1968
*Oct. 8, 9
Dec. 20

F. W. ARGUE, LIMITED and CLIFFORD HEMPHILL (*Defendants*) ..... APPELLANTS;

AND

ROBERT BINGHAM HOWE (*Plaintiff*) ... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Delivery of fuel oil to customer's premises from tank truck—Excess quantity of oil escaping through faulty connection of overflow pipe and covering basement floor—Oil ignited—Sole negligence causing or contributing to damage that of delivery man and distributing company.

*PRESENT: Cartwright C.J. and Abbott, Judson, Spence and Pigeon JJ.

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Limitation of actions—Motor of tank truck used to operate pump in delivery of fuel oil—Damage not caused by use or operation of motor vehicle—The Highway Traffic Act, R.S.O. 1960, c. 172, s. 147(1).

A fire which originated in the basement of a building owned by the respondent caused extensive damage to the said building and the property of the occupants as well as to an adjoining building and the property of the tenants therein. Ten different writs were issued by various plaintiffs against the defendants A Co. and H. A Co. was a fuel distributing firm and H was a fuel delivery man acting at all material times in the course of his employment with A Co. All of the actions were tried together and were dismissed by the trial judge. On appeal, the Court of Appeal held: (1) that the provisions of s. 147(1) of *The Highway Traffic Act,* R.S.O. 1960, c. 172, did not apply to bar the action despite the fact that the writs were issued considerably longer than a year after the occurrence; (2) that the negligence of the plaintiff (the present respondent) contributed to the damage which had arisen from the negligence of H, therefore, the provisions of *The Negligence Act,* R.S.O. 1960, c. 261, applied, and that the fault should be apportioned 40 per cent to the plaintiff and 60 per cent to the defendants. The defendants appealed to this Court from the judgment of the Court of Appeal in so far as that judgment held that the limitation provision of *The Highway Traffic Act* did not apply to bar the plaintiff's action. The plaintiff cross-appealed asking that the judgment of the Court of Appeal should be varied to permit him to recover the full amount of his loss.

On the day of the fire H pumped 471 gallons of fuel oil into the respondent's premises, although the storage tank had a capacity of only 300 gallons. The excess oil escaped through a faulty connection of the overflow pipe, spread across the basement floor and shortly thereafter ignited. H made the delivery of oil from a tank truck by the operation of a pump which discharged oil from the tank of the truck into the fill pipe leading to the storage tank in the basement. The motor of the truck was used to operate the pump, being connected to the pump by a special transmission and lever which the operator of the truck manipulated to put the pump in operation.

There was a vent alarm system to warn the delivery man when the tank was full. By standing near the outside end of the vent pipe the employee would hear a whistle which sounded as long as air was being expelled from the tank. Following a short interval after the sound of the whistle ceased, a sound of the gurgle of oil would be heard in the pipe and finally, if the pumping continued, the oil would be driven up the pipe to fall outside on the ground with a plop.

The end of this pipe which had been inserted into a rubber compression collar at the top of the respondent's storage tank had become disengaged from the collar. Although the respondent knew that his equipment was old and that there was some slack in the vent pipe connection with the storage tank, and that the smell of oil was found after the periodic deliveries, he failed to make any repairs.

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H's evidence was that the whistle was faint and that at times he failed to hear it. He heard no gurgle or plop, nor did any oil escape outside. After the pump had been operating for some eleven minutes, H checked the number of gallons that had been pumped into the fill pipe and realizing that the amount was far in excess of the ordinary receipt at the respondent's premises, he shut off the pump and entered the building, where he found that the basement floor was completely covered with oil. He left the premises immediately to obtain assistance in the removal of the spilled oil without cutting off the emergency power switch or without warning anyone of the excessive danger of fire. A short time thereafter the fire commenced.

Held: The appeal should be dismissed and the cross-appeal allowed.

The provisions of s. 147(1) of the *Highway Traffic Act* did not apply to bar the action of the plaintiff. The damage was not caused by the use or operation of a motor vehicle but was caused by the use or operation of the pump mounted on the motor vehicle when the motor vehicle itself was stationary.

The sole negligence which caused or contributed to the damage was that of the defendant H, who failed to stop the pump on the tank truck as soon as the sound of the whistle ceased, and of the defendant A Co., for that defendant had notice of both the faintness of the whistle and of the smell of oil which had been present for the last fill of the tank. The negligence, if any, of the plaintiff, being not negligence which caused or contributed to the damage, the plaintiff was entitled to recover his damages in full.

Dufferin Paving & Crushed Stone Ltd. v. Anger and Derbyshire, [1940] S.C.R. 174; *Heppel v. Stewart and Domingos,* [1968] S.C.R. 707, distinguished; *Peters et al. v. North Star Oil Ltd. et al.; Derksen et al. v. North Star Oil Ltd. et al.* (1965), 53 W.W.R. 321; *Harvey v. Shade Brothers Distributors Ltd.* (1967), 61 W.W.R. 187, referred to.

APPEAL and CROSS-APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing appeals from a judgment of Landreville J. Appeal dismissed and cross-appeal allowed.

Rowell K. Laishley, Q.C., for the defendants, appellants.

Adrian T. Hewitt, Q.C., and *John L. Nesbitt,* for the plaintiff, respondent.

The judgment of the Court was delivered by

SPENCE J.:—In this matter, ten different writs were issued by various plaintiffs against the defendants F. W.

[1] [1966] 2 O.R. 615, 57 D.L.R. (2d) 691, *sub nom. R.A. Beamish Stores Co. Ltd. et al. v. F. W. Argue Ltd. et al.*

Argue Limited and Clifford Hemphill. All of the actions were tried together and were dismissed by Landreville J. in his judgment of June 16, 1966.

In the Court of Appeal[1], the appeal of certain of the plaintiffs was allowed in full and it was adjudged that they should recover the full amount of their losses to be ascertained upon a reference to the Local Master. Three of the plaintiffs had abandoned their appeal from the judgment of Landreville J. It was further adjuged that Robert Bingham Howe recover from the defendants 60 per cent of his loss to be ascertained upon such reference. The defendants appealed to this Court from the judgment of the Court of Appeal for Ontario in so far as the said judgment held that the limitation provision of the Ontario *Highway Traffic Act,* R.S.O. 1960, c. 172, s. 147(1) did not apply to bar the plaintiff's action. The plaintiff Robert Bingham Howe cross-appealed asking that the judgment of the Court of Appeal should be varied to permit him to recover the full amount of his loss as assessed upon the reference.

Robert B. Howe was the owner of a building on the north-east corner of Bank Street and Second Avenue in the City of Ottawa, and had, for many years, operated therein a pharmacy business known as Howe's Drug Store. Later, Howe sold the drug store business to one Alan Francis Forhan, and leased to him the building in which the business was carried on. In the basement of this building there were two furnaces both of which had been converted to the use of fuel oil. To store the fuel oil, there was a 300-gallon tank along the south wall of the basement. In the top of that tank, there were two openings, one of which was connected by a solid joint to a two-inch inlet pipe which led through the wall to the outside of the building and into which the oil was poured when the tank was filled. In the second opening, there was inserted by a threaded connection a device known as a vent alarm or whistle. This device consisted of a pipe running through the upper wall

[1] [1966] 2 O.R. 615, 57 D.L.R. (2d) 691, *sub nom. R. A. Beamish Stores Co. Ltd. et al. v. F. W. Argue Ltd. et al.*

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of the tank down some inches inside it. As the fuel oil flowed into the tank through the inlet pipe, it displaced the air which had occupied the empty portion of the tank, and that air rushing through this vent alarm caused a clearly audible whistle until the level of the oil in the tank reached the lower end of the vent alarm pipe when, of course, the whistle ceased. The sound of this whistle was transferred to the area of the outside from which the tank was being filled, by a three-quarter-inch pipe. That pipe had been connected to the vent alarm or whistle by a compression rubber collar and it ran from such collar through the outer wall and then perpendicularly up the wall for about seven feet, so that the operator supervising the pouring of the fuel oil into the outside end of the inlet pipe could hear this whistle sounding as the tank filled.

The defendant F. W. Argue Limited had, for some years, supplied the fuel oil to the plaintiff, here respondent, Robert B. Howe. Prior to the year 1959, the device on the outer end of the inlet pipe had been known as the "fast fill system" and that device seems to have consisted of a rubber diaphragm into which was inserted the nozzle of the hose from the tank truck. The purpose of the rubber diaphragm was simply to prevent splashing back of the oil. In the year 1959, the defendant F. W. Argue Limited installed in these and other premises to which they supplied oil in the City of Ottawa a different device known as the "Unifil system". This system was said by the witness John Argue to have two advantages over its predecessor: firstly, it was more efficient, permitting the operator to make a more rapid connection between the hose from the tank truck and the inlet pipe, and, secondly, it permitted the oil to flow into the customer's tank at a more rapid rate. The previous rate of flow was 32 gallons per minute and the rate with Unifil was 40 gallons per minute. It would seem, on all of the evidence, that the Unifil system had another very distinguishing feature. It provided, if not a solid, at least a very tight connection between the hose from the tank truck and the inlet pipe, while its predecessor had provided a connection which was

much less tight. The result was that the full pressure of the pump on the tank truck was transmitted through the hose and the nozzle at the end thereof into the inlet pipe and down into the tank. The previous system had permitted a break in that line of pressure. Although there has been no finding, it may be that the displacement of the end of the vent pipe which had been inserted in the rubber compression collar on the top of the plaintiff's storage tank could have been caused by this additional pressure in the fuel oil tank after the installation of the Unifil system. It should be noted that the plaintiff-respondent Howe was never informed of this alteration in the method of connecting the tank truck hose with the inlet pipe.

The witness Bullis, who was an inspector in the service of the Energy Board of the Province of Ontario, agreed with the learned trial judge that this rubber collar would be the weakest point and under pressure "it would be the one that would go".

In mid-January 1961, the defendant Argue delivered fuel oil to the plaintiff Howe's premises from a tank truck. This outfit, I avoid the use of the word "vehicle" as that word is given a definition in the Ontario *Highway Traffic Act,* consisted of an ordinary truck driven, of course, by the usual gasoline motor and, mounted on that truck, a large tank for carrying fuel oil and also a pump with a long hose to connect the pump with the customer's inlet pipe. The motor of the truck was used to operate the pump, being connected to the pump by a special transmission and lever which the operator of the truck manipulated to put the pump in operation. The speed at which the pump was operated was controlled by the speed of the only motor on the outfit, that which propelled the truck when it was in motion. There was a nozzle at the end of the pipe which was connected to the Unifil device on the outer end of the inlet pipe in the fashion which I have described and which the operator could control by a hand valve. There was, in addition, a meter on the pump so that the operator could determine the exact gallonage which had been pumped from the truck into the consumer's tank. On the occasion of

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the filling of the tank in mid-January 1961, and on a considerable number of occasions before, the operator of the truck had noted that the sound of the whistle coming from the vent alarm system was faint and the operator Hemphill had reported this fact to his employer the defendant Argue. It was said that that circumstance did not cause any particular concern as some other vent alarm whistles were faint.

On January 28, 1961, the defendant Argue delivered another supply of oil to the plaintiff's (Howe's) premises. On that occasion, and on the two previous deliveries, the operator of the defendant Argue's tank truck was the defendant Hemphill. The trial judge found that the defendant Hemphill, although he had a certain degree of instruction in carrying out the operation, was comparatively untrained. He connected the hose from the tank truck to the inlet pipe and started the pump. Hemphill's evidence was that the whistle was faint and that at times he failed to hear it. He purported not to have been concerned at his failure to hear the whistle which, of course, ordinarily would have indicated that the oil in the plaintiff's tank had not reached the level of the lower end of the whistle pipe because he blamed it on traffic noise in the neighbourhood. The inlet was only some few feet away from Bank Street, a main business street. He gave as a further reason for his unconcern the fact that he heard no gurgle. Now if a vent alarm whistle and the sound-carrying pipe are connected in the fashion I have already described when the whistle stops because the level of the oil has reached the bottom of the whistle pipe after an interval the sound of the whistle is replaced by the sound of the gurgle of the oil in the whistle pipe and the connecting pipe to the outside, and finally if the pumping is continued the oil is driven up that connecting pipe and falls outside on the ground with a plop. The three forms of warning were referred to during the trial as "whistle, gurgle, and plop". Hemphill heard no gurgle or plop, nor did any oil escape outside. At long last he became somewhat concerned at the length of time that the oil had been pumped, checked his gauge and was astounded to find that he had pumped in

471 gallons. He realized immediately that the amount was far in excess of the ordinary receipt at the plaintiff's premises. He shut off the pump, entered the premises, spoke to Forhan, the tenant, and asked to see the storage tank in the basement. As Hemphill and Forhan descended the steps into the basement, they saw that the floor of the basement was completely covered with oil. The depth of that covering was not determined. Although there was an emergency switch which could have cut off the power to the oil burner, Hemphill left the premises immediately to obtain assistance in the removal of the spilled oil without cutting off that switch or without warning anyone of the excessive danger of fire. Some short time after he left—no more than from fifteen minutes to half an hour—a fire commenced. Forhan attempted to extinguish that fire but was unsuccessful. A very serious conflagration ensued damaging extensively not only the plaintiff's building and Forhan's drug stock and equipment but also the neighbouring premises.

Other circumstances should be recounted. After the defendant Argue's employee Hemphill had filled the plaintiff's tank in mid-January of 1961, the plaintiff's tenant Forhan reported to the plaintiff that there was a smell of oil permeating the building. The plaintiff went to the premises, descended into the basement, opened a panel in the end of a plywood shell surrounding the storage tank, and aided by a flashlight sought evidence of oil spillage. He found no oil on or under the tank and it seemed to him that the vent alarm pipe was sitting in its rubber compression collar. The learned trial judge pointed out that that observation could not have been dependable when made under the circumstances I have outlined, and in fact found that:

> Furthermore, in light of all the evidence, I have arrived at the conclusion that the vent pipe had worked its way out of its proper connection for many months past. How it came into that position is problematic. The defence wishes me to assume that the cause is the pressure exercised by the cement step on the horizontal portion of the pipe outside the wall. Alternatively the moving by hand of the outside upright piece of pipe which was not bracketed to the wall by some unknown person may have given the torque necessary to unseat it at the tank connection. In my opinion, it is pointless to make such a finding.

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At any rate, the fact that the plaintiff found no evidence of oil about the outside of the tank or underneath it in mid-January, in my view, shows that the delivery which had been made at that time had not resulted in any overflow and that therefore the faint whistle carried to the outside by the vent pipe despite the fact that its end was displaced from the collar was sufficient to warn the driver on that occasion when he had filled the tank up to the bottom of the whistle pipe. So, on that occasion, immediately previous to the one when the damage occurred, the operator Hemphill acting on the cessation of the vent alarm whistle did not need either the gurgle or the plop warnings.

The plaintiff testified that immediately after this inspection, he attended the office of the defendant Argue and there spoke to Mr. Murphy, whom he knew, and who was then the sales manager of the defendant Argue, paid the oil account to that date, and informed Mr. Murphy of this smell of oil. Mr. Murphy, in examination for discovery, testified that no such attendance had been made by the plaintiff. At trial, in examination-in-chief, he indicated that he had searched the corporate records and found a receipt had been issued which convinced him that the plaintiff had attended the premises about January 18, 1961, but stated flatly that the plaintiff had not then complained about any smell of oil. However, this statement, although repeated during the cross-examination with much less force, was really a conclusion based on the fact that he had not passed on such complaint to the mechanical side of the defendant Argue's business, as he said was his invariable practice on such occasions.

The trial judge found and I accepted his finding:

> The faintness only begged greater attention and diligence by Hemphill. In my opinion, it does not excuse him. This condition of the whistle, as well as the smell of oil in the basement whenever the tank was being filled, had been reported to the office, not only on the one occasion by Cleary, but also by Howe in the other case. I find that the defendant company had notice and was negligent in not investigating these two abnormalities.

The delivery of the oil and the consequent fire occurred on January 28, 1961. The actions were instituted by the

various writs of summons issued on June 5, 1962. On the basis of these facts, the Court of Appeal for Ontario held, firstly, the provisions of s. 147(1) of *The Highway Traffic Act*, R.S.O. 1960, c. 172, did not apply to bar the action despite the fact that the writs were issued considerably longer than a year after the occurrence; secondly, that the respondent and cross-appellant Howe's negligence contributed to the damage which had arisen from the negligence of Hemphill, therefore, the provisions of *The Negligence Act*, R.S.O. 1960, c. 261, applied, and that the fault should be apportioned 40 per cent to the plaintiff Howe and 60 per cent to the defendants.

Little need be said as to the negligence of the defendant Hemphill, for whose negligence, of course, the defendant Argue is responsible, as the negligent acts were committed during the course of his employment. The trial judge made specific findings as to such negligence as follows:

> 1. that Hemphill, the delivery man, was negligent in the performance of his duty and that negligence was a direct cause of the spillage of oil of some two or three hundred gallons on the basement floor;
>
> 2. the oil coming in contact and flowing into the firebox of the furnace was ignited later, when, by thermostat, the oil burner went on, spread and set fire to the building;
>
> 3. that the negligence of Hemphill was a *direct cause* of the fire which consumed the building.

Laskin J.A., in his reasons for judgment in the Court of Appeal, said:

> Hemphill's negligence in this case consisted in his failure to shut off the flow of oil when he no longer heard the whistle, and particularly when he could hear no gurgle. He had made two previous deliveries of oil to the premises, on January 10 and January 19, discharging 241 and 151 gallons respectively on those occasions. Knowing the rate of flow, he should have realized, if he was at all alert to time, that he was overtaxing the capacity of the tank. Beyond this he showed poor judgment in leaving the premises, after seeing the basement flooded with oil, without turning off the oil furnace or ensuring that this would be done.

There are, therefore, concurrent findings as to Hemphill's negligence and such findings are amply supported by the evidence. Counsel for the appellant in this Court made no attempt to contest such findings.

The first important question to be decided must be whether the Court of Appeal for Ontario was correct in

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holding that s. 147(1) of *The Highway Traffic Act*, R.S.O. 1960, c. 172, did not apply under the circumstances which occurred to bar this action. The subsection provides:

> 147. (1) Subject to subsections (2) and (3) no action shall be brought against a person for the recovery of damages occasioned by a motor vehicle after the expiration of twelve months from the time when the damages were sustained.

Subsections (2) and (3) are irrelevant for the purposes of this consideration.

Many cases were cited and analyzed in the careful argument of counsel, some of which, however, I do not deem to be relevant. Those are cases such as *Stevenson v. Reliance Petroleum Limited; Reliance Petroleum Limited v. Canadian General Insurance Company*[2]; *Irving Oil Company Limited v. Canadian General Insurance Company*[3], and *Law, Union & Rock Insurance Company Limited v. Moore's Taxi Limited*[4]. All of those cases dealt with the liability of an insurance company under a policy and depended for their decision upon the words of the policy. In my view, it mattered not that the words of the policy were also the words of the statute because if there was a statute involved that statute was not a limitation provision of the *Highway Traffic Act* but was a provision of the *Insurance Act* of Ontario. As an example, in the *Stevenson* and *Reliance Petroleum* cases, the clause in one policy covered claims "... against the liability imposed by law upon the insured ... for loss or damage arising from the ownership, use or operation of the automobile". Those words form part of the standard owner's form of automobile insurance approved by the Superintendent of Insurance of Ontario. The present statutory provisions as to the contents of a standard owner's policy appears in *The Insurance Act*, R.S.O. 1960, c. 190, as s. 213, and the coverage as outlined in subs. (1)(*a*) thereof is "arising from the ownership, use or operation of any such automobile in Canada ...". In so far as the cases may be considered cases dealing with the interpretation of the statute as well as the actual words

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2 [1956] S.C.R. 936.

3 [1958] S.C.R. 590.

4 [1960] S.C.R. 80.

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of insurance contract, they are words which interpret the provision of the *Insurance Act* and not the provisions of the *Highway Traffic Act*.

The relevant section of the *Highway Traffic Act*, as Laskin J.A. pointed out in his reasons for judgment in the Court of Appeal for Ontario, has appeared in the statute in substantially the same words since it was first enacted in 1923. The important words of the section are, of course, "occasioned by a motor vehicle", and, as Laskin J.A. notes, counsel for the plaintiff seeking to avoid a bar created by the section stresses the words "by a motor vehicle" and counsel for the defendant seeking to establish a bar to the action stresses the word "occasioned". The section has been considered in at least two cases in this Court and like sections have been considered in several cases in other Courts throughout Canada. I think one may commence with *Dufferin Paving & Crushed Stone Ltd. v. Anger and Derbyshire*[5]. There, the plaintiffs sued for damages which had been caused to their residence on Beech Avenue in the City of Toronto by heavy vibrations. The vibrations were caused by the passage along Beech Avenue of large cement ready-mix trucks. These trucks, although beyond the weight permitted by the *Highway Traffic Act*, had been permitted to use the street by a special authority granted by the City of Toronto, such special authority being permitted under the provisions of the *Highway Traffic Act*. The action was laid in "nuisance" and not "negligence" and there was no evidence that the driving of the heavy trucks had been negligent or that they were driven in a manner contrary to the provisions of the said permission. The writ was issued more than a year after anything but a negligible portion of the damage had been caused. It was the unanimous judgment of this Court that the action was barred by the provisions of the said statute. All the members of the Court adopted the rule of construction that if the words were in themselves precise and unambiguous then no more can be necessary than to expound those words in their natural and

[5] [1940] S.C.R. 174.

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ordinary sense. The words themselves in such case best declare the intention of the lawgiver. Crocket J., said at p. 183:

> There can be no doubt, I think, that the concrete mixing trucks were motor vehicles within the meaning of s. 1(*h*) of the *Highway Traffic Act*, nor that Beech Avenue was a highway within the terms of that statute. The learned trial judge having clearly found that the damage to the plaintiffs' property, for which compensation was sought in this action, was caused by the operation of these cement mixing trucks upon the highway and that the provisions of the *Highway Traffic Act* and the municipal by-laws and regulations were lived up to in connection with their movement along that highway, I am at a loss to perceive how it can well be said that this action was not an action "for the recovery of damages occasioned by a motor vehicle," within the meaning of s. 53 of the *Highway Traffic Act* or that the plaintiffs' right to recover for such damages was a common law right entirely beyond the scope and purview of that statute.

And at p. 184, he said:

> The section itself says nothing about the damages sued for being occasioned by the negligent operation of a motor vehicle upon a highway. It is directed wholly to the bringing of actions "for the recovery of damages occasioned by a motor vehicle"—a motor vehicle, which can only be lawfully operated on a highway under a permit granted in accordance with the provisions of the *Highway Traffic Act*.

As to the contention of the appellants that the section was limited to bar negligent operation upon the highway, Crocket J. said at p. 185:

> It seems to me, with the highest respect, that we could not give effect to the distinction now relied upon in support of the judgment *a quo* without reading into the language of a perfectly clear, precise and unambiguous enactment, words which it does not contain, and, moreover, without holding that the section was enacted as a protection only for those who violated the provisions of the statute, and not for those who observed them.

Kerwin J., as he then was, carefully considered the evidence to determine whether there was any evidence that the vibrations which caused the damage were the result of rotation of the cement mixer on the truck as distinguished from the vibration caused by the moving vehicle with its rotary mixer. It is of some significance that in this, the *Dufferin Paving* case, the mixer was rotated by a different motor than that which propelled the vehicle and that the mixer rotated whether it was filled or empty. Kerwin J. was

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unable to find that there was any evidence of damage which arose from vibrations caused by the rotation of the mixer as distinguished from the overall vibration occurring. At p. 188, he said:

> While, no doubt, throughout the trial emphasis was placed upon the fact that the cement mixers operated while trucks were in motion upon the highway both when carrying cement and when empty, and while it may be a fair inference that the mixers and auxiliary motors did set up vibrations, I am unable to find any evidence to warrant a finding that these vibrations caused damage to the respondents' house. *I therefore conclude that in this case the damages were caused by motor vehicles.*

The italicizing is my own.

I am of the opinion that the *Dufferin Paving* case is an authority only for the proposition that when damage is occasioned by a motor vehicle *used as such* whether that damage sounds in negligence or in nuisance or in breach of statutory regulations, the section is a bar to actions instituted by the issuance of a writ more than twelve months after the damage occurred. I find a distinct inference in the words of Kerwin J. which I have quoted above that if the damage was occasioned by some operation of the apparatus other than its operation as a motor vehicle, the section would not apply to bar the action. With respect, I agree with the comment of Laskin J.A. in reference to this case, when he said:

> I find nothing in the *Dufferin Paving* case incompatible with the view I would take of section 147(1), namely, that it applies only where the damage is occasioned by a motor vehicle which is used in that character and not where it is used for another purpose to which it has been adapted, as, for example, a stationary pumping machine.

In *Heppel v. Stewart and Domingos*[6], this Court considered the following circumstances. On June 15, 1964, a motor vehicle owned by one defendant and operated by the defendant Domingos ran into the rear of a motor vehicle owned by the plaintiff Stewart when it was stopped, causing personal injuries and property damage. The writ of summons was issued on April 21, 1965, *i.e.*, still within the twelve-month period. The statement of defence was delivered on June 17, 1965, *i.e.*, two days after the twelve-

[6] [1968] S.C.R. 707.

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month period had expired. In the statement of defence, the defendants alleged that the brakes on the automobile had been repaired by one Heppel, a short time prior to the accident, and that the brakes had operated satisfactorily until the time of the accident. The plaintiff Stewart only then made application to add the appellant as a party defendant, and this application was resisted on the allegation that any action against Heppel was barred by the said section 147(1) of the *Highway Traffic Act*. This Court held, reversing the Court of Appeal for Ontario, that the section was a bar. Martland J., giving the judgment for the Court, said:

> The learned judge of first instance was of the opinion that the subsection applied if the damages claimed were physically caused by the motor vehicle. The Court of Appeal held that the provision applied only if the legal basis of the claim is the use or operation of the motor vehicle.
>
> With respect, I do not agree with this interpretation of the subsection. It does not purport to apply only to causes of action of a particular nature. It does not refer to the use or operation of a motor vehicle. It states specifically that *no action* shall be brought to recover damages occasioned by a motor vehicle. If a motor vehicle is the occasion for the damage, *i.e.*, if it is the vehicle which brings it about, then the limitation period applies.

The *Dufferin Paving* case was cited as the authority.

Again, I stress that in the *Heppel* case, the damage was occasioned by a motor vehicle acting as a motor vehicle and not when stationary acting as a fuel pumping device.

Martland J. in *Heppel v. Stewart* cited and adopted Kerwin J., as he then was, in the *Dufferin Paving* case, at p. 189:

> Taken by themselves the words used in this subsection are clear and unambiguous. In terms they are not limited to circumstances where damages are occasioned by a motor vehicle on a highway; they are not restricted to cases where damages are caused by a motor vehicle coming in contact with a person or thing; they do not state that the damages must have been occasioned by negligence in the operation of a motor vehicle or by reason of the violation of any of the provisions of the Act. It is contended on behalf of the respondent that the subsection must be construed in a narrower sense and that such a claim as the present, based as it is on an alleged nuisance at common law, is not within its purview.

and continued:

> I agree with this interpretation of the subsection and, in my opinion, in terms, it covers the circumstances in the present case. In fact, in the

present case, the plaintiff's claim against the appellant clearly is founded upon the use and operation of a motor vehicle; *i.e.*, one with defective brakes.

I am of the opinion that the *Heppel* case should not be applied to find that the statutory bar applies in the present case. In the present case, the damage was not caused by the use or operation of a motor vehicle but was caused by the use or operation of the pump mounted on the motor vehicle when the motor vehicle itself was stationary. I agree, with respect, with Laskin J.A., that the fact that the engine which propelled the tank truck along the highway was also the motor which drove the pump does not mean that the damage which ensued by such pumping when carried out negligently was "damage occasioned by a motor vehicle". I, further, with respect, agree with the learned justice in appeal when, citing the definitions appearing in s. 1(1) of the *Highway Traffic Act,* in para. 15 thereof "motor vehicle" includes "an automobile, motorcycle, and other vehicle propelled or driven otherwise than by muscular power...", and in para. 29 thereof "vehicle" "includes a motor vehicle, trailer, traction engine, farm tractor, road-building machine and any vehicle drawn, propelled, or driven by any kind of power, including muscular power . . .", he concludes that the definitions convey a suggestion of something propelled or driven along a surface and not a stationary pump.

Dickson J. in *Peters et al. v. North Star Oil Limited et al.; Derksen et al. v. North Star Oil Limited et al.*[7] considered circumstances somewhat similar to those here. In that case, the fluid which was negligently allowed to overflow and caused a fire was gasoline being delivered to a service station. The action was commenced more than twelve months after the time when damages were sustained. Section 98(1) of *The Highway Traffic Act,* R.S.M. 1954, c. 112, provided:

> No action shall be brought against a person for the recovery of damages occasioned by a motor vehicle
>
> . . .

[7] (1965), 53 W.W.R. 321.

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At p. 334, Dickson J. said:

> In my view, the words "damages occasioned by a motor vehicle or by the operator thereof" do not embrace situations where damage is occasioned—the vehicle being stationary—by the use of auxiliary equipment attached to, but not forming an integral part of, a vehicle, and used for a purpose unrelated to the operation of the vehicle *qua* vehicle.

Dickson J., as I have, concluded that cases dealing with the provisions of insurance policies have no application to this issue.

Counsel for the respondent in this Court also cited *Harvey v. Shade Brothers Distributors Ltd.*[8] That case may hardly be considered as a persuasive authority because Tyrwhitt-Drake, L.J.S.C., adopted as his authority the Court of Appeal decision in the case presently under appeal to this Court. I wish, however, to cite and, with respect, to adopt the words of Tyrwhitt-Drake, L.J.S.C., at p. 189:

> Shortly put, the test to be applied when considering the character of a multi-purpose article at any given time is the purpose for which, at that time, it was being used. To take an extreme example: to hold that in all circumstances a self-propelled gun is a vehicle, and never a piece of artillery, would be an obvious absurdity. Similarly, to say that a self-propelled supply tank is invariably a vehicle and never a supply tank—these uses being exclusive in essence—does not make sense;...

For these reasons, I have come to the conclusion that the provisions of s. 147(1) of the *Highway Traffic Act* do not, in the circumstances of this case, apply to bar the action of the plaintiff despite the fact that the writ was issued more than twelve months after the damage occurred. I, therefore, would dismiss the appeal.

I now turn to consider the respondent's cross-appeal. By that cross-appeal, the respondent asks that he be allowed to recover his damages against the defendants in full rather than merely the 60 per cent thereof allowed to him by the judgment of the Court of Appeal for Ontario. This reduction in the damages allowed to the plaintiff, here cross-appellant, is based upon the finding of negligence made in the Court of Appeal for Ontario in the words I have already quoted. By those words, Laskin J.A. outlined Howe's negligence as consisting of his failure to put and

[8] (1967), 61 W.W.R. 187.

keep his heating equipment in repair when he knew that it was old and that there was some slack in the vent pipe connection with the storage tank, and that the smell of oil was found after a delivery, such deliveries having been made periodically. For the purpose of the disposition of this case, I am content to accept that finding of negligence as against the plaintiff Howe. I am, however, with respect, not in agreement with Laskin J.A.'s sentence immediately following such finding, "This negligence contributed to the damage arising from the negligence of Hemphill." As I have already demonstrated, the negligence of Hemphill was his negligence in failing to stop the pump on the tank truck as soon as the sound of the whistle ceased. That sound of a whistle may have been faint. The evidence showed that other whistles on vent alarm systems were faint. The evidence showed that on previous occasions, despite the faintness of the whistle which had persisted for some considerable time over several deliveries, there had not been any overflow.

In my view, Hemphill, by failing to heed, if he had ever listened for the cessation of the sound of the whistle, and by relying on possible subsequent alarms such as a gurgle in the pipe or finally the plop of oil on the outside of the building, simply continued his negligence. This was not a case where a whistle had stopped and then some short time thereafter the oil gurgled up the vent pipe and plopped onto the ground causing some little damage by way of stain on ground or building. This was a case in which Hemphill poured 471 gallons of oil into the plaintiff's basement. Since the oil was pumped at the rate of 40 gallons a minute, pumping this amount took over eleven minutes. Although Hemphill was not under any duty to know the capacity of the plaintiff's storage tank, he had to realize, had he paid any attention whatsoever, that pumping for eleven minutes at the rate of 40 gallons a minute was delivering an amount of oil far in excess of that similarly delivered during similar climatic conditions.

The plaintiff and cross-appellant, by failure to have the looseness of the rubber compression collar's grip on the vent pipe repaired some time before might have resulted

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in his suffering a larger amount of damage than he would have had such repair been made; but on the other hand there has been no evidence to prove that the vent pipe became disengaged from the collar due to the looseness and not due to the pumping of the oil into the storage tank under the increased pressure which resulted from the Unifil system or perhaps even on the occasion of this very incident by the over-filling of the tank. Upon the whole of the evidence, I have come to the conclusion that the sole negligence which caused or contributed to the damage was that of the defendant Hemphill and of the defendant Argue, for that defendant company had notice of both the faintness of the whistle and of the smell of oil which had been present for the last fill of the tank.

Under these circumstances, the negligence, if any, of the plaintiff, cross-appellant, being not negligence which caused or contributed to the damage, the plaintiff should be entitled to recover his damages in full. I would, therefore, allow the cross-appeal and direct that the judgment at trial be varied to the effect that Robert Bingham Howe recover against the defendants the full amount of his loss, to be ascertained upon a reference to the Local Master of the Supreme Court of Ontario at Ottawa, together with his costs throughout.

Appeal dismissed and cross-appeal allowed with costs.

Solicitors for the defendants, appellants: Hughes, Laishley, Mullen & Touhey, Ottawa.

Solicitors for the plaintiff, respondent: Hewitt, Hewitt and Nesbitt, Ottawa.