

3 *Salmond on Torts*, 14th ed., 1965, at 648.

4 212 U.S. 215, 221.

5 *Ante*, n. 3, at 650.

mark of a contract of service—i.e., the relationship of master and servant—and the following passage from that text has often been cited as fundamental master-servant law:

> What, then, is the test of this distinction between a servant and an independent contractor? The test is the existence of a right of *control over the agent in respect of the manner in which his work is to be done.* A servant is an agent who works under the supervision and direction of his employer; an independent contractor is one who is his own master. A servant is a person engaged to obey his employer's orders from time to time; an independent contractor is a person engaged to do certain work, *but to exercise his own discretion as to the mode and time of doing it*—he is bound by his contract, but not by his employer's orders. Thus my chauffeur is my servant; and if by negligent driving he runs over someone in the street, I am responsible. But the cabman whom I engage for a particular journey is not my servant; he is not under my orders; he has made a contract with me, not that he will obey my directions, but that he will drive me to a certain place: if an accident happens by his negligence he is responsible and not I. [Italics added]

The particular sort of control envisaged in the above quotation is control, not merely of what work is to be done but also the manner of doing it.[6] Most contracts of temporary employment contain at least a few express or implied specifications as to what work is to be done. But such specifications do not amount to control over the manner of doing work, as indicated by the Saskatchewan Court of Appeal:

> What is to be done is subject, of course, to the specifications, and, to the directions of the trustees. This is no more than happens in the case of almost any building contract, where from time to time under the directions of the owner extras are ordered in addition to what the plans and specifications call for; but under such circumstances it cannot be contended that, because control is exercised over the contractors as to what work is to be done, the contractors are thereby placed in the position of servants or agents of the owner.[7]

In *Cassidy* v. *Blaine Lake Rural Telephone Co.*[8] the plaintiff by contract undertook to do all work that might become necessary from time to time in keeping the defendant's telephone system in a satisfactory state of operation, he being an expert in such matters. In some cases complaints were made to the defendants by subscribers of the plaintiff's neglect to remedy trouble occurring in the service, and on those occasions the defendants called the plaintiff's attention to the complaints and directed him to attend to the trouble. The Court held that such instructions were nothing more than "an intimation to the plaintiff that he must live up to his contract, the penalty, of course, being the defendants right to put an end to it," and were "not evidence of the relationship of master and servant."[9] In *The City of St. John* v. *Donald*[9a] Anglin, C. J. C., said, in reference to the wide powers of interference and control reserved to the city in the employment contract,

> ". . . their mere existence does not *in se suffice* to make the contractor and his workmen in carrying out the work contracted for the servants of the city. It may, as Sir Frederick Pollock says (Law of Torts, 12th Ed., p. 80-81), sometimes 'be a nice question whether a man has let out the whole of a given work to an independent contractor or reserved so much power or control as to leave him answerable for what is done." But in the absence of actual interference by the employer or his personal representative in exercise of the power thus reserved resulting in the injury for which damages are claimed—here there was none—the authorities seem to be reasonably clear that the mere reservation, to quote Smith's Law of Master and Servant, (7th Ed. p. 238), 'by contract (of) general rights of watching the progress of works which the contractor has agreed to

6 *Stuart* v. *Pennant School District*, [1927] 1 W.W.R. 949, 954, per Martin, J. A. (Sask. C.A.); *Harris* v. *Howes*, [1928] 1 W.W.R. 217, 222, per Martin, J. A. (Sask. C.A.).
7 *Stuart* case, *id.*, at 954.
8 [1933] 3 W.W.R. 641 (Sask. C.A.).
9 *Id.*, at 647.
9a [1926] S.C.R. 371.

carry out for him, of deciding as to the quality of the materials and workmanship, of stopping the works or any part thereof at any stage, and of dismissing disobedient or incompetent workmen employed by the contractor will not of necessity render (the employer) liable to third persons for the negligence of the contractor in carrying out the works.'[9b]

This passage should not, if it can be avoided, be construed as suggesting that the actual exercise of control by the employer, and not his right to control, is the important criteria. As was said by Lord Porter in *Mersey Docks and Harbour Board* v. *Coggins and Griffith (Liverpool) Ltd.*, "the ultimate question is not what specific orders, or whether any specific orders, were given but who is entitled to give the orders as to how the work should be done."[9c] The American authorities would seem also to state clearly that the relevant fact is not to actual exercise of control, but the right to exercise control; not in the actions of the parties subsequent to the contract, but in the relationship to be found in the contract.[9d] Suffice it to say, on the basis of all the above cases, that mere control over matters not involving control over the manner of doing work is not indicative of a master-servant relationship; and that is true notwithstanding the fact that control over such other matters is quite extensive.

The cases on commission salesmen present a good example of the operation of the control test. In such cases, the person employed is paid, not by wages, but by commission on sales. He is usually quite free to work as and when he pleases, and need not appear with any regularity at his employer's place of business. His employer usually does not have the right to say what he should do from day to day, nor how it should be done. Yet, he is often employed by only a single employer, and his work is usually quite continuous, and he is usually subject to some control as to the manner of completing his sale contracts. The Courts have held him to be an independent contractor.[10]

Nowhere has the control test faced more criticism than in cases of employment of professional men. A professional man, being a man of highly developed skill is seldom in any substantial respects controlled by his employer as to the manner of doing his work. Yet, such an employee must in some instances be more than a mere independent contractor. This problem has been most often wrestled with in hospital cases—i.e., cases in which a patient in the care of a hospital is injured by the negligence of a nurse, doctor, anaesthetist, or radiologist.

In *Hillyer* v. *St. Bartholomew's Hospital*[11] the plaintiff was injured while gratuitously under the care of a consulting surgeon attached to the defendant hospital's staff. He sued the hospital for damages, and the hospital pleaded that the injury was caused by an independent contractor. The Court of Appeal held that generally a hospital was not responsible for the negligence of its professional staff in matters in-

9b *Id.*, at 381.

9c [1947] A.C. 1, 17.

9d See Masterson, W. D. *The Legal Position of the Drilling Contractor*, First Annual Institute on Oil and Gas Law and Taxation, Southwestern Legal Foundation (1949) 183, at 188-189 where he refers to *Lone Star Gas Co.* v. *Kelly*, 46 S.W. (2d) 656, (Tex. Com. App. 1932); 27 *Am. Juris*, 488 and cases cited in note No. 9 thereof.

10 *Carter* v. *Bell*, [1936] 2 D.L.R. (Ont. C.A.); *Clarke* v. *Clear and May Company Limited*, (1959), 28 W.W.R. (N.S.) 673 (Sask. Dist. Ct.).
On the other hand, see *Re Western Coal Co.* (1913), 4 W.W.R. 1238, where teamsters employed to haul coal from a company's mine at a certain sum per ton, who used their own wagons and horses, were under no obligation to haul any specific quantity, and who could stop work or be discharged at any time, were held to be servants.

11 [1909] 2 K.B. 820.

volving professional care and skill as distinct from purely administrative matters. Farwell, L. J. stated:

> It is impossible to contend that Mr. Lockwood, the surgeon, or the acting assistant surgeon, or the acting house surgeon, or the administrator of anaesthetics, or any of them, were servants in the proper sense of the word; they are all professional men, employed by the defendants, to exercise their profession to the best of their abilities according to their own discretion; but in exercising it they are in no way under the orders or bound to obey the directions of the defendants.

In *Gold* v. *Essex C.C.*,[12] however, the Court of Appeal reversed its opinion, and held that it is not true that a hospital could never be responsible for the negligence of its professional staff in matters involving professional skill and care. In that case the plaintiff was injured by the negligent act of a radiologist in the giving of treatment for facial warts. The hospital was held liable for such negligence. Lord Greene, M. R., indicated that a consulting or visiting surgeon would clearly not be a servant of the hospital; whereas a nurse on permanent staff would be. He expressed no opinion on the position of a house surgeon. In *Cassidy* v. *Minister of Health*,[13] the Court of Appeal went further and held that house surgeons and resident medical officers on the hospital's permanent staff would also be servants for whose negligent acts, done in the course of employment, the hospital would be liable. Denning, L. J., there said:

> It is no answer for them [the hospital authorities] to say that their staff are professional men and women who do not tolerate any interference by their lay masters in the way they do their work. The doctor who treats a patient in the Walton Hospital can say equally with the ship's captain who sails his ship from Liverpool, and with the crane driver who works his crane in the docks, 'I take no orders from anybody.' That 'sturdy answer,' as Lord Simonds described it, only means in each case that he is a skilled man who knows his work and will carry it out in his own way; but it does not mean that the authorities who employ him are not liable for his negligence. See *Mersey Docks and Harbour* v. *Coggins and Griffith (Liverpool) Ltd.*, [1947] A. C. 1, 20. The reason why the employers are liable in such cases is not because they can control the way in which the work is done—they often have not sufficient knowledge to do so—but because they employ the staff and have chosen them for the task and have in their hands the ultimate power of dismissal.

However, the learned Lord Justice's opinion on the question of the relationship between a hospital and medical men or its permanent staff is entirely obiter. It was held that the hospital had a contractual duty to provide proper treatment of the patient, and that where there is failure to perform such a duty it is no excuse to plead that it was given over to an independent contractor for performance.[14] This rule is well-recognized in our law, and will be discussed more fully later in this paper; but it made unnecessary in the *Cassidy* case the decision that staff doctors are servants. Certainly, the mere fact that the hospital has the power of dismissal is not of itself enough to render a person a servant.[15]

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12 [1942] 2 K.B. 293.

13 [1951] 2 K.B. 343.

14 Salmond, *ante*, n. 3, at 653 points out that under the National Health Service Act, 1946, a hospital has a statutory duty to provide treatment "and not merely to make arrangements for treatment by and at the sole risk of independent specialist contractors."

15 See *Tully* v. *Genbey*, [1939] 1 W.W.R. 161.
The power of dismissal is a factor tending to indicate the relationship of master-servant (see *ante*); but, surely, where there is no control over the manner of doing of work the mere fact of a power of dismissal is not enough to render the person employed a servant. Lord Simonds in the *Mersey Docks case*, [1947] A.C. 1, 17, referred to the power of dismissal, but he did so in terms of it being a "sanction" by means of which the employer may exercise his control over how the work should be done.

The conclusion reached by Denning, L. J., is probably nonetheless correct in result. The facts of employment by the hospital, payment by the hospital of salary, provision of equipment by the hospital, the continuing nature of the employment, all combined with the power of dismissal by the hospital are enough to permit the finding that a house surgeon or resident doctor is a servant of the hospital that employs him. At most, on the question of what makes an employee an independent contractor, the *Cassidy* case can be said to be authority for the proposition that the absence of control by the employer over the manner in which work is done is not conclusive—other circumstances may nonetheless cause the employed person to be characterized as a servant.

That control is no longer the test that governs all cases has been declared by the Privy Council in *Montreal* v. *Montreal Locomotive Works Limited*,[16] and by the Alberta Appellate Division in *Canadian Utilities Limited* v. *Mannix Limited*.[17] In the former case, the Board said:

> In earlier cases a single test, such as the presence or absence of control, was often relied on to determine whether the case was one of master and servant, mostly in order to decide issues of tortious liability on the part of the master or superior. In the more complex conditions of modern industry, more complicated tests have often to be applied. It has been suggested that a fourfold test would in some cases be more appropriate, a complex involving (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss. Control in itself is not always conclusive. Thus the master of a chartered vessel is generally the employee of the shipowner though the charterer can direct the employment of the vessel. Again the law often limits the employer's right to interfere with the employee's conduct, as also do trade-union regulations. In many cases the question can only be settled by examining the whole of the various elements which constitute the relationship between the parties.[18]

In *Marine Pipeline & Dredging Ltd.* v. *Canadian Fina Oil Ltd.* the Alberta Appellate Division indicated that it was aware "that the test of superintendence or control may require to be modified in relation to employees who are members of certain professions and skilled trades,"[19] but held that in that particular case that test need not be modified. It held that persons hired to inspect pipeline welding were independent contractors, because although the employer "could tell the inspectors where to inspect, when to inspect, what to inspect, to whom they were to deliver their reports of inspection, how often the reports would be made," there was no evidence that the employer "had authority to direct or control the inspectors as to how the inspections were to be made."[20] In view of this case, and other recent cases in which the control test has been applied, the control test is probably still the single most important test for ascertaining the nature of the employer-employee relationship. In cases of employment of professional and other highly skilled persons that test may give way to an accumulation of other circumstances pointing towards a master-servant relationship;[21] but control, or the absence of it, over the manner in which work is done remains nonetheless a significant circumstance.[21a]

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16 [1946] 3 W.W.R. 748.

17 (1959), 29 W.W.R. (N.S.) 289. The only significance of this case, so far as the present discussion is concerned, is that it cites the hospital cases as indicative of the trend away from the use of the control test as a test that can be applied in all cases singularly.

18 *Ante*, n. 16, at 756-757.

19 (1964), 48 W.W.R. 462, 470.

20 *Id.*, at 474.

21 As the *Cassidy* case, *ante*, n. 13, shows.

21a See *Bain* v. *Central Vermont Ry.*, [1921] 3 W.W.R. 44, 48.

(b) Other Relevant Circumstances

We have already seen in the *Cassidy* case that circumstances other than control can have considerable bearing on the nature of the relationship. In that case the Court of Appeal stressed the right of dismissal. A person who employs an independent contractor to do work for him does not as a rule have the right to summarily dismiss him; he is bound by his contract as much as is the contractor he employs. Where A is in the general employ of B (for example, the case of a taxi-cab driver who is employed by taxi-cab company for hire to the public at large) C, who employs A for a temporary and particular purpose cannot be said to have the power to dismiss A.[22] A is, *quoad* C, an independent contractor. The right to dismiss or suspend the person employed is one of the four criteria given by the House of Lords in *Short v. Henderson.*[23]

The Montreal case, discussed above, indicates the existence of three other criteria: (1) ownership of the tools, (2) chance of profit, and (3) risk of loss. The first of these can be a very important consideration, especially in the oil industry, and has been considered such in many cases.[24] It is not necessary that an employer, to be a master, own the equipment and supplies necessary to do the work undertaken, but his lack of ownership does tend to show that the person he employs is an independent contractor.[25]

Where a party is employed on the basis of a bid on a particular job, so that he in effect must make his profit by doing the job for less than his bid price or else suffer loss, he is apt to be characterized as an independent contractor. Building contractors and sub-contractors are prime examples of such cases. Of course, the mere fact that the person employed is paid by the hour is no bar to finding that he is an independent contractor.[26] The use of the word "salary" or the word "wages" in in describing a person's remuneration has no legal significance.[27] In the normal case, however, "a servant is paid wages or salary at definite periods, or on a basis of definite periods or items of specific work done by him. Thus, he will be paid per hour, per day, per month, or per pair of trousers, per door fitted, etc."[28] An independent contractor, on the other hand, is usually paid on the basis of a completed job, or on a commission basis. Another relevant question is, who pays the person employed? If he is paid by his general employer (e.g., a crane operator by the crane owners), and not by his immediate but temporary employer, he is more likely to be an independent contractor.[29]

A further criteria, which is perhaps part and parcel of the control test, is the nature of the task undertaken and the degree of skill required to perform it.[30] A person who brings highly specialized skill (and usually equipment as well) to a task is more likely to be found to be an independent contractor than is a person who brings to a task only his

22 *Tully* v. *Genbey*, [1939] 1 W.W.R. 161, 169 (Man. C.A.).
23 (1946), 174 L.T. 417; 115 L.J.P.C. 41.
24 *E.g.*, in *Tully* v. *Genbey*, *ante*, n. 22, the Court made reference to the fact that the person employed there supplied his own car and gasoline.
25 *Russell* v. *Seeley*, [1939] 1 D.L.R. 60 (N.B. App. Div.).
26 *Ibid.*
27 See Powell, *ante*, n. 2, at 19, where he refers to *Performing Right Society Ltd.* v. *Mitchell & Booker (Palaise de Danse) Ltd.*, [1924] 1 K.B. 762, 766, per McCardie, J.
28 See Powell, *id.*, at 19.
29 *Gemco Equipment Limited* v. *Weston* (1965), 54 W.W.R. 513; *Bain* v. *Central Vermont Ry.*, [1921] 3 W.W.R. 44, 48.
30 *Ibid.*

strong back and hands. However, as the hospital cases cited above make clear, the degree of skill required can by no means be a conclusive test. Indeed, like all the criteria other than (possibly) control, it must be combined with other circumstances all pointing to one conclusion.

The length of employment can be a useful circumstance to note. In the majority of master-servant cases an employee is employed on a substantially continual basis; whereas an independent contractor in the typical case is employed to do only a particular job.

Closely related to the length of employment is the criteria of the number of persons a party works for. A cab driver works for many people; whereas a chauffeur usually works for only one party; and Salmond has already shown the distinction between such persons.[31] If the person employed of his own accord hires others to assist him in the work undertaken by him on behalf of a primary employer, without that primary employer's interference with such employment, then such person is more apt to be found to be an independent contractor.[32]

Finally, there is the criteria of the master's power of selection of his servant, a criteria stated by Lord Thankerton in *Short* v. *Henderson*[33] to be one of the four *indicia* of a contract of service.[34]

Of course, as Lord Thankerton indicated in that case,[35] a contract of service may still exist notwithstanding the absence of any of the four indicia he described, or any others for that matter. Indeed, each of the four indicia he describes are, to his admission, affected by statutory provisions and rules restricting the choice of employees and limiting the right of dismissal. The existence of the relationship of master and servant must in each case depend upon the net result of all the indicia in the circumstances of the case.

It should at this point be mentioned that The Supreme Court of Canada has made it clear that the existence of indemnity provisions between the employer and the contractor cannot affect either the question of whether the contractor is a servant or an independent contractor or the question of the liability of the employer to third parties.[36]

(c) *Servant With Two Masters*

It is possible for a servant to have two or more masters at the same time with respect to different employments. A master may lend or hire his servant to another person for a certain undertaking so that *quoad* that employment he becomes the servant of the person to whom he is lent or hired, though for other purposes he remains the servant of the lender.[37] Whose servant the employee is in such circumstances is a question of fact. As indicated in the *Mersey Docks case*,[38] the general rule is that the employee remains the servant of his general or permanent employer. Indeed, there is a heavy onus on the general employer to shift his *prima facie* responsibility for the wrongful acts of servants employed and paid by him to the hirer who for the time being has the ad-

31 *Ante*, n. 5.
32 *Re Dominion Shipbuilding and Repair Co.* (1921), 70 D.L.R. 869.
33 (1946), 174 L.T. 417.
34 The other three were (a) the payment of wages or other remuneration, (b) the master's right to control the method of doing the work, and (c) the master's right of suspension or dismissal.
35 *Ante*, n. 33, at 421.
36 *Algoma Steel Corp.* v. *Dube*, [1916] S.C.R. 481, 498.
37 Salmond, *ante*, n. 3, at 654-655; *Consolidated Plate Glass Co.* v. *Caston* (1899), 29 S.C.R. 624.
38 [1947] A.C. 1.

vantage of the particular service rendered. Whose servant the employee is at a particular time will usually be answered by asking who has the right to control the way in which the work is done.[39]

In the *Mersey Docks* case the hirer had control over the task to be performed but not over the way in which it was to be done. In the *Consolidated Glass Co.* case the test applied was as follows: "Could the hirer have himself taken absolute control of the vehicle, horse and harness, taking it altogether out of the possession of the driver?" The Court concluded that the general master alone could have done that and that therefore the employee in that case was the servant of the general employer notwithstanding his services being for the immediate benefit of the hirer. The test of control would seem to be decisive still in cases in which a servant has more than one master.[40]

(d) Servants and Independent Contractors in the Petroleum Industry

The basic rules with respect to the distinction between servants and independent contractors having been described, a look may now be had at the typical seismic and drilling contractor's arrangements with oil operators to permit the characterization of such contractors. In this examination the writer is particularly indebted to an article written for the First Annual Institute on Oil and Gas Law and Taxation (Southwestern Legal Foundation) in 1949 by W. D. Masterson.[41]

It is the understanding of the writer[42] that the usual contractual arrangement for the carrying out of seismic, drilling and water flooding operations in Alberta involves the employment by oil operators of "independent" (at least in the popular sense of that word) contractors who work on a contract basis, supplying their own equipment and labour, and who offer their services to whatever operator may desire them largely by bidding on work contracts; that in all of those operations a considerable degree of specialized skill is required by the contractors; that the hiring and firing of employees for the purposes of those operations is in the hands of the contractors; and that the oil operators have little real control over the manner in which those operations are carried on, although they do keep their own engineers on the job to be certain, in drilling contracts, that the contract is performed according to specifications[43] and to check drill cores. In short, it is the writer's understanding that seismic, drilling and water flooding contracts are completed in

39 See, besides the *Mersey Docks* case: *A. H. Bull & Co.* v. *West African Shipping Agency*, [1937] 3 W.W.R. 87; [1927] A.C. 686; *Societe Maritime Francaise* v. *Shanghai Dock and Engineering Co.*, [1921] A.C. 417; *Muranyi* v. *Vallance Coal & Cartage Co.*, [1932] 1 W.W.R. 182 (Sask. C.A.); *Achdus Free Loan Society* v. *Shatsky*, (1955), 14 W.W.R. 481, 484, per Friedman, J., (as he then was); *Bain* v. *Central Vermont Railway Co.*, [1921] 3 W.W.R. 44 (P.C.); *Harrison* v. *Toronto Motor Car Ltd.*, [1945] 1 D.L.R. 286, 288-289.

40 The writer refers the reader to further discussion of the two-masters situation by Salmond, 656-657 and the cases cited in support thereof:

> The hirer may, of course, intervene to give a specific order which is in fact obeyed by the workman, and if damage then results he will in general be liable as a joint tortfeasor with the workman but this is not by reason of any relationship of master and servant. Nor is it conclusive that (again as in the *Mersey Docks* case) the two employers have made a contract stating whose servant the employee is to be on the particular occasion; servants cannot be transferred from one service to another without their consent. Such a consent may determine the liability of the employers *inter se* but it has only an indirect bearing on the question which of them is to be regarded as master of the workman on a particular occasion. But it may be easier to assume a transfer of employment when the plaintiff is not a third party, but the workman himself, who is claiming that he has been injured by reason of the hirer's failure to fulfill some duty owed by an employer to his servants—*e.g.* the duty to provide a safe system of work.

41 The article, at 183, is entitled *The Legal Position of the Drilling Contractor.*

42 Based by no means on any extensive experience in or familiarity with the petroleum industry, and certainly open to correction.

43 *E.g.*, to ensure that the drill is straight and that drilling mud is used properly.

the normal case by agents in circumstances that, on the application of all the foregoing tests for the existence of the employer-independent contractor relationship, can only yield the conclusion that the persons usually employed to carry out those undertakings act as independent contractors.

Unfortunately the writer has not found any Canadian cases that directly support this conclusion. There are, however, a number of American cases that do justify it. In *Traders* v. *General Insurance Co.*[44] one A. N. Edwards had made an oral contract with one H. E. Turpin to drill and complete a well. The contract was what is known as a contract for day work on rig-time work. Turpin was to perform the operation of drilling into the pay sand. He was to be paid at the rate of $8.50 per hour. He furnished his own rig, employees and supervision. During those operations, the rig was damaged by fire. Turpin sued Edwards and the A. N. Edwards Construction Company alleging that their negligence caused the damage to the rig. Edwards demanded that his insurers defend the action and hold him free from liability. When the insurers refused, Edwards commenced action. The insurer's defence was that there was no liability under the policy for damages to property "owned, occupied or used by or rented to the insured." The trial judge held that Turpin was an independent contractor and that he and his employees were not under the supervision and control and were not subject to the direction of Edwards in the performance of the work. Huxman, Circuit Judge, applied the "control" test to the case and concluded as follows, affirming the trial judge:

> All the testimony is that neither Edwards nor his agents had any authority to direct the drilling operations. They could not tell Turpin's employees when to start, how to operate the equipment, or exercise any other direction or control over the manner in which the work was to be done. They did have the right to observe the drilling operations, tell the employees when to stop for the purpose of testing the formation and could determine when drilling operations should cease, but this was all. This falls short of exercising such supervision and control over the operations so as to place the equipment under the control of Edwards and make the workmen his agents and employees.

The judgment was a clear application of the correct control test which, in view of the statements made in cases such as *St. John* v. *Donald*,[45] as to control over matters not directly concerned with the manner of doing the work, would have good application under general Canadian law. If the result of the control test itself were not ground enough to reach the same result in a similar case in Alberta, then the additional facts of the supply by the drilling contractor of his own equipment and labour and of the nature of the employment as a particular and temporary one, together with the specialized nature of the task undertaken, would, together with the control indicia, necessitate the reaching of that result.

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[44] (1954), 216 F. (2d) 441, (U.S.C.A. 10th cir.).

[45] *Ante*, n. 9a. On this question of the nature of the control, the American authorities seem to be substantially the same as our own. As Masterson indicates in his article, *ante*, n. 41, at 186:

> Practically every drilling contract provides for inspection of the work as it progresses by the operator. A right to inspect without any right to control does not destroy or affect in any way the status of an independent contractor, and this is true whether the right to inspect accrues after the work is completed, or whether the right is to inspect as the work progresses. This rule is well stated in *American Jurisprudence* as follows: 'The mere retention by the owner of the right to inspect work for an independent contractor as it progresses, for the purpose of determining whether it is completed according to plans and specifications does not operate to create the relation of master and servant between the owner and those engaged in the work. This rule is not altered by the fact, that the employer may stop work which is not properly done.' [*Ark. Nat. Gas Co.* v. *Miller*, 105 Ark. 477; 152 SW 147; 27 *Am. Juris* 490 (Citing numerous cases), Annot. 20 A.L.R. 709].

In *Nance Exploration Co.* v. *Texas Employers' Insurance Assoc.*,[46] D. A. Peachee Drilling Company entered into a contract with Nance Exploration Company to drill shot-holes for Nance. Nance had been engaged by an oil and gas lessee to do seismograph work. One of Peachee's employees was injured on the job. It was held, *inter alia*, that the seismic company, Nance, and the drilling company, Peachee, were both independent contractors.

In *Pair* v. *Caraway Drilling Co.*[47] a drilling contractor was again held to be an independent contractor. The contract of employment in that case provided for payment of a certain sum per drilled foot, the drilling contractor to furnish all labour, material and equipment and to pay all bills, to drill a well with a rotary and to drill a straight hole acceptable to the operator, to permit the operator to be about the well at all times and to have access to all reports, records and logs. The drilling contractor also agreed to furnish all insurance and to indemnify the landowners against all claims for damages for performance of the contract. The landowner agreed to furnish all cement and all of the expense in cementing the oil string, a road to the well, and a slush pit.

Page v. *Hardy* is a useful case inasmuch as it gives several tests for the determination of the nature of the relationship between the employer and the person he employs. In that case, Corn, Vice C. J., referred at length to the control test, and stated that every case must be determined on the basis of all its circumstances. He went on to say that,

> The various elements to be considered are (a) the nature of the contract between the parties, whether written or oral; (b) the degree of control which by the agreement, the employer may exercise on the details of the work or the independence enjoyed by the contractor or agent; (c) whether or not the one employed is engaged in a distinct occupation or business and whether he carries on such occupation or business for others; (d) the kind of occupation with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (e) the skill required in the particular occupation; (f) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (g) the length of time for which the person is employed; (h) the method of payment, whether by the time or by the job; (i) whether or not the work is a part of the regular business of the employer; (j) whether or not the parties believe they are creating the relationship of master and servant; and (k) the right of either to terminate the relationship without liability.[48]

In that case an oil operator's servant was injured due to the negligence of another party employed by the contractor. The issue was whether the negligent party was an employee of the operator or an independent contractor. The other party was a welder who carried on a general welding service using his own tools and equipment. The welder was employed to do welding on a separator located on the operator's lease. The welder alleged that he was a co-employee of the plaintiff and that therefore the plaintiff's sole remedy was against their employers, the operator, under the Workmen's Compensation Act. The learned Justice reviewed the evidence as follows:

> Testing the evidence in the light of the foregoing elements to be considered, Hardy (the welder) was orally employed to do a welding job on a separator located on the Lindquist-Anderson lease. He was given the specifications for the job and the result required, and the time and place to do such job. Hardy carried on his separate business doing welding jobs for anyone. Welding is the work of a specialist for which Hardy was trained. He furnished his own

46 305 S.W. (2d) 621, (1957 Texas Ct. of Civ. App.).
47 250 S.W. (2d) 292, (1952 Texas Ct. of Civ. App.).
48 334 P. (2d) 782, 784, (1958 Okla. S.C.).

> instrumentalities and tools, but he did the work at the lease where the separator was located. He was hired to weld the separator and lower the connections for the water siphon thereon. He was paid at the rate of $5.00 per hour for time required to do the job. No deduction was made for withholding and social security. The separator was used in Lundquist & Anderson's business. It had to be in repair to be used. Welding was not part of their regular business. Hardy testified that he was told by the foreman the work to do and indicated that he was an employer.[48a]

There was a difference in testimony as to the degree of control that the employers had over Hardy. The Court, in view of that and of all the circumstances above described, felt that the case was sufficiently borderline to be put to the jury. The value of the case for our purposes is, firstly, its description of several indicia of the nature of an employment relationship; and, secondly, its indication that an hourly-paid tradesman who furnished his own tools and equipment to do a job on an oil operator's premises could, if control were not exercised by the operator over the manner of doing his work, be an independent contractor.

It should be remembered that a contract may create the status of independent contractor as to one aspect of the work and fail to do so as to another aspect. It is the writer's understanding[49] that a drilling contract, for example often provides for stand-by periods, during which the operator either directly or through another contractor tests or does specialized work, as, for example, making a drill stem test, or a Schlumberger test. Whether a drilling contractor would become a servant during such portions of his work would depend upon the circumstances, especially upon the amount of control that the operator exercises over the manner that the contractor does his work. In *Standard Insurance Co.* v. *McKee*[50] a drilling contract vested complete control in the independent contractor until the pay zone was reached, whereupon control shifted to the operator for the purpose of completing the well. The contractor, while assisting in completion of the well, was injured. He claimed workmen's compensation on the theory that at the time of his injury he was the operator's employee. His claim was upheld. The Texas Supreme Court said:

> The judgment rendered on the jury's finding that the respondent was not an independent contractor when he was injured does not mean, as petitioner argues, that the contract for drilling the well terminated when the day work stage of operations began after the well had been drilled to the lime. Both the letter and the oral testimony prove that the respondent was employed to drill and finish the well. The effect of the jury's finding is that the contract as evidenced by the letter and the oral testimony made respondent an independent contractor as to one part of the work under the contract and an employee as to the other part. One may entrust work to an independent contractor and retain such control over the doing of a part of the work as to create the relation of master and servant insofar as that part of the work is concerned.

The above-stated proposition is not inconsistent with Canadian law, and in the absence of our own authorities, the above case can be useful in the resolution of similar problems if and when they arise in Alberta.

To sum up, then, on the matter of the relationship between an oil operator and a seismic contractor or a drilling contractor (and presumably also a contractor who is employed to conduct water flooding operations), it is probably fair to conclude that in the normal situation the contractor works as an independent contractor rather than a servant of the oil operator, save perhaps in relation to work done during stand-by

48a *Id.*, at 785.
49 From Masterson's article, *ante*, n. 41, at 187.
50 205 S.W. (2d) 362, (1947 Tex. S.C.).

periods. In any given problem, of course, the relationship must be determined by the application of all the above-mentioned tests, especially the control test.

III. *LIABILITY*

Once it is ascertained what is the relationship between an employer and the person he hires, there arises the question that is the cause of the whole search for the nature of the relationship—the employer's liability for the wrongful acts of the person employed. In dealing with this subject, the writer intends to discuss rather generally and with reference primarily to text authority the question of the liability of a master for the acts of his servants. Whole texts have been written on that subject, and there is little to be gained in attempting in this paper to take a lengthy jaunt into that area. The liability of an employer for the acts of an independent contractor will, however, bear a closer look.

(a) *Liability of a Master for the Acts of His Servants*

It is accepted law that the true basis of a master's liability for the wrongful acts of his servant is that stated by Lord Brougham in *Duncan* v. *Finlath*:[51]

> The reason I am liable is this, that by employing him I set the whole thing in motion; and what he does, being done for my benefit and under my direction, I am responsible for the consequences of doing it.

(As Salmond[52] put it, "vicarious liability is based in 'social convenience and rough justice.") The explanation of the doctrine given by Lord Brougham must be qualified. First of all, a master may be liable even though the act or default is not for his own benefit,[53] and even though he has expressly forbidden it.[54] Secondly, it may be that the master's right to control is merely a criterion of the existence of the relationship which gives rise to vicarious liability, and not in itself a justification of that liability.[55] Finally, it is probably true that the courts in laying down vicarious liability rules have been much influenced by the facts that the master is usually more able than the servant to satisfy claims by injured persons and to pass on the burden of liability by way of insurance, and that the imposition of strict liability on the master tends to cause the master to take greater care and thereby prevents accidents.[56]

(i) *Master's liability to his own servants.*

The common law has always held that a master is under an obligation to take reasonable care for his servant's safety. The nature of that duty is described by Lord Herschell in *Smith* v. *Charles Baker & Sons*:[57]

> It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk.

The master is liable for his own breach of that personal duty and for the breach thereof by a servant to whom the master delegates its

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51 (1839), 6 Cl. & F. 894, 910; 7 E.R. 934, 940.
52 *Salmond on Torts* (14th ed. 1965), at 644, quoting from *I.C.I Ltd.* v. *Shatwell*, [1964] 3 W.L.R. 329, 348, per Lord Pearce.
53 *Lloyd* v. *Grace, Smith & Co.*, [1912] A.C. 716; 81 L.J.K.B. 1140.
54 *Ante*, n. 52, at 662-663.
55 *Id.*, at 644-645 and at 647. The basis is control of and the right of selection of servants at least in Quebec law: See *Curley* v. *Latreille* (1919), 60 S.C.R. 131, 152-154.
56 *Id.*, at 645.
57 [1891] A.C. 325, 362.
58 We shall see, post, that this duty cannot be delegated and that an employer is responsible for breaches thereof even though he has employed an independent contractor to perform them.

performance.[58] This duty is customarily expounded under the threefold heading of the provision of a competent staff of men, adequate material, and a proper system of work; but it remains nonetheless a singular duty to take reasonable care having three different facets.[59] For a more complete discussion of this duty and responsibility therefor, the reader is referred to Salmond On Torts (14th Ed. 1965) at pages 672 to 680 and to Munkman's *Employer's Liability at Common Law* (5th Ed. 1962, Butterworths, London).

(ii) *Master's liability to third parties for his servant's acts and defaults.*

The most common instance of a master's liability to third parties for the acts and defaults of his servants is vicarious liability under the maxim of *respondeat superior*. The basis of such liability, namely, that it is the master who places the servant into action, has already been indicated above. Of course, a master is responsible for acts actually authorized by him, whether expressly or impliedly; for liability would exist in such cases if the relation were one between a principal and an agent who is not a servant.[60] However, as Salmond indicates,

> . . . a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorized, provided they are so connected with acts which he has authorized that they may rightly be regarded as modes—although improper modes—of doing them. In other words, a master is responsible not merely for what the he authorizes his servant to do, but also for the way in which he does it. If a servant does negligently that which he was authorized to do carefully, or if he does fraudulently that which he was authorized to do correctly, his master will answer for that negligence, fraud or mistake.[61]
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> On the other hand, if the unauthorized and wrongful act of the servant is not so connected with the authorized act as to be a mode of doing it, but is an independent act, the master is not responsible: for in such case the servant is not acting in the course of his employment, but has gone outside it. He can no longer be said to be doing, although in a wrong and unauthorized way, what he was authorized to do, he is doing what he was not authorized to do at all.[62]

Another oft-quoted and general discussion of the liability of a master for the wrongs of his servant done in the course of the servant's employment is that of Lord Phillimore in *Lee Kim Soo* v. *Goh Choon Seng*:[63]

> As regards all the cases which were brought to their Lordships' notice in the course of the argument this observation may be made. They fall under one of three heads: (1) The servant was using his master's horses, vehicles, machinery or tools for his own purposes; then the master is not responsible. Cases which fall under this head are easy to discover upon analysis. There is more difficulty in separating cases under heads (2) and (3). Under head (2) are to be ranged the cases where the servant is employed only to do a particular work or a particular class of work, and he does something out of the scope of his employment. Again, the master is not responsible for any mischief which he may do to a third party. Under head (3) come cases like the present, where the servant is doing some work which he is appointed to do, but does it in a way which his master has not authorized and would not have authorized had he known of it. In these cases the master is, nevertheless, responsible.[64]

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59 *Ante*, n. 52, at 674.

60 *Ante*, n. 52, at 658; see also *Canadian Performing Right Society Limited* v. *Ming Yee*, [1943] 3 W.W.R. 268. Responsibility for such acts is not vicarious liability, but, rather, is direct liability; the acts of the agent are not his own, but are, rather, the acts of his principal.

61 *Id.*, at 658. This rule as described by Salmond was approved by the Privy Council in *Lockhart* v. *C.P.R.*, [1942] 3 W.W.R. 149, 157.

62 *Id.*, at 658-659. This passage was quoted by Kerwin, J., in the Supreme Court of Canada in the *Lockhart* case, [1941] S.C.R. 278, 299; [1941] 2 D.L.R. 609, 636.

63 [1925] 2 W.W.R. 439; 94 L.J. P.C. 129, 157.

64 This passage was quoted with approval by the Alberta Appellate Division in *Bickman* v. *Smith Motors* (1955), 16 W.W.R., 606, 611. The latter case is also worthy of note in relation to the present discussion insofar as it indicates that a master's liability for his servants may be widened by contract, either expressly or by implication, as in the case of a bailment contract.

Having referred to the general rules as to vicarious liability on the *respondeat superior* maxim, the writer leaves it for the reader to wade into the vast quagmire of cases applying the rules to various factual situations. Suffice it to say that whether a servant's act is done in the course of his employment is often an extremely difficult question to answer.[65] Finally, it should be noted that a master may be rendered liable even for the fraudulent acts[66] and probably even criminal acts[67] of his servant committed in the course of his employment.[68]

(b) *Liability of Employers for Acts and Defaults of Independent Contractors*

(i) *General Rule.*

The stating of a single general rule as to the liability of an employer for the acts of an independent contractor is a difficult task, for there are several modes of stating the rule to be found in the authorities. Salmond states the general rule to be "that although an employer is responsible for the negligence and other wrongdoing of his servants, he is not responsible for that of an agent who is not a servant but an independent contractor.[69] That statement of the general rule finds some support in the Canadian cases, particularly some of the more recent ones.[70] Anglin, C. J. C., states the general rule a little differently in *The City of St. John* v. *Donald*:

> . . . it is, no doubt, the general rule that the person who employs an independent contractor to do work in itself lawful and not of a nature likely to involve injurious consequences to others is not responsible for the results of negligence of the contractor or his servants in performing it.[71]

A third, also oft-quoted, but somewhat different statement of the general rule is that given by Lord Blackburn in *Dalton* v. *Angus*:[72]

> Ever since *Quarman* v. *Burnett*[73] it has been considered settled law that one employing another is not liable for his collateral negligence unless the relation of master and servant existed between them. *So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants.* On the other hand, a person causing something to be done, the doing

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65 For further general discussion of the rules to be applied see *Consolidated Mining & Smelting Co.* v. *Murdock*, [1929] S.C.R. 141; *Curly* v. *Latreille* (1919), 60 S.C.R. 131; *W.W. Sales Ltd.* v. *Edmonton*, [1942] S.C.R. 296; *Twerdochlib* v. *Hanns*, [1935] 1 W.W.R. 533 (Alta. App. Div.); *Griggs* v. *Southside Hotel Co.*, [1947] 4 D.L.R. 49 (Ont. C.A.).

66 *Mackay* v. *Commercial Bank* (1874), 43 L.J. P.C. 31; *McCrindle* v. *London Scottish Canadian Investment Syndicate*, [1922] 3 W.W.R. 977 (Alta. C.A.). See also *Lloyd* v. *Grace, Smith & Co.*, *ante*, n. 53, which holds this to be true even though the fraudulent act is not done for the master's benefit; but see also the limitation placed upon the *Lloyd* case by the Alberta Appellate Division in *Bickman* v. *Smith Motors* (1955), 16 W.W.R. (N.S.) 606, 612.

67 *Derby* v. *Ellison* (1912), 2 W.W.R. 99 (B.C. C.A.).

68 A master may in some instances be liable under penal laws for the acts and defaults of his servants, when those acts are done with the knowledge and approbation of the master and in the course of the servant's employment: see 15, C.E.D. (Western), at 220-221 and cases cited therein. And, of course, a master who authorizes expressly or impliedly, procures, or participates in the torts or other wrongs of his servant is liable as a joint tort-feasor: see Salmond, *ante*, n. 52, at 641. Finally, where the acts of a servant are within his ostensible authority and are done in the master's interest, the master is responsible therefor: see Salmond at 661-662. All of these matters are left out of the discussion in this paper in order to bring the scope of the discussion within reasonably narrow limits.

69 *Ante*, n. 52, at 685-868.

70 *Achdus Free Loan Society* v. *Shatsky* (1955), 14 W.W.R. (N.S.) 481, 486, per Freedman, J.; *Eisert* v. *Rural Municipalities of Martin and Silverwood* (1955), 18 W.W.R. (N.S.) 314, 320, per Culliton, J. A. (Sask. C.A.). Indeed, Culliton, J. A., states that "no authority is needed for the general proposition that an employer is not liable for the torts of his independent contractor."

71 [1926] S.C.R. 371, 383. This passage was quoted with approval by the Ontario High Court in *Schoeni* v. *King*, [1943] 4 D.L.R. 536, 540, per *Roach, J.*, in a judgment that was subsequently affirmed by the Ontario Court of Appeal in [1944] 1 D.L.R. 326. The *St. John* case has been cited and applied in many Canadian cases, including the *Eisert* case, *ibid.* The rule so stated derives from an oft-cited passage in *Bower* v. *Peate*, case, *ibid.* The rule so stated derives from an oft-cited passage in *Bower* v. *Peate* in *Hughes* v. *Percival* (1883), 52 L.J. Q.B. 713.

72 (1881) 6 A.C. 740; 50 L.J. Q.B. 689, 750.

> of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it. (Italics added)

Are all these statements reconcilable? It is suggested that they are. To explain this it is first of all necessary to point out that there are a number of recognized cases in which an employer is liable for the acts of an independent contractor. Now, each of the above three statements contains one thing in common: a statement that, subject to one sort of qualification or another, an employer is not generally liable for the acts and defaults of an independent contractor. The qualification stated by Anglin, C. J. C., differs from that of Lord Blackburn only in this respect: it refers to only one of the special circumstances in which the general rule does not apply, namely, cases in which the work undertaken is of a dangerous nature (or, as he puts it, "of a nature likely to involve injurious consequences to others"); whereas Lord Blackburn's statement attempts to encompass all of the recognized special cases in his reference to works "the doing of which casts on [the employer] a duty." In its lack of completeness Anglin, C. J. C.'s, statement appears to be less neat than Lord Blackburn's, for it would require the statement of exceptions to the general rule.[74a] The writer doubts that Anglin, C. J. C., intended to rule out the liability of an employer for failure of the independent contractor to perform his employer's statutory duty or occupier's duty to invitees. That liability exists in such cases admits of no doubt.[74b] In any event, Duff, Mignault and Newcombe, J. J., in the *St. John* case all referred to a duty resting on the defendant's employer which could not be discharged by delegation; so that the case actually supports the rule as stated by Lord Blackburn.

Munkman accepts Lord Blackburn's statement as the true statement of the general rule,[74c] and it is probably fair to say that the statement in Salmond On Tort does not vary from this view of the law. In the sixth edition, Salmond treated the various special cases as exceptions to the general rule of no liability whatsoever:

> . . . the vicarious responsibility or the employer of independent contractors is not the outcome of any far-reaching principle, but represents merely a number of more or less arbitrary exceptions based on considerations of public policy.[75]

By the fourteenth edition, the general rule was still stated, as above indicated, to be one of no liability; but to it was added the following caveat.[76]

> The liability of the employer of an independent contractor, however, is not properly vicarious:[77] the employer is not liable for the contractor's breach of duty; he is liable because he has himself broken his own duty. He is under a primary liability and not a secondary one. Hence it is misleading to think of the law on this point as a general rule of non-liability subject to a more or less lengthy

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73 6 Mee & W. 499; 151 E.R. 509.

74 His Lordship, on this point cites *Hole* v. *Sittingbourne and Sheerness Railway*, 6 Hurl. & N. 488; *Pickard* v. *Smith*; 10 Com. B. Rep. N.S. 470; and *Tarry* v. *Ashtown*, 45 L.J. Q.B. 260.

74a The qualification "in itself lawful" is probably implicit in both Chief Justice Anglin's and Lord Blackburn's statements. For work in itself unlawful the employer would be directly and jointly liable for having ordered unlawful work to be done: *Walker* v. *McMillan* (1882), 6, S.C.R. 241. (It is a bit difficult to determine what precisely is the ruling of Ritchie, C. J., in this case. At 265 he refers to the unlawfulness of the work to be done; at 266 he refers to the inherently dangerous nature of the work; and at 267 he refers to nuisance).

74b See *post*.

74c *Employer's Liability at Common Law* (1962), at 84-85.

75 At 125.

76 (14th ed. 1965), 686.

> list of exceptions. The real question is whether the defendant is, in the circumstances of the particular case, in breach of a duty which he owes to the plaintiff. If the plaintiff proves such a breach it is no defence to say that another has been asked to perform it. This seems to be all that is meant by talk of 'non-delegable duties.'

The change was no doubt brought about by numerous recent cases such as *Cassidy* v. *Minister of Health*,[78] which have applied and approved the statement in *Dalton* v. *Angus* quoted above. In substance then, Salmond's present statement of the rule, so qualified, is the same as that of Lord Blackburn. In summary then, it can with a fair degree of confidence be stated that generally an employer is only liable for the acts and defaults of an independent contractor with respect to duties which attach personally to the employer.[79]

One of the reasons for the writer's discussing the general rule at such great length is to permit the laying at rest of a fourth statement thereof. In *Smith* v. *Ulen*,[80] Beck, J., stated the following propositions (*inter alia*):

> Where an independent contractor is employed to do a particular thing which the principal is authorized to do, whether by statute or otherwise, and the contractor does the thing in an improper manner, so that the impropriety or imperfection is the cause of the damage, the principal is liable. (*Hole* v. *Sittingbourne Ry. Co.*, 6 H. & N. 488, 30 L.J. Ex. 81).
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> * * *
>
> Where an independent contractor is employed to do a particular thing, and in the ordinary course of events the omission to take proper precautions with regard to the manner in which the work is to be done is the occasion of a person being injured, the principal is liable if he fails to see that proper precautions are taken (*Hughes* v.*Percival*, 8 A.C. 443, 52 L.J.Q.B. 719; *Pickard* v. *Smith*, 10 C.B. (N.S.) 470; *Bower* v. *Peate*, I.Q.B.D. 321, 45 L.J.Q.B. 446; *Dalton* v. *Angus*, 6 A.C. 740, 50 L.J.Q.B. 689; *Penny* v. *Wimbeldon* [1899] 2 Q.B. 72.)

The first proposition is plainly bad law, the second is a misleading statement of Lord Blackburn's rule in *Dalton* v. *Angus*.

The former derives from passages in *Hole* v. *Sittingbourne & Sheerness Ry. Co.* which seem to suggest that the freedom of an employer from liability for the acts and defaults of an independent contractor exists only in relation to collateral matters and not in relation to the doing of the very things that the independent contractor is employed to do.[81] Those passages from the *Sittingbourne* case have been quoted and applied in several older Canadian cases.[82] The proposition must be false, for if an employer is generally liable for the acts and defaults of an independent contractor in relation to all matters that are part of the work which the contractor is hired to do, then there is no need to be concerned with special cases such as inherently dangerous works, and occupier's liability.[83]

In *City of Kitchener* v. *Robe and Clothing Co.*,[84] Anglin, C. J. C., seemed to apply this incorrect rule. In that case, the City of Kitchener had hired independent contractors to relay pavement. In the course of doing that work, the contractors obstructed the natural flow of the

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77 On this point he cites Williams, [1956] C.L.J. 180.
78 [1951] 2 K.B. 343. See *ante*, in relation to discussion of hospital cases.
79 Joint liability for acts authorized expressly, impliedly or ostensibly need not be included in the rule.
80 (1914), 6 W.W.R., 678-679, (Alta. S.C.).
81 158 E.R. 201, 204-205, per Pollock, C.B.; and at 205-206, per Wilde, B. The case could actually be classified as one of nuisance (see 205, per Martin, B.) or a breach of a statutory duty (see facts at 201), both of which, as we shall see, are probably special cases of personal duties of the employer not being capable of delegation.
82 *E.g.*, *Wheelhouse* v. *Darch* (1877), 28 U.C.C.P. 269, 278-281, per Gwynne, J.
83 There are many cases that discuss such special cases at length (see *post*). Are their statements of the law all to be considered idle?
84 [1925] S.C.R. 106.

surface water and caused it to back and flood the plaintiff's premises. Anglin, C. J. C., said, at pages 111 to 112:

> To protect their fresh concrete from traffic entering Foundry street from the lane was a necessary incident of the work they had undertaken. The specifications expressly imposed that obligation and required that barriers should be put up and maintained. To provide such protection by means of a dam of earth thrown across the lane instead of the customary open barrier, which would not have interfered with the flow of water into the lane, was, under the circumstances, very gross negligence. Such a method of carrying out an integral part of the work contracted for was palpably wrong and involved the city in liability. *Hole* v. *Sittingbourne & Sheerness Ry. Co.* Having undertaken the construction of the drop crossing at Hall's Lane, in connection with the paving of Foundry street, it became incumbent upon the city so to dispose of the material necessarily excavated in the course of that work as not to cause injury to neighboring property owners. For the performance of the work itself and the discharge of that incidental duty it was, no doubt, authorized to employ contractors. But their failure to fulfil their obligation to the city in regard to the safe disposal of excavated material left the latter responsible for the resultant injury. Its duty to the plaintiffs remained undischarged and the contractor's fault of omission was not more casual or collateral negligence for which the city would not have been responsible. Upon that ground, therefore, the city is responsible for the damages thus caused.[85]

The learned Chief Justice clarified the law considerably one year later when he set straight the incorrectness of the apparent *Sittingborne* rule in the *St. John* case: [86]

> The employer is never responsible for what is termed casual or collateral negligence of such a contractor or his workmen in the carrying out of the contract; and it is not universally true that he is responsible for injury occasioned by improper or careless performance of the very work contracted for; he is not so where the work is not intrinsically dangerous and, if executed with due care, would cause no injury, and the carrying out of it in that manner would be deemed to have been the thing contracted for.

It is to be hoped that this statement lays to rest the first proposition stated by Beck, J., in *Smith* v. *Ulan*.[87] The second proposition is at best a restatement of Lord Blackburn's rule, and, at worst, a reiteration of the incorrect first proposition. If it is the latter, then cases cited in support of it do not actually give it support.[88]

(ii) *Collateral Negligence*

Before considering the operation of Lord Blackburn's rule, one proposition must be made clear. As indicated in the above passage from Anglin, C. J. C.'s, judgment in the *St. John* case, an employer is never liable for what is called the casual or collateral negligence of the contractor or his workmen in carrying out the contract.[89] The rule admits of no doubt. Its application, like the application of the course of employment rule in master-servant law, is another matter. If an indepen-

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85 The learned Chief Justice went on to add that, if he was not correct on that, then the City is responsible for not removing or causing to be removed a danger known to it. This latter ground appears to be something of the nature of a liability for a nuisance of which the City was aware. Idington, J., applied Lord Blackburn's rule in *Dalton* v. *Angus*, but did not indicate the nature of this particular special duty.

86 [1926] S.C.R. 371, 383. This passage was quoted and applied by the Saskatchewan Court of Appeal in *Eisert* v. *Rural Municipalities of Martin and Silverwood* (1955), 18 W.W.R. (N.S.) 314. See also *Savage* v. *Wilby*, [1954] S.C.R. 376, 379, per Rand, J.

87 *Ante*, n. 80.

88 *Hughes* v. *Percival* (1883), 52 L.J.Q.B. was a case of an inherently dangerous work, and Lord Fitzgerald (as well as, probably, Lord Watson) treated it as such: see at 726. Lord Blackburn merely applied *Dalton* v. *Angus*, expressingly reservations as to the general rule stated in *Bower* v. *Peate* (1876), 45 L.J.Q.B. 446; *Pickard* v. *Smith* (1861), 142 E.R. 335 may be explained as another case of an inherently dangerous work, or of occupier's liability. *Penny* v. *Wimbledon Urban Council*, [1899] 2 Q.B. 72, was clearly a case of an inherently dangerous undertaking. So, too, was *Dalton* v. *Angus*, (1886), 6 A.C. 740, 50 L.J.Q.B. 589; and *Bower* v. *Peate* (1876), 1 Q.B.D. 321; 45 L.J. Q.B. 446.

89 See, also, *Longmore* v. *J. D. McArthur Co.* (1910), 43 S.C.R. 640, 645, per Anglin, J., as he then was.

dent contractor's workman places a tool on a window-sill and the wind blows it off the sill and causes the plaintiff injury, that is collateral negligence.[90] On the other hand, where a contractor is employed to dig an excavation and in the process of doing so the contractor stores dynamite in such a negligent fashion that it explodes and damages the plaintiff's property, that is not collateral negligence.[91] A rough rule for distinguishing between collateral and non-collateral negligence is given by Salmond as follows:[92]

> Probably the rule as to collateral negligence means nothing more than that the negligence required to impose liability upon the employer of an independent contractor must be negligence committed in the doing of the act itself which he is employed to do, and that negligence in other operations which, though connected with that work, are not themselves part of the work which he contracted to do is not sufficient.[93] The employer is exempt from liability, not so much because the act done cannot be foreseen or guarded against, but because it is outside the scope of the duty imposed on the employee. Thus, if the defendant employs a contractor to make an excavation in a street, the defendant will be responsible for the negligence of the contractor in failing to light or guard the excavation, but will not be responsible for his negligence in carting materials to or from the scene of the operations.

Returning now to Lord Blackburn's rule, that an employer is only liable for the acts and defaults of an independent contractor in respect to duties which attach personally to the employer upon his causing a work to be done, when can it be said that a personal duty arises from the causing of the work to be done—i.e., when will the law impose such a duty? Most acts—the doing of works, of course, requires actions—are hinged about with duties to others. As Salmond indicates:[94] "There are few operations entrusted to an agent which are not capable, if due precautions are not observed, of being sources of danger to others."[95] Clearly, if I hire a cab to drive my child to school, that work is of a character which may cause damage to others unless precautions are taken in the course of the driving of the cab. Yet, no court would suggest that I am liable for the injuries caused by the negligent driving of the cab driver. There are six types of duty that are recognized as coming within Lord Blackburn's rule.[96] The most that can be done in attempting to ascertain what sort of duties fall within that rule is to describe those recognized duties.[97]

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90 *Padbury* v. *Holliday & Greenwood, Ltd.* (1912), 28 T.L.R. 494.

91 *City of St. John* v. *Donald*, [1926] S.C.R. 371.

92 (14th ed. 1965), at 694.

93 The text indicates that this sentence was cited in *McDonald* v. *Associated Fuels*, [1954] 3 D.L.R. 775, at 779. It refers the reader also to *Torette House Pty. Ltd.* v. *Berkman*, (1939), 62 C.L.R. 637, 648; and *Thompson* v. *Anglo-Saxon Petroleum Co. Ltd.*, [1955] 2 Lloyd's Rep. 383.

94 *Ante*, n. 92, at 687.

95 This passage is contained in that part of the text in which Salmond attempts to show that the general rule stated in *Bower* v. *Peate*, [1876] 1 Q.B.D. 321, 326, cannot be correct. That rule is in terms the same as that applied by Anglin, C. J. C., in the *St. John* case, *ante*. The *St. John* case, however, was a clear case of an inherently dangerous operation, and when the learned Chief Justice referred to works "of a nature likely to involve injurious consequences to others," he should probably be taken to mean inherently dangerous work. The statement in *Bower* v. *Peate* could similarly be construed. If that is true, then those cases are not inconsistent with the law as Salmond interprets it. It is, however, correct to say that liability does not attach to the employer from the mere fact that the work entrusted to the contractor is of a character which may cause damage to others unless precautions are taken. If that is the ruling in *Bower* v. *Peate*, then the writer must accept Salmond's criticism of that case and reject the case for the same reasons as stated by that text at 687.

96 They are (a) statutory duties (b) duty to employees and other contractural duties, (c) duty to see that care is taken in the doing of inherently dangerous work, (d) duties of an occupier to invitees, and (e) duty of the employer to protect against the creation or continuation of nuisances, and (f) duties involving strict liability for non-performance.

97 Salmond does more than this, at 687-693. He places duties (b) and (d) (*ibid*) under the category of "Duty to take reasonable care," describing them as exceptions to the rule that the employer is not liable for the mere negligence of his independent contractor; and he places (a), (c), (e) and (f) under a category of more positive duties which he describes as "Duty to see that care is taken."

An employer is in all cases in which the work to be done involves technical skill or knowledge, required to entrust its performance to an apparently competent contractor.[98] If he does not take due care to see that the contractor employed is properly qualified for the performance of the task committed to him, or if he fails to give proper instructions to him in order to enable him to avoid dangers incidental to the work, he may be liable to a party injured by the contractor's negligence.[99]

(iii) *Statutory duties.*

There is ample authority for the proposition that where an absolute duty is laid by statute upon an individual or class or individuals, the performance of it cannot be delegated to an independent contractor to enable liability to be evaded.[99a] The writer merely refers, therefore, to Salmond, and adopts his discussion of the matter:[100]

> This principle applies whether the duty is owed to the public or only to a section of the public.[101] The duties imposed by the Factories Act, 1961, to fence dangerous machinery[102] and to provide safe means of access[103] are of this kind, and so is the duty to take safety precautions required by the Building (Safety, Health and Welfare) Regulations, 1948.[104] The courts are moving in the direction of holding that the duties imposed on hospital authorities by the National Health Service Act, 1946, are also of this character.[105]

(iv) *Employer's duties to his own employees—Contractual duties*

The duty of an employer to his own servants has already been discussed above. Liability for failure to perform that particular duty cannot be avoided by delegating the duties to an independent contractor. This was made plain by the Supreme Court of Canada in *Marshment* v. *Borgstrom*.[106] In that case, the plaintiff was employed by the defendant to assist in sawing wood on the defendant's farm. The sawing equipment was supplied and operated by a third party, whom the Court assumed to be an independent contractor. In the course of the operations, a large cast iron fly-wheel on the equipment, which was being operated according to an unsafe system and by a person not competent to take charge of and operate the equipment, burst and a section of it struck and injured the plaintiff, who sued for damages. The Court held that it was the defendant employer's duty to his employee, the plaintiff, to supply and install proper equipment for sawing the wood and a proper system of work so far as care and skill could secure those results, and to select properly skilled persons to manage and superintend the equipment; and that this obligation was personal to the employer, who could not free himself from responsibility for the duty by merely delegating it to an independent contractor, any more than he could do so by delegating

98 *Riverstone Meat Co. Pty., Ltd.* v. *Lancashire Shipping Co. Ltd.*, [1961] A.C. 807.
99 Salmond cites on these points, at 688, the *Riverstone Meat* case, *ibid; Robinson* v. *Beaconsfield R.D.C.*, [1911] 2 Ch. 188; and *Sumner* v. *William Henderson & Sons, Ltd.*, [1964] 1 Q.B. 450, 471.
99a See Munkman, *Employer's Liability at Common Law*, 5th ed., 1962, 181-190; See also *Ballentine* v. *The Ontario Pipe Line Co.* (1908), 16 O.L.R. 654, 657-658, per Riddell, J. How far the statutory duty could be carried is not clear. One who wishes to ship goods by truck has, if he drives the truck himself, a statutory duty under the vehicles and highway legislation, of one sort or another, to obey the rules of the road. It is not likely, however, that because of such legislation he would be liable for the negligence of an independent contractor whose truck he hires, should the independent contractor not obey the rules of the road. Perhaps the type of statutory duty that comes within the rule of liability can be characterized as a duty of a more positive sort.
100 (14th ed. 1965), at 691.
101 Salmond cites *Mulready* v. *J.H. & W. Bell Ltd.*, [1953] 2 Q.B. 117.
102 Salmond cites *Groves* v. *Wimborne (Lord)*, [1898] 2 Q.B. 402.
103 Salmond cites *Hosking* v. *DeHavilland Aircraft Co. Ltd.*, [1949] 1 All E.R. 540.
104 Salmond cites *Mulready* v. *J. H. & W. Bell, Ltd.*, [1953] 2 Q.B 117.
105 *Ante*, n. 100, at 651-653.
106 [1942] S.C.R. 374.

it to an employee.[107] Duff, C. J., treated the duty of an employer to his servant as a contractual duty:

> The points in this statement [i.e., that of Lord Wright in the *Wilson* case,[108]] which, I think, may usefully be emphasized are, first, that the duties of the employer are 'fundamental obligations of a contract of employment', and, in the next place, that these obligations fall within the same category as a statutory duty in respect of the characteristic that the employer cannot fulfil them by entrusting their fulfilment to competent employers.[109]

One wonders whether the rule stated in the *Wilson* case would ever have arisen were it not for the doctrine of common employment. Without that doctrine, it would have been simple to rule that a servant injured by the negligence of another of his master's servants may hold his master liable on ordinary *respondeat superior* principles. In any event, the rule was in existence when the *Marshment* case came before the Canadian Courts. Once the master's liability for the wrongs of one servant to another was ruled to be based on the principle described in the *Wilson* case, rather than on the basis of *respondeat superior,* it was not difficult for the Supreme Court of Canada to extend the liability to acts of independent contractors. The duty of a master to his servants is a common law duty to take reasonable care, and, as such is a quite ordinary duty (as opposed to a strict or special or severe duty, or a duty to see that care is taken.)[110] This extension of a master's liability for the acts of independent contractors might well provide a precedent for further extension in other areas in which an employer owes a duty of care to others. And it is not at all certain that extension is desirable.[111]

The recent House of Lords decision in *Davie* v. *New Merton Board Mills, Ltd.*[112] places a limitation on the extent of the liability to employees. An employee of the plaintiff was injured due to a hidden defect in a tool bought by the defendant employer from an independent supplier and provided to the plaintiff for use in his work. The House held that, the duty of a master to his servant being no more than a duty to take reasonable care, though a personal duty, did not result in strict liability of the employer, and was discharged when the defendant employer bought from a reputable source the tool in question the latent defect of which they had no means of discovering. As Salmond indicates,[113] in quoting Lord Justice-Clerk Thompson in *Sullivan* v. *Gallagher and Craig*,[114] the *Davie* decision shows that:

> "There is no longer the same sociological justification for pushing the personal liability doctrine to what may have been its logical conclusion. So now the tide has turned and the erosion has ceased. Generally when the tide turns, the scars of erosion are only too obvious and a good deal of debris is left stranded on the deserted shore. One can look only with unfeigned admiration at the salvage work in *Davie,* and the restoration of the water-front to much of its pristine purity."

If the *Davie* case provides hope for English employers, it does more for those in Canada.[115] The Supreme Court of Canada in *Marshment*

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107 The Court applied *Wilson & Clyde Coal Co.*, v. *English*, [1937] 3 All E.R. 628, in which the House of Lords held that an employer could not rid himself of responsibility for his duty to his employee by delegating its performance to another employee.
108 *Id.*, at 640.
109 *Ante*, n. 6, at 376.
110 *Ante*, n. 100, at 687-693.
111 *Ante*, n. 100, at 686 and at 690; Williams, [1956] C.L.J. 180. Perhaps the rule stated in the *Marshment* case can be now attacked by reason of the abolition of the common employment doctrine with the introduction of workman's compensation legislation: see Salmond, at 690.
112 [1959] A.C. 645; [1955] 2 W.L.R. 331.
113 At 690.
114 [1959] S.C. 243, 258-259.
115 That is, insofar as it shows a tendency away from extending the liability of an employer for the acts of an independent contractor.

clearly holds that an employer's duty to his servant is a contractual one. In view of that, the decision is not startling—it seems consistent with authority and reason to suggest that liability for contractual duties cannot be avoided by delegation, even to independent contractors. If the case is to stand as authority for such a proposition, it represents no departure from established law; and does not present, in the light of the turn of the tide suggested by the *Davie's* case, any threat of extension of an employer's liability for the acts of independent contractors with respect to mere duties to take reasonable care.

Perhaps a further indication of a new trend is the recent Supreme Court of Canada case of *Cappell's Limited* v. *Municipality of the County of Cape Breton.*[116] In that case the defendant contractor was engaged in making repairs to a building owned by the plaintiff. He instructed an independent contractor to solder a hole in the gutter of the building. A fire was caused by the negligence of a servant of an independent contractor when he attempted the repair. It was found that there was no contract between the plaintiff and the defendant whereby the defendant undertook to repair the gutter. All that the defendant did was hire the independent contractor for the plaintiff and provide the staging from which to do the work. The Court held that the duty of the defendant, who had contracted with the independent contractor at the plaintiff's request for the plaintiff, and not for himself, was no more than to exercise reasonable care in the selection of a competent independent contractor to perform the work.

(v) *Employer's Duty to occupiers*

In *Thomson* v. *Cremin*[117] the plaintiff dock-worker was injured when a heavy wooden shore collapsed on the defendant's ship. The defendant was held liable for his injuries. Viscount Simon, L. C., said:[118]

> As between the shipowner and the pursuer, the former must be regarded as the occupier and the latter as an invitee who comes to work in the hold in consequence of the contract made between the shipowner and the pursuer's employees. The shipowner's responsibility for the safety of the structure is not, indeed, absolute, but, on the principle of *Indamaur* v. *Dames*,[119] he owes to the invitees a duty of adequate care. If adequate care was not exercised in fitting and securing the shore, it would be no answer (as the appellant's counsel candidly admitted) to say that the shipowner employed an independent contractor at Freemantle to do the work [install the shore].

As Salmond indicates,[120] the House of Lords in the *Thomson* case was not given the opportunity of considering the Court of Appeal decision in *Haseldine* v. *Daw & Sons Ltd.*[121] That case applied the orthodox rule that an occupier is not liable when the performance of his duty requires technical skill or knowledge, and "he has taken all reasonable care to select an expert having that skill or knowledge, and to follow his advice."[122] In the *Haseldine* case it was held that an occupier performed his duty to keep elevators in repair sufficiently by employing "a first-class firm of engineers' to inspect and report on them. On the other

116 [1963] S.C.R. 340. The writer must admit that his suggestion that this case might tend to support the existence of a trend away from extending the liability of an employer for the acts of an independent contractor is probably no more than conjecture.
117 [1953] 2 All E.R. 1185 (H.L.).
118 *Id.*, at 1187-1188.
119 (1867), L.R. 1 C.P. 274; 35 L.J.C.P. 184.
120 *Ante*, n. 100, at 688-689.
121 [1941] 1 K.B. 688.
122 *Ante*, n. 100, at 689.

hand, in *Woodward* v. *Mayor of Hastings*[123] the governors of a school were held liable when a contractor failed to brush snow away from the school steps with resultant injury to the plaintiff. Du Parc, L. J., in holding the governors liable, stated that "The craft of a charwoman may have its mysteries, but there is no esoteric quality in the nature of the work which cleaning a snow-covered step demands."[124] The *Haseldine* question didn't really come before the House in *Thomson* v. *Cermin*, and the latter case cannot therefore be taken to overrule the *Haseldine* rule.[125] It can therefore be concluded that an employer's duty to invitees is discharged by the employment of an independent contractor to attend to it unless the duty does not require technical skill or knowledge.

(vi) *Nuisance*

An employer is responsible for a nuisance on a highway which he does, or ought to, reasonably foresee notwithstanding the fact that it is created by an independent contractor.[126] Even apart from nuisances on highways, where the work undertaken is of a nature that it "involves a special danger of nuisance being complained of," then the employer is responsible for nuisance that arises in the carrying out of such work by an independent contractor.[127] This case may well be nothing more than a case of a duty being fixed on the employer by reason of the inherently dangerous nature of the work done.[128] It seems to be an application of the old *Bower* v. *Peate* rule discussed earlier in this paper.[129]

(vii) *Strict Liability*

Under the rule in *Rylands* v. *Fletcher*[130] an employer is liable for the acts of an independent contractor.[131] Salmond treats this as a separate type of duty under the *Dalton* v. *Angus* rule. So it properly is with respect to the rule in *Rylands* v. *Fletcher*. The writer suspects, however, that cases such as the escape of fire, or of damage by a savage animal would be more apt to be classed by Canadian courts together with all other cases of inherently dangerous undertakings.

(viii) *Inherently dangerous works*

This category of case seems to be divided into two separate classes of responsibility by Salmond, namely, the "creation of dangers on a highway" and "cases of strict liability."[132] The Canadian cases seem to simply apply a more general rule imposing on a person who undertakes work of an inherently dangerous nature a duty to be certain that proper precautions are taken by the independent contractor to guard against

123 [1945] 1 K.B. 174. Salmond, at 689, refers also to *Bloomstein* v. *Railway Executive*, [1952] 2 All E.R. 418; *Hartley* v. *Mayoh & Co.*, [1954] 1 Q.B. 383.
124 *Id.*, at 182.
125 See Salmond, *ante*, n. 100, at 689. The text points out that cases subsequent to *Thomson* v. *Cremin* have shown "a certain preference for distinguishing *Thomson* v. *Cremin* and instead following the decision in *Haseldine* v. *Daw & Sons, Ltd.*": See *Davie* v. *New Merten Board Mills Ltd.*, [1959] A.C. 604, 644-645, 648-649; *Green* v. *Fibreglass Ltd.*, [1958] 2 Q.B. 245; *Lyons* v. *Nicholls*, [1958] N.Z.L.R. 409.
126 *Carroll* v. *Kepic*, [1955] 1 D.L.R. 53.
127 *Matania* v. *National Provincial Bank*, [1936] 2 All E.R. 633, 646, per Slessor, L. J.; 648, per Romer, L. J.; 650-651, per Finlay, J.
128 See, especially, *id.*, at 650-651, per Finlay, J.
129 The case of *Achdus Free Loan Society* v. *Shatsky* (1955), 14 W.W.R. 481 is a special one. In that case an independent contractor created a nuisance for which his employer was held liable. However, Freedman, J., as he then was, found that in respect to the particular matter that was a nuisance the contractor was under the control of the employer. Presumably that means that the particular act of the contractor was in that case the act of the employer. Liability for the nuisance was also based upon the contract of the defendant with the plaintiff (see 484).
130 (1868) L.R. 3 H.L. 330; see *Salmond On Tort*, 14th ed., 1965, c. 14.
131 See the *Achdus* case, *ante*, n. 130, at 486.
132 *Ante*, n. 130, at 692-693.

those dangers. This result probably derives from the application of the *Bower* v. *Peate* rule to cases such as *City of St. John* v. *Donald*[133] in which the court found a special danger inherent in the nature of the work undertaken. It would seem to be that this class of case in Canada was, at least until very recent times, the chief area of expansion of the liability of employers for the acts of independent contractors. In *Savage* v. *Wilby*,[134] for example, the Supreme Court of Canada held that the use of an inflammable paint remover to remove paint from the interior of a building was a dangerous undertaking, notwithstanding the fact that inflammable paint remover was normally used to remove paint in the painting trade. The Court applied *Bower* v. *Peate*, but in its own language was treating the case as one of an inherently dangerous undertaking, as is indicated by the language of Rand, J.:

> In *Penny* v. *Wimbleden Urban Council*,[135] a case holding a district council liable for unlighted obstructions left in a highway being repaired for the council by a contractor, Romer, L. J., at page 78 says:—'When a person, through a contractor does work which from its nature is likely to cause danger to others, there is a duty on his part to take all reasonable precautions against such danger, and he does not escape from liability for the discharge of that duty by employing the contractor if the latter does not take these precautions.'
>
> In such circumstances, *inherent in the work itself are unusual risks which call for special precautions;* and since they result from the act of setting the work on foot, a duty on the person so acting arises as a concomitant of the work, towards interests reasonable measures are taken against them. . . . Since he had, in fact, imposed the dangerous agencies and their hazards on that property, it would be repugnant to principle that he should be permitted to relieve himself of responsibility by the introduction of an intermediary. This circumstance is not significant to the ordinary case since the risk there encountered is related to the actor and not the work, and as a matter of policy the promotion of such works is not to be discouraged by extending the liability of those for whom they are done to the delinquent conduct of other persons who have become virtually the necessary means of carrying them out. (Italics added)

The test for the existence of this particular duty is given in the *St. John* case by Anglin, C. J. C., as follows:

> His vicarious responsibility arises, however, where the danger of injurious consequences to others from the work ordered to be done is so inherent in it that to any reasonably well-informed person who reflects upon its nature the likelihood of such consequences ensuing, unless precautions are taken to avoid them, should be obvious so that were the employer doing the work himself his duty to take such precautions would be indisputable.[137]

The test as stated by Anglin, C. J. C., could be construed sufficiently broadly to encompass many types of work that would not, one would have thought, in ordinary parlance come within the expression inherently dangerous. Danger lurks about the simplest tasks. Driving a car would, it is certain, not in law be considered as coming within the rule stated by Anglin, C. J. C.; yet who would deny that in modern traffic conditions driving a car can be a dangerous undertaking? The answer to this must lie in the nature of the work with which the court was concerned in the *St. John* case, namely, the use of dynamite in a built-up area. If one reads into the statement of the Chief Justice those pertinent facts of the case,[138] then his conclusion and statement of law are not at all surprising:

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133 Discussed *ante*, n. 71.
134 [1954] S.C.R. 376.
135 [1899] 2 Q.B. 72.
136 [1954] S.C.R. 376, 379.
137 [1926] S.C.R. 371, 383. This passage was applied by both Kellock and Cartright, J. J., in the *Savage* case, [1954] S.C.R. 376, 380 and 383 respectively.
138 And surely the statement of the law must be at least tempered by the facts in the stating of a *ratio decidendi*.

> His vicarious responsibility arises, however, in cases involving work such as the use of dynamite in built-up areas: where the danger of injurious consequences to others from the work ordered to be done is so inherent . . . [etc.].

If this is a correct statement of the rule in the *St. John* case, then the decision reached in *Savage* v. *Wilby* would, in view of its facts, be a surprising one indeed (as it probably was in fact to most lawyers). Suffice it to say that the special case of inherently dangerous undertakings as it has been applied in Canada may well render employers liable in this country for far more acts and defaults of their independent contractors than are their counterparts in England.[139]

(IV) *APPLICATION OF LIABILITY FOR THE ACTS OF INDEPENDENT CONTRACTORS IN THE OIL INDUSTRY.*

The writer's knowledge of the oil industry being as limited as it is, he can do no more than describe the general rules (as was done above) relating to an employer's liability for the acts of an independent contractor and suggest that if and when cases involving the oil industry come before the Canadian courts the general rules could apply to those cases without any special considerations being necessary. There are doubtlessly many statutory duties which are imposed on oil operators, seismic contractors and drilling contractors, which are not capable of delegation without liability. The rules dealing with the duty of an employer to his employee, the duty to take reasonable care in the selection of an independent contractor, the duty of an occupier to his invitees,[140] and the duty to avoid the creation or continuation of nuisances on the highways would probably require no modification with respect to the oil industry. The rule respecting the incapability of an employer to avoid responsibility for the non-performance of contractual duties has already been discussed to a limited extent in the *Alberta Law Review*.[141] The matter of the question of inherently dangerous work in the oil industry is one which would require a searching look at American and Canadian authorities which would carry too far the scope of this paper. Suffice it to say that American decisions seem to have adopted the same rule as that in our *St. John* case; but have made a much narrower application of that rule in relation to the oil industry,[142] than would be likely to be made in Canada.[143]

(V) *CONCLUSION*

In conclusion, it can be said with a fair degree of certainty that work contracts in Canada between oil operators and seismic and drilling operators are probably of an employer-independent contractor nature; but that, in view of the non-delegable duties, including the apparently broad duty in respect of inherently dangerous works, the protection provided by the nature of that relationship is in Canada not as extensive

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139 For additional Canadian cases on inherently dangerous works, see *Longman* v. *J. D. McArthur Co.* (1910), 43 S.C.R. 640; *Cockshutt Plow Co.* v. *Donald*, [1912] 3 W.W.R. 488; *Peters* v. *North Star Oil Limited* (1965), 53 W.W.R. 321 (Man. Q.B.); *Ayoub* v. *Beaupre*, [1964] S.C.R. 448 (not a case involving independent contractors, but it does hold the handling of gasoline to be inherently dangerous); *Reid* v. *Linnell*, [1923] S.C.R. 594; *Johnston* v. *Mills*, [1917] 3 W.W.R. 742 (Alta. App. Div.).

140 In the U.S. the duties to invitees rule was applied in *Nance Exploration Co.* v. *Texas Employees Insurance Assoc.*, 305 S.W. (2d) 621, (1957 Texas Ct. of Civ. App.).

141 Bredin, E. M., *Legal Liability for Water Flooding in Petroleum Reservoirs in Alberta*, 1 Alta. L. Rev. 516, at 520; see also Masterson's article, *ante*, n. 41, at 205.

142 See *Weeks* v. *Texas Illinois Gas Pipeline Co.*, 276, S.W. (2d) 321, (1955 Tex. Ct. of Civ. App.); and see Masterson's article, *ante*, n. 41 at 197.

143 If the *Savage* case, [1954] S.C.R. 376, is any indication of the tendencies of our Courts.

as it is in either Great Britain or the United States. Indeed, it may well turn out that in the oil industry, which is reputed at least in the lay mind to be fraught with many dangerous works,[144] the only extensive practical value of employing an independent contractor will be to permit the employer to avoid responsibility for the collateral or casual wrongdoings of the contractor one employs. But even that value has a considerable measure. In view of its existence, an oil operator may well find it useful, in employing seismic and drilling contractors:

(a) to define carefully in his written agreement the authority of the party employed, leaving control over the manner in which the work is done largely in the hands of the party employed;

(b) to define the type of equipment to be used, so as to avoid the use of unusual equipment which might be construed as possessing inherent dangers;

(c) to endeavour to employ various contractors in order to prevent the continuous use of a single contractor being construed as employment of a servant;

(d) to continue to insist on the contractor providing his own tools and equipment;

(e) to leave largely to the control of the contractor the selection and dismissal of employees, and the payment of them;

(f) to define in general terms the type of system to be used to do the intended work, taking care therein to ensure the use of a reasonably safe system;

(g) to define which party shall have control over each of the various aspects of the work to be done;

(h) to fix liability for damages between the contracting parties and between each of them and third parties; and, finally,

(i) (adopting one of the suggestions of Mr. Masterson *in toto*:)

to determine the matter of how broad the indemnity clause should be and, connected therewith, how much insurance the contractor should be required to carry. . . . Factors to consider include: (a) If the contractor is forced to increase expenditures, this will usually be reflected in the price charged to him, and this will be actually and ultimately a cost to the producer—on the other side of this scale is the factor mentioned at the outset, that if cost goes too high, use of the independent contractor method of drilling wells may diminish; (b) who would be liable aside from indemnity and insurance clauses is important.[145]

B. RELATIONSHIPS GIVING RISE TO VICARIOUS LIABILITY*

Introduction

It is obvious that operations for producing oil and gas may result in damage or injury to the person or property of third parties. Indeed, some of these operations may be inherently dangerous or may involve extra danger if special precautions are not taken. Those who have an interest in the development of leased lands foresee these possibilities and therefore seek to protect themselves by the contractual arrangements which they make. If one is the operator, his interest will be to attempt to get those who will benefit from the operations to agree to share in the risks of development, including this risk of causing injury to another. Those who are not operators will attempt to limit their responsibility for

144 The writer must admit that this conception (or misconception) may well exist in only his own mind.

145 Masterson, *ante*, n. 1, at 219.

* This portion of the paper was written by A. R. Thompson.

damage caused to others and may seek indemnification from the operator.

Before considering the kind of contractual provisions which may provide for the sharing of responsibility or for indemnification, it will be helpful to analyze the relationships between parties interested in oil and gas development and to consider those relationships which may give rise to vicarious liability for the negligence or tortious acts of the operator. The relationships to be examined are as follows:

> A is an original lessee and has assigned his lease to B, reserving an overriding royalty. B has made a farmout and joint operating agreement with C whereby C earns a 50% undivided interest in the leases and is operating them for the joint accounts of B and C. C has engaged D, a drilling contractor, to drill a well on the leased land.

Each of A, B and C will attempt by the terms of his contract and by his actual conduct to isolate himself from responsibility for the drilling operations of D. Whether each is successful will in some measure depend on the nature of drilling operations, because, as an exception from the general rule that there is no liability for the torts of one who is not a servant or agent, inherently dangerous operations or operations which are extra-hazardous without special precautions are in a category whereby responsibility may result even though the actual operations are conducted by an independent contractor. Since some aspects of drilling operations may well fall into the categories of inherently dangerous or extra-hazardous, it is necessary to carry the investigation forward on two fronts, and to consider first, whether A, B, or C have an agency or master and servant relationship with D, and second, whether any of them has responsibility for D's operations as an independent contractor with respect to those aspects of drilling which are inherently dangerous or extra-hazardous.

A's Case

A, the original lessee, has assigned the lease and therefore it is highly unlikely that the facts would support a case for saying that D is the servant or agent of A. Therefore A will not have vicarious responsibility for the normal operations of D. With respect to the inherently dangerous or extra-hazardous drilling operations, the question is whether it can be said that D is carrying out a work on A's behalf. This test requires elaboration, and because the question arises in the same way with respect to B and C as well, its consideration is deferred until D's case is dealt with.

B's Case

The vicarious liability of B must be viewed in two aspects, first, in the aspect of B as farmor, and second, in the aspect of B as non-operator under the joint operating agreement. As farmor, it seems that B is in the position of one who has engaged, for a consideration, an independent contractor, C, to drill a well. Therefore, he will not ordinarily incur vicarious liability. But, insofar as operations are inherently dangerous or extra-hazardous, then B's position is that he cannot be relieved from responsibility by delegation of the operations to C, or by C's delegation to the drilling contractor, D. As non-operator under the joint operating agreement, B's vicarious liability depends upon whether or not C will be regarded in law as B's agent or partner in the conduct of the operations. This question has been considered in Canada in the *Midcon* case,[1]

1 *Midcon Oil and Gas Ltd.* v. *New British Dominion Oil Co.*, [1958] S.C.R. 314; 12 D.L.R. (2d) 705 (S.C.C.).

but not in a way which permits an authoritative statement of the law to be made. One can yet only conjecture that, despite the several clauses in an operating agreement which attempt to eliminate the relationship of partnership, joint venture, or agency, a court may well be tempted to find that the non-operator is vicariously liable for a tort committed by the operator on the ground that the operator is the agent of the non-operators in conducting development operations. If the operator is financially responsible, it does not seem likely that a plaintiff would seek to add the non-operators in a damage suit, and consequently the issue whether the non-operator has vicarious liability is to a large degree academic.

C's Case

With respect to C, the farmee-operator, he will have direct liability in tort with respect to the operations which he himself conducts. As to those operations for which he engages independent contractors, such as the drilling contractor, D, vicarious responsibility should exist only with respect to those non-delegable duties to take guard against injury or damage from inherently dangerous or extra-hazardous operations.

D's Case

D, the drilling contractor, has of course, direct responsibility for torts committed during drilling operations. Insofar as he has engaged independent sub-contractors to perform some of the work, he escapes liability except with respect to the non-delegable duties to prevent injury or damage from inherently dangerous or extra-hazardous operations. However, there are cases where the exercise of control may involve D in direct liability with respect to the negligent acts of employees of a sub-contractor, as where the employee is deemed to be under the control of D *pro tem* owing to D's general supervision and control of operations. This issue was before the courts in Manitoba in the case of *Birch* v. *Virden Drilling Co.*[2]

When dealing with A's case, the question was raised whether D could be said to be carrying out A's work so as to involve A in vicarious liability with respect to inherently dangerous or extra-hazardous acts done negligently by D. Now this question must be considered. Can D be found to be an independent contractor of A who is merely a lessee who has assigned his lease retaining an override? No authority has been found. In principle, if the test of such liability is "Who has engaged D to do the work?", then A is not liable. If the test is "Who had an obligation to do the work?" then A might be liable, because even under an "unless"-type of oil and gas lease A had a right to drill and, if drilling should occur, an obligation that prudent and workmanlike procedures should be employed. If the test is "For whose benefit is the work done?", then A may again be liable because his override gives him a direct financial interest in production.

The Lessor

This brief analysis of the relationship arising with respect to development operations would not be complete without a short statement of the position of the lessor. A lessor who owns the surface as well as the minerals has occupier's liability with respect to his land outside of surface

2 (1957), 23 W.W.R. 683 (Man.).

areas leased to the operator under a surface lease or granted to the operator under a right of entry order. The operator is in turn responsible as occupier for torts committed on well sites. This clear division of responsibility is frequently clouded by the practice of permitting the lessor to use portions of the well site for the purpose of taking crops or grazing cattle. Under these very informal agreements the lessor may merely be a licensee, but it is more likely that he is a tenant at will of the operator. For example, if he invites the neighbour's boy to bring in the cattle from the well site, and the boy is injured owing to the blowing off of a negligently defective valve, would not the lessor be liable as occupier for this tort? Conversely, the operator may be responsible for vicarious or negligent acts of the lessor on the well site. If the lessor is not a tenant at will, but merely has a licence coupled with an interest or a *profit à prendre,* i.e., the right to sow and reap a crop, or to have cattle graze, then probably the lessor is not vicariously responsible for the negligence of the operator on the well site, but the operator would clearly be liable as occupier with respect to the lessor's negligence giving rise to occupier's liability.

This brief summary may be fittingly concluded by noting that the most skilled practice of the lawyer's art is no assurance that the client will be insulated from vicarious liability in tort arising from operations in which the client has a direct financial interest. In the 1965 case of *Peters* v. *North Star Oil Ltd.*,[3] Mr. Justice Dickson of the Manitoba Court of Queen's Bench held that North Star was vicariously liable for the negligence of a bulk distributor of its products when delivering gasoline because the distributor was an agent, if not a servant, of the company, notwithstanding that the agreement with the distributor sought to establish the distributor as an independent contractor.

C. INDEMNIFICATION*

Years of experience in its own endeavour and observation of other fields of commercial enterprise have taught members of the oil industry that liability for the acts or omission of another can often and unexpectedly arise because of a mere passive relationship with another.

Thus vicarious liability in tort may beset the master for the negligent act or omisison of his servant; or a partner may be liable through contract for the acts or omissions of his partners. In neither case is the liability brought about by the master or partner's own act or omission.

As soon as it was realized that there could be no escape from liability to third parties, those on whom liability became fixed because of their relationship with those who directly caused the liability, began to develop means so as not to have to meet the liability out of their own pocket.

One of those means is the indemnity clause used in almost all commercial contracts and certainly used in all contracts in the oil industry which form the basis of a relationship that may bring about "indirect" liability.

The following is a general statement of the law of indemnity:

> A right to indemnity exists where the relation between the parties is such that either in law or in equity there is an obligation upon the one party to indemnify the other. Indemnity springs from contract express or implied and is distin-

3 (1965), 54 D.L.R. (2d) 364 (Man.).

* This portion of the paper was written by P. G. Schmidt.

> guished from guarantee and suretyship in that the engagement is to make good and save another from loss upon some obligation which he has incurred or is about to incur to a third person and is not, as in guarantee or suretyship, a promise to one to whom another is answerable.[1]

In accordance with these general statements respecting the right to indemnity we find the inclusion of indemnity clauses in some assignments of leases, in farmout agreements, joint operating agreements and in many other agreements relating to the exploration for and development, recovery and processing of petroleum and natural gas.

The analysis in this paper of the right of indemnity will be confined to how the right is dealt with in typical assignments of leases, farmout agreements and joint operating agreements.

Assignments of Leases

A typical indemnity clause in an assignment of a lease will read as follows:

> The assignee shall indemnify the assignor from and against all accounts, suits, actions, claims, costs and demands, loss, damages and expenses which may be brought against or suffered by the assignor or which it may sustain, pay or incur by reason of any matter or thing arising out of or in any way attributable to the operations carried on by the assignee, its servants, agents, employees, contractors or subcontractors with respect to the lands.

Or it will be coupled with another clause, such as one imposing on the assignee an obligation to develop the assigned land and will read:

> The assignee shall, from the date of this Agreement, assume, carry out, observe and perform and not suffer or permit any default in any and all of the terms and conditions, commitments, covenants and liabilities of the Lease and on the part of the lessee contained in such Lease to be performer. The assignee shall at all times indemnify and save harmless the assignor from and against all claims and demands, loss, costs, damage, actions, suits or proceedings whatsoever caused by or arising out of any default by the assignee in the performance of any such terms, conditions, commitments, covenants and liabilities contained in the Lease.

In the examples we see how the assignor attempts to obtain indemnity for liability that may arise as a result of a tort or because of the existence of a contract. The first clause is obviously designed to cover indemnity for any type of liability arising from operations on the lands, including tortious liability, vicarious or joint. The second clause leads to the conclusion that it is designed to cover indemnity for liability that may arise contractually under the provisions of the lease.

This, of course, is in accordance with the principle that the inclusion of the indemnity clause in the assignment creates at law and preserves for the stipulated event the right of the assignor to be indemnified by the assignee for the liability to the third party who suffered the damage.

> Where a tortious act of the party covenanting to indemnify, of the very class against the consequences of which such indemnity has been stipulated for, is the primary cause of injury, that party cannot escape the liability to indemnify merely because that act itself, or neglect to provide against its consequences, has also entailed liability to the person injured of the party in whose favour the stipulation for indemnity was exacted. It is upon the very liability thus entailed that the claim for indemnification rests.[2]

Where the relation between the assignor and the assignee can be found to be one of agency or master and servant, there is a right to indemnity for vicarious tortious liability even without the inclusion of an indemnity clause.

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1 13 C.E.D. (Western) 29 (2nd ed.).

2 *Kitchener (City) v. Robe and Clothing Co.*, [1925] SCR 106 (per Anglin, J.); see also *McFall and McFall v. Vancouver Exhibition Assn. and Marble (No. 2)*, [1943] 2 W.W.R. 225; [1943] 3 D.L.R. 39 (B.C.).

> A right of indemnity is an incident of legal relations, for example, those of agency or master and servant, where an agent or servant is liable to be indemnified by his principal or master against liabilities incurred in the reasonable performance of his agency or employment.[3]

However, where an indemnity clause is included in an assignment, then the implied right to indemnity arising out of the relationship will be excluded and the clause will govern.

> The right to an implied indemnity is excluded, in the absence of an indication of contrary intention, by an express contract relating to the same subject matter; for, where there is an express contract, the parties must be guided by it, and one party cannot relinquish it or abide by it as it may suit his convenience to do.[4]

Where the liability arises as a result of contract and the contract does not include a provision whereby the lessee is wholly relieved from the covenants under the lease if he assigns the lease, then he protects himself by the inclusion of the second type of indemnity clause, because:

> An assignment does not prejudice the personal contract between the lessor and the lessee, who remains liable to the lessor on the covenant to pay rent and the other covenants in the lease. To release the lessee from these covenants something more on the part of the lessor than consent to the assignment and dealings with the sub-lessee seems necessary, for a valuable consideration must move from the lessee to the lessor for his release if it is not under seal.[5]

Since section 176(5) of The Mines and Minerals Act, 1962, provides that the transferee of a Crown lease becomes the lessee upon the registration of a transfer, the assignor of a lease will not be faced with contractual liability to the Crown for anything arising after the registration of a transfer of the lease pursuant to section 176(1) of that Act.

Farmout Agreements

The purpose of the indemnity clause in a farmout agreement is quite similar to that which it serves in an assignment of a lease, imposing the obligation to develop on the assignee. The "farmout" provisions are, however, one step short of an actual assignment. But so far as "indirect" liability, tortious or contractual, of the assignor or the farmor is concerned, the two situations do not materially differ.

Indemnity clauses in farmout agreements as in assignments take two approaches. One will be the use of a simple clause such as the following:

> Farmee shall indemnify Farmor against all actions, suits, claims, costs and demands, loss, damages and expenses which may be brought against or suffered by Farmor or which it may sustain, pay or incur by reason of any matter or thing arising out of or in any way attributable to the operations carried on by Farmee, its servants, agents or employees pursuant to this Agreement.

This clause is used by itself where the farmor, without more, permits the farmee by the drilling of a test well to earn an interest in the lease.

Where obligations under the lease are intended to be imposed on the farmee, a second indemnity clause, coupled with the obligation to assume and carry out the provisions of the lease, will be used:

> Except as otherwise provided in this Agreement, Farmee shall, as of the date of this Agreement, assume, carry out, observe and perform all the obligations of the Lessee contained in the Leases and, in the event of Farmee's failure so to do, Farmee shall at all times indemnify Farmor against all actions, proceedings, claims and demands, costs, damages and expenses which may be brought or made against it or which it may sustain, pay or incur by reason of such failure, including in such indemnity any and all sums paid by Farmor pursuant to a

3 18 *Halsbury's Laws* 531, para. 976 (3d ed. Simonds 1955).
4 *Ante*, n. 3, para. 977.
5 Lewis and Thompson, *Canadian Oil and Gas*, Vol. 1, Div. A, Sec. 9.

bona fide settlement made with any claimant having a claim arising out of or consequent upon any such failure.

The similarity to the protection employed in assignments of leases readily becomes apparent, and the principles discussed in relation to assignments of leases are equally applicable here.

Protection such as that afforded by the foregoing indemnity clauses is restricted to the activities of the farmee before he has earned his interest in the leased lands. It will not extend to the farmor once the farmee has drilled the test well and earned his interest.

Joint Operating Agreements

Under both of the foregoing agreements we have found the assignor—farmor to retain certain rights against the assignee—farmee. Under neither of these agreements does the assignor—farmor either take an active part in the development of the leased lands, or even go so far as to share in the cost of their development. The "joint operating agreement" is generally considered to be misnamed since the operations on the lands comprised in the agreement are not, in fact, carried on jointly by all the parties to it.

Under a joint operating agreement one party will be appointed to develop the lands comprised in the agreement; the other parties to the agreement agree to share in the costs of the development and assume other obligations. A joint operating agreement will generally be entered into among parties who jointly own or jointly desire to develop certain lands. Basically the agreement provides for the joint undertaking to drill a well and to operate the lands jointly.

Different considerations with respect to the right of indemnity will arise in a situation where one or more of the parties, without the consent of all of the other parties, proceeds to drill a well, than in the situation where all the parties agree and proceed to drill the well.

The first situation will be covered by the following clauses:

(1) If, prior to the expiration of Thirty (30) days from receipt of the proposal notice, less than all parties agree in writing to the drilling of the independent well (and failure to advise proposing party shall be deemed non-agreement), proposing party, together with any parties electing to participate therewith in such drilling (all parties so participating, including proposing party, are in this Clause collectively referred to as "drilling party") may, prior to the expiration of Sixty (60) days from receipt of the proposal notice, commence the drilling of the independent well and thereafter drill it to the proposed depth. If the independent well is not commenced within the aforesaid Sixty (60) day period, it shall not be drilled without a new proposal notice. The parties included in drilling party shall each participate in the drilling, completion, capping or abandonment of the independent well, the production therefrom, if any, and any liability or risk attendant thereupon, for a fraction of the total interest, the numerator of which is the participating interest of each of such parties and the denominator is the total of the participating interests of all parties in drilling party. The interest of each of the parties included in drilling party is in this Clause referred to as "the drilling interest."

(2) Operations pursuant to Clause (1) shall be performed by drilling party, and the independent well shall be drilled, completed, capped or abandoned at the sole risk and expense of drilling party. Unless any other party included in drilling party is designated to perform the operations, proposing party shall perform all operations on behalf of drilling party. All the terms and provisions of this Agreement with respect to the rights and obligations of Managing-Operator and a Joint-Operator shall, mutatis mutandis, apply respectively to the party performing and other parties included in drilling party.

(3) Every party included in drilling party shall separately indemnify and save harmless the other parties to this Agreement, and each of them, from and against all actions, suits, claims and demands whatsoever by any person or

> persons whomsoever in respect of any loss, injury or damage or obligation to compensate arising out of or connected with the operations carried on by drilling party pursuant to this Clause and prior to the operation of the independent well by Managing-Operator for the account of the parties.
>
> (4) Each party who carries on any operations at its own risk and expense pursuant to this Agreement shall indemnify and save harmless the other parties from and against all actions, causes of action, suits, claims and demands by any person or persons whomsoever in respect of any loss, injury, damage or obligation to compensate arising out of or connected with such operations.

Under these clauses any parties proceeding without the consent of all of the other parties to the agreement not only are entitled to all of the benefits of their operations, but are likewise solely responsible therefor, until the operation becomes completely joint.

The second situation does not require special indemnity clauses in the nature of the foregoing since the operations are covered by the indemnity clauses provided for the joint operations of the lands. The usual clause providing for indemnity for liability caused to the non-operators by the acts or omissions by the managing operator in managing the joint operations will be as follows:

> (1) Managing-Operator shall be solely liable for any loss or damage of whatsoever nature when such loss or damage is caused by Managing-Operator's gross negligence or wilful misconduct, and in such event Managing-Operator shall indemify and save harmless each Joint-Operator from and against all actions, causes of action, suits, claims and demands by any person or persons whomsoever in respect of any loss, injury, damage or obligation to compensate.
> (2) Except as provided in the foregoing provisions of this Clause, all liabilities incurred by Managing-Operator in the carrying out of any operations pursuant to this Agreement, whether contractual or tortious, shall be charged to the account of the parties and shall be borne by the parties in accordance with their respective participating interests."

A difference between indemnity for independent operations on the lands comprised in the agreement, and for joint operations by the managing operator immediately becomes apparent. Is this difference necessary? It is submitted that the specific non-participation in the first instance and the agreed participation in the second instance justifies the difference.

> In general one joint tort-feasor cannot claim indemnity from another, even under an express contract of indemnity. There is, however, even apart from statutory exceptions, a well-defined exception to the general rule. The exception is that where both parties' negligence contributes to an accident, but one's negligence consists in commission, the other's merely in omission, there the situation is not the same as where they are partners in wrongdoing, but the inactive party may claim indemnity from the other.[6]

The difference lies in the restriction, in the second instance, of the right to indemnity, to indemnity for a managing operator's "gross negligence or wilful and wanton misconduct." The restriction brings about a certain amount of equity in the agreement. The non-operators, being entitled to participation in the proceeds of the lands comprised in the agreement, are willing to assume responsibility for liability occurred in the creation of the participation except where the liability is not merely the result of the managing operator's negligence in conducting the operations but is actually caused, in a subjective sense, by the wilful misconduct of the managing operator.

Relative to Crown holdings, it need only be mentioned that Crown lessees who are parties to joint operating agreements are in no different position contractually than freehold lessees who are parties to a joint

[6] *Ante*, n. 1, at 33.

operating agreement. Both are directly responsible to their respective lessors and owe a duty to themselves to assure that their leases are kept in good standing.

General

In the foregoing discussion it should be kept in mind that the indemnity clauses used as examples in this paper are those that may be described as "primary" indemnity clauses. In addition to these clauses each of the agreements discussed contains what may be described as "secondary" indemnity clauses. The latter relate to liability arising from operations such as re-entry to or abandonment of a well, to surrender of the agreement or to further assignment of the rights thereof. As can readily be seen, there is only a matter of difference in the event against which the protection is sought by these clauses. The difference is not in the principles applicable to the indemnity contracted for.

A discussion of indemnity would be incomplete without at least a mention of some of the devices used in agreements to avert "indirect" liability. One devise is to attempt to define the liabilities of the parties:

> Each of the parties hereto shall be individually responsible for its own obligations as in this Agreement set forth, and neither of the parties hereto shall by reason of its execution, of this Agreement be deemed to assume any joint or several liability in respect of the said lands or the operations conducted thereon pursuant hereto."

Another device is to define the exact relationship between the parties:

> The parties hereto shall hold the said lands as tenants in common and nothing herein contained shall ever be construed as creating any partnership, joint venture, association, or trust, or as imposing upon the parties hereto any partnership duty, obligation, or liability.

These, however, are methods intended as a first barrier against "indirect" liability as they may avert such liability altogether and may negative the need for the use of the indemnity clause.

Conclusion

In any of the three foregoing agreements, whenever vicarious tortious liability arises the liability will only arise because of a legal or equitable relationship between the parties. Because the law provides for an implied right of indemnity arising out of the relationship it is probably unnecessary to include in any of the foregoing agreements clauses purporting to assure the right to indemnity for vicarious liability. However, since it is uncertain against what liabilities the implied right of indemnity can be relied upon, it is in the interest of the party seeking indemnification against all acts or omissions that may bring about vicarious tortious liability. Since there is no implied right of indemnification for indirect contractual liability, it is imperative that to guard against such liability an indemnity clause or clauses be included in the agreement.

In either instance the right of indemnity should be for those matters specifically covered in the particular indemnity clause used. All matters that may bring home liability to the inactive party should be carefully considered before drafting the clause and the clause should then be worded so as to extend its protection against all liabilities that may occur.