

# THE MANY FACETS OF *COOK v. LEWIS*

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## 1. INTRODUCTION

This article explores various lessons to be drawn from *Cook v. Lewis*,<sup>1</sup> a case of seemingly lasting interest and, in so doing, will mimic the economy of exposition that is a hallmark of its reasons for decision. The case is an early example of the jurisprudence of the Supreme Court of Canada acting as our court of last resort. It reveals the importance of the drawing of pleadings and how plaintiffs can thereby gain advantages. It reviews the choices available to an aggrieved party faced with multiple defendants. It is a singular example of a reversed burden, not just evidentiary but of the legal onus itself. The *obiter dicta* in *Cook v. Lewis* foresaw development of liability attaching to inherently dangerous activities; it pointed the way to the very recent developments of liability based on destruction of the plaintiff's proof and, some would find, the origins of the duty to warn.

I have observed elsewhere that the Supreme Court of Canada enjoys today a deserved reputation internationally as a progressive institution.<sup>2</sup> That was not always so, in part because the Court languished as an intermediate appellate tribunal until the abolition of civil appeals to the Judicial Committee of the Privy Council in 1949,<sup>3</sup> the last case arriving in Downing Street, London, in 1960.<sup>4</sup> Justice Rand himself reportedly offered an explanation for the restricted ambition of the Court before its liberation:

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<sup>1</sup> *Cook v. Lewis*, [1951] S.C.R. 830.

<sup>2</sup> E. Veitch, "Scandalum Magnatum is Alive and Well in Canada?" (2000) 11 *National Journal of Constitutional Law* 169.

<sup>3</sup> *An Act to Amend the Supreme Court Act*, S.C. 1949, c. 37. Criminal appeals had initially been abolished in 1887 by an amendment to the *Criminal Code*, later held invalid in *Nadan v. The Queen*, [1926] A.C. 482. Following enactment of the *Statute of Westminster, 1931*, which expressly authorized Parliament and the legislatures to repeal or amend imperial statutes, Parliament once again enacted the same amendment to the *Criminal Code*, later held valid in *British Coal Corp. v. The King*, [1935] A.C. 500.

<sup>4</sup> *Ponoka-Calmor Oils Ltd. et al. v. Earl F. Wakefield Co. et al.*, [1960] A.C. 18 (P.C.).

During the hearings... the late Ivan Rand remarked to me that great as the late Chief Justice Sir Lyman Duff was, he could never develop his talent because of the Privy Council and the necessity for Duff to always write his legal opinions in the light of what the higher tribunal might decide.<sup>5</sup>

That appreciation rings true, as any discussion with a trial judge or appellate justice will confirm. A primary or intermediate body must always be mindful of what a superior court has done earlier and rein in their initiative lest it be deemed unworthy on appeal. Our principal case then, in 1951, was the product of a court free to go its own way. The decision attracted the immediate attention of some of the sharpest minds of the day.<sup>6</sup> But why? Was it the individual fact pattern or the reasons for decision that caught their fancy? A reading of the literature around the globe determines that it was both, as a leading United States text makes clear.<sup>7</sup>

## 2. *COOK v. LEWIS*

On the opening day of hunting season for blue grouse and deer in 1948, the 11<sup>th</sup> of September, Robert Lewis was hunting with his brother Jack and a friend, Fitzgerald. He suffered a gunshot wound to the face which he claimed was caused by one of another group of hunters comprising David Cook, one Akenhead and a lad, Wagstaff, who was not a shooter. The latter threesome had earlier agreed to share their bag. As it was opening day, the area teemed with hunters. Justice Rand held, with Justices Estey, Cartwright and Fauteux concurring, and with Justice Locke in dissent: if a plaintiff shows guilt in one or both of two persons, then their acts in themselves impaired the plaintiff's capacity to establish liability and the onus shifts to the wrongdoers to exculpate themselves.

## 3. *LESSONS OF COOK v. LEWIS*

The initial commentator was the legendary Glanville Williams, Quain Professor of Jurisprudence.<sup>8</sup> He discerned the origins of the rule in *Cook v. Lewis* in United States' case law,<sup>9</sup> but found most interesting the individual manner in which the Court reached its decision.<sup>10</sup> He thought the principle, of casting on each defendant the burden of

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<sup>5</sup> W. G. Morrow, "The Last Case" (1978) 16 *Alberta Law Review* 1.

<sup>6</sup> G. Williams, "Case Comment on *Cook v. Lewis*" (1953) 31 *Canadian Bar Review* 315; T. B. Hogan, "*Cook v. Lewis* Re-Examined" (1961) 24 *Modern Law Review* 331.

<sup>7</sup> D. Dobbs, *The Law of Torts*, vol. 1 (St. Paul, Minn.: West, 2001) at 426-27.

<sup>8</sup> Williams, *supra* note 6.

<sup>9</sup> *Oliver v. Miles*, 110 So. 666 (Miss. S.C. 1926) and *Summers v. Tice*, 199 Pac. 2d 1 (Cal. S.C. 1948), both noted by the Supreme Court of Canada.

<sup>10</sup> Williams, *supra* note 6, at 316.

self-exculpation, to be an important contribution to the law of tort and the law of evidence. He supported the outcome on policy grounds: to deny a remedy would mean that justice would certainly not be done, whereas to grant recovery ensured a fifty percent chance that justice would in fact be done.<sup>11</sup> He observed that, while the two hunters were neither joint tortfeasors nor several concurrent tortfeasors, the prevailing apportionment legislation in the provinces would come to the plaintiff's aid.<sup>12</sup>

The second analyst was much less enthusiastic. Brian Hogan began by chiding Justice Rand for failing to take notice of the criminal law jurisprudence.<sup>13</sup> He referred to an eighteenth century decision, on similar facts, but in which all of the accused were discharged.<sup>14</sup> He declared the Canadian rule to be: where there is one guilty party, as between two named defendants, the guilty party not only injured the plaintiff but in conjunction with the circumstances made it impossible for the plaintiff to prove his case and thus the burden shifted.<sup>15</sup> He found this "startling". The late John Fleming found Hogan's critique "unconvincing",<sup>16</sup> which position has carried the day.<sup>17</sup> Hogan acknowledged that Justice Rand enjoyed the confidence of the treatise writers of the time in Australia,<sup>18</sup> England<sup>19</sup> and the United States.<sup>20</sup> But, he remained unimpressed by the implicit support given to Justice Rand by Lord Denning, M. R. in 1954,<sup>21</sup> asking rhetorically: was it fair to ask an innocent party to assist the plaintiff to prove his case? However, the presumption that both defendants in *Cook v. Lewis* were in breach of a duty of care to the plaintiff caused Hogan to pose two awkward questions: (a) What if it was known that one of the defendants did not breach any duty of care? In such circumstance, to hold all liable because the actual wrongdoer remained unknown, he characterised as "monstrous".<sup>22</sup> And (b), what if it was known that one of the defendants did not cause the harm but was guilty of a breach of a duty of care? Was multiple responsibility justified on some notion of "guilt", "fault" or

<sup>11</sup> *Ibid.*, at 317.

<sup>12</sup> *Ibid.*; and see G. Williams, *Joint Torts and Contributory Negligence: A Study of Concurrent Fault in Great Britain, Ireland and the Common-Law Dominions* (London: Stevens & Sons, 1951).

<sup>13</sup> Hogan, *supra* note 6, at 333.

<sup>14</sup> *Richardson's Case* (1785), 168 E.R. 296.

<sup>15</sup> Hogan, *supra* note 6, at 333.

<sup>16</sup> J. G. Fleming, *The Law of Torts*, 6<sup>th</sup> ed. (Sydney: The Law Book Company, 1983) at 288, footnote 6. In the first edition of this work, Prof. Fleming gave uncritical mention of *Cook v. Lewis* in two footnotes: J. G. Fleming, *The Law of Torts* (Sydney: The Law Book Company of Australia Pty. Ltd., 1957) at 295 and 745.

<sup>17</sup> *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634, at 639-40.

<sup>18</sup> Fleming, *supra* note 16, at 295.

<sup>19</sup> H. Street, *The Law of Torts* (London: Butterworth & Co., 1955) at 143; P. H. Winfield, *Torts* (6<sup>th</sup> ed.) (London: Sweet & Maxwell, 1954) at 501; J. W. Salmond, *Torts*, 12<sup>th</sup> ed. (London: Sweet & Maxwell, 1957) at 429.

<sup>20</sup> W. L. Prosser, *Handbook of the Law of Torts*, 2<sup>nd</sup> ed. (St. Paul, Minn: West, 1955) at 231.

<sup>21</sup> *Roe v. Minister of Health*, [1954] 2 Q.B. 66, at 82.

<sup>22</sup> Hogan, *supra* note 6, at 334.

“blameworthiness”? Therefore, could a breach of a duty of care by an “innocent” party ever justify shifting of the evidentiary burden? Hogan preferred the reasoning of Justice Locke, in dissent: a party could only be a defendant if, on the balance of probability, he caused the damage.<sup>23</sup> Therefore, Hogan’s doctrinal response: if two defendants were joint tortfeasors, they were liable; if several concurrent tortfeasors, they were all on the hook. But unless they were either, the plaintiff must fail. His policy rejoinder was unequivocal: the objection to *Cook v. Lewis* was that it failed to give the interests of the defendants equal consideration to those of the plaintiff.<sup>24</sup>

Glanville Williams and Brian Hogan were first out of the blocks in their treatment of *Cook v. Lewis*. For law teachers, it was too good to pass up. How better to befuddle first year law students – an exception to a hallowed rule: if the plaintiff failed to show which of two defendants was negligent, then the plaintiff failed, but for the rule in...!<sup>25</sup> As a result, students in the common law world have been dragooned into parsing the language of the reasons for decision since they were published over fifty years ago. Apart from the works listed earlier,<sup>26</sup> references have appeared in Atiyah,<sup>27</sup> Fridman,<sup>28</sup> Hepple & Matthews,<sup>29</sup> Baker,<sup>30</sup> and Clerk & Lindsell.<sup>31</sup> Equally, our own tort scholars have not been shy in paying homage to the case in their texts.<sup>32</sup> Thus, the case enjoys iconic status as an early adventure by the Supreme Court of Canada as a final court. It began the recognition of the Court as a leader within the family of courts of last resort – which tradition continues apace.<sup>33</sup>

The principal decision signaled our flirtation with the notion of negligent trespass to the person. Justice Locke, in dissent, quoted the pleadings:

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<sup>23</sup> *Ibid.*, at 339.

<sup>24</sup> *Ibid.*, at 344.

<sup>25</sup> The hallowed rule was typified by *Baker v. Market Harborough Industrial Co-op Society Ltd.*, [1953] 1 W.L.R. 1472 (C.A.).

<sup>26</sup> *Supra* notes 18-20.

<sup>27</sup> *Vicarious Liability in the Law of Torts* (London: Butterworths, 1967) at 20 and 124.

<sup>28</sup> *Modern Tort Cases* (London: Butterworths, 1968) at 123-24.

<sup>29</sup> *Tort: Cases & Materials* (London: Butterworths, 1974) at 615-16

<sup>30</sup> *Tort*, 2<sup>nd</sup> ed. (London: Sweet & Maxwell, 1976) at 102-03.

<sup>31</sup> *Clerk & Lindsell on Torts*, 14<sup>th</sup> ed. (London: Sweet & Maxwell, 1975) at paras. 201 and 317.

<sup>32</sup> G. H. L. Fridman, *The Law of Torts in Canada*, vol. 1 (Toronto: Carswell, 1989) at 341-43; L. N. Klar, *Tort Law* (Toronto: Carswell, 1991) at 366-67. The case continues to intrigue abroad: F. A. Trindade & P. Cane, *The Law of Torts in Australia* (Melbourne: O.U.P., 1985) at 269 and 350; S. M. D. Todd, *et al.*, eds., *The Law of Torts in New Zealand* (Sydney: Law Book, 1991) at 292-96; and, B. S. Markesinis & S. F. Deakin, *Tort Law*, 4<sup>th</sup> ed. (London: O.U.P., 1999) at 184-85.

<sup>33</sup> P.-G. Jobin and E. Veitch, eds., *The Supreme Court of Canada: Legacy and Challenges/La Cour suprême du Canada: héritage et défis* (Ottawa: CBR-RBC, 2001).

The cause of action pleaded against both defendants was for damages: alleged to have been caused solely by the negligent conduct of the defendants in recklessly discharging their guns in the direction of the plaintiff, knowing that the plaintiff was in the vicinity, or alternatively, without first making sure that there was no one in the line of fire.<sup>34</sup>

It has been argued that, where a plaintiff is harmed by direct force whereby his right to integrity has been violated, the defendant should be required to justify his actions.<sup>35</sup> Therefore, where defendants fire their weapons in the plaintiff's direction, and he or she is injured, the plaintiff's cause of action rests in negligent battery. Such a form of pleading gives the plaintiff significant advantages, even though in the instant case it was not available because the plaintiff could not identify the author of his misfortune. Justice Cartwright gave the form of action his imprimatur:

[W]here a plaintiff is injured by force applied directly to him by the defendant his case is made by proving this fact and the onus falls upon the defendant to prove "that such trespass was utterly without fault."<sup>36</sup>

Justice Cartwright had earlier observed: "While it is true that the plaintiff expressly pleaded negligence ... he also pleaded that he was shot ... and in my opinion under the old form of pleading would properly have been one of trespass not of case."<sup>37</sup> He derived this from a reading of the nineteenth century English case of *Stanley v. Powell*<sup>38</sup> which lost its currency in the host jurisdiction by the mid-20th century.<sup>39</sup> What were the advantages for the plaintiff in pleading negligent battery? Australian writers,<sup>40</sup> whose jurisprudence followed our own, have listed these to be: (a) the plaintiff need not establish a duty of care; (b) invasion of the right is actionable *per se* without proof of special damage; (c) it may bypass a limitation obstacle relevant to claim in negligence; and (d) the defendant may not plead contributory negligence in

<sup>34</sup> *Supra* note 1, at 848.

<sup>35</sup> R. Sullivan, "Trespass to the Person in Canada: A Defence of the Traditional Approach" (1987) 19 *Ottawa Law Review* 533. A further attempt to expand the rule in *Cook v. Lewis* to find liability against a nurse and a hospital failed in *Kolesar Estate v. Joseph Brant Memorial Hospital* (1977), 15 N.R. 302, at 310, where Justice Spence wrote:

I am unable to find any assistance in the judgment of this Court upon that appeal. In the first place, the judgment of Rand J. was not the judgment of this Court as he spoke only for himself and the judgment for the majority composed of Cartwright J., as he then was, Estey and Fauteux JJ. was given by Cartwright J....

<sup>36</sup> *Supra* note 1, at 839.

<sup>37</sup> *Ibid.*

<sup>38</sup> (1891), 1 Q.B.D. 86.

<sup>39</sup> *Fowler v. Lanning*, [1959] 1 Q.B. 426; *Letang v. Cooper*, [1965] 1 Q.B. 232 (C.A.).

<sup>40</sup> *Trindade & Cane*, *supra* note 32, at 262-74.

mitigation of their exposure. The precise value of such benefits have been queried by Canadian authors;<sup>41</sup> but these “assists” should be seen as practical attempts by judges to aid the plaintiff to secure a just result. *Cook v. Lewis* should be viewed alongside the doctrine of *res ipsa loquitur*,<sup>42</sup> and the “benign smile” of *McGhee v. National Coal Board*,<sup>43</sup> albeit both have been reinterpreted by the Supreme Court of Canada.<sup>44</sup> These three rules represented a bending of the rules to assist plaintiffs where their burden of proof was difficult or impossible. Thus, if a victim could lead evidence of breach of a duty of care, it was deemed “just” that the onus shifted so that defendants must speak to what they knew and of matters which the plaintiff could never have known.<sup>45</sup> Plaintiffs’ counsel in most jurisdictions have learned to heed the advice of the justices in *Cook v. Lewis* and have pleaded accordingly to give their clients the benefits so recognised.<sup>46</sup> The varied critiques of the decision tell us much of the prejudices of the commentators: pro-plaintiff or pro-defendant? This was clear from the differing appreciations of Glanville Williams and Brian Hogan noted earlier.

One author has pointed to the ratio of *Summers v. Tice*<sup>47</sup> – the case closest to the facts of *Cook v. Lewis* – rested on the fact that the hunters were joint tortfeasors. Conversely, Justice Cartwright was clear that there was no finding of common negligent enterprise<sup>48</sup> and that to have made such a determination would have the effect of making every law-abiding member of a group vicariously liable for the negligence of a single person within the group. Forty years later the New Brunswick Court of Appeal had occasion to lean on that wisdom in their efforts to do justice, where three youths broke into an arena and one of them set a fire which destroyed the structure.<sup>49</sup> Hoyt J.A. wrote: “There is, of course, a distinction to be made when two or more

<sup>41</sup> Fridman, *supra* note 32, at 342; Klar, *supra* note 32, at 41-2.

<sup>42</sup> *Byrne v. Boadle* (1863), 159 E.R. 299.

<sup>43</sup> [1972] 3 All E.R. 1008 (H.L.). In *Fitzgerald v. Lane*, [1987] 3 W.L.R. 249, at 262, Nourse L.J. wrote of *McGhee*: “a benevolent principle smiles on these factual uncertainties and melts them all away.” See also: *Fairchild v. Glenhaven Funeral Services Ltd.*, [2002] 3 W.L.R. 89, 3 All E.R. 305 (H. L.) and discussion in T. S. Woods, “Establishing Causation in Negligence: The House of Lords Speaks Again” (2003) 26 *Advocates’ Quarterly* 471 and J. Stapleton, “Lords a’leaping evidentiary gaps” (2002) 10 *Torts Law Journal* 276. And see: *Gregg v. Scott*, [2005] UKHL 2, *per* Lords Nicholls of Birkenhead and Hope of Craighead in dissent; and *barker v. Corus (UK) plc*, [2006] UKHL 20.

<sup>44</sup> Respectively, *Snell v. Farrell*, [1990] 2 S.C.R. 311 and *Fontaine v. B.C. (Official Administrator)*, [1998] 1 S.C.R. 424. In *Athey v. Leonati*, [1996] 3 S.C.R. 458, Justice Major, for the Court, sought to provide the Court’s own appreciation of its progressive approach to hallowed tort doctrine.

<sup>45</sup> C. Gearty, “The Smiling Principle that Melts Judicial Hearts: Case Comment on *Fitzgerald v. Lane*” (1988) *Cambridge Law Journal* 8.

<sup>46</sup> *Teece v. Honeybourn* (1974), 54 D.L.R. (3d) 549 (B.C. S.C.); *Doyle v. Garden of the Gulf Security & Investigation Inc.* (1979), 24 Nfld. & P.E.I.R. 123 (P.E.I. S.C.).

<sup>47</sup> *Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (California 1948).

<sup>48</sup> *Supra* note 1, at 841.

<sup>49</sup> *Newcastle (Town) v. Matatall, Porter and Harris* (1989), 87 N.B.R. (2d) 238 (C.A.).

persons engage in a common action for a wrongful purpose as contrasted with those who engage in a common action for lawful purposes.<sup>50</sup> Therefore, that court held that the three youths were engaged in a joint venture for an unlawful objective. The United States' precedent for this was *Oliver v. Miles*,<sup>51</sup> in which two hunters committed acts which violated state law and whose actions injured the plaintiff. But one cannot avoid the case law in which persons have been held responsible, absent criminality,<sup>52</sup> where the justification for responsibility is mere collaboration in a common purpose.

In *Cook v. Lewis* the nine justices at three levels were faced with a situation in which two shooters were either (a) independent tortfeasors who could not be joined and against whom the plaintiff could only recover for the damage caused by each, or (b) they were joint tortfeasors, which would permit the plaintiff to sue one or both and to recover judgment against one, even if it was unclear that that particular party had caused the harm. The plaintiff's task was well nigh impossible: two hunters not acting in concert contrived to injure him, but he could not establish which of the two was guilty. In such a situation, the Supreme Court of Canada reached for a novel approach – the reversal of the legal onus – rather than cobble together some notion of joint liability based on a common enterprise proven by the deal to share the bag. And that is why the decision continues to attract attention!

Adoption of the reversal of the legal burden has drawn differing modes of analysis. Glanville Williams saw the rule as one in which two negligent defendants were asked to discharge the burden of proving that each did not cause the plaintiff's injury and read the ratio as a contribution to the law of evidence.<sup>53</sup> He also believed that, as the plaintiff had proven fault against both defendants, both were caught by the language of the apportionment legislation.<sup>54</sup> Brian Hogan perceived the rule of the case to be a reversal of the legal onus; that is, the plaintiff failed on the balance of probabilities to prove who had fired the shot which injured him, so the burden passed to the shooters to exonerate themselves.<sup>55</sup> More recent writers, following Hogan, have described the ratio as an unwarranted extension of aids to plaintiffs and as a decision inimical to the proper protections afforded defendants.<sup>56</sup> That appreciation has a healthy tradition: an American author in 1927, on a fact pattern and finding similar to that in *Cook v. Lewis*, observed: “[It] at most removes from the plaintiff the burden of proving actual causation [but] it does not provide a means of equitably adjusting the

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<sup>50</sup> *Ibid.*, at 258.

<sup>51</sup> *Supra* note 9.

<sup>52</sup> *Brooke v. Bool*, [1928] All E.R. Rep. 155 (K.B.); *Beecham v. Henderson*, [1951] 1 D.L.R. 628 (B.C.S.C.); and *Scarsbrook v. Mason*, [1961] 3 All E.R. 767 (Q.B.).

<sup>53</sup> *Supra* note 6, at 316-17.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Supra* note 6, at 332.

<sup>56</sup> *Trindade & Cane*, *supra* note 32, at 269.

damages between the defendants.”<sup>57</sup> On the other hand, a Canadian scholar<sup>58</sup> has drawn on the analysis of cause-in-fact in United States jurisprudence.<sup>59</sup> Thus the questions posed: (i) What harm? (ii) What actions? (iii) What breach of a standard of care? and, (iv) Would the harm have occurred but for the defendants’ acts? These questions read like some re-formulation of *McGhee v. The N.C.B.*<sup>60</sup> and our own *Snell v. Farrell*.<sup>61</sup>

But tort law refuses to stand still. While the common law moved from certainty to probability in the sixteenth century<sup>62</sup> and from probability to possibility in the twentieth,<sup>63</sup> we have most recently arrived at presumed causation<sup>64</sup> alongside which the reversed burden in *Cook v. Lewis* lies neatly. Ahead of our final Court, the High Court of Australia rejected the “but for” test of causation, where that test produced results which offended justice and which required the tempering notions of “value judgments”, “policy considerations”, “common sense” and “experience”. For doctrinal lawyers this must cause outright panic and compel recourse to John Selden’s *Table Talk*:

Equity is now also the law. Equity is a roguish thing. For Law we have a measure, know what to trust to; Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. T’is all one as if they should make the standard for the measure we call a “foot” a Chancellor’s foot; what an uncertain measure would this be. One Chancellor has a long foot, another a short foot, a third an indifferent foot. T’is the same thing in the Chancellor’s conscience.<sup>65</sup>

What then of “value judgments”, “policy considerations”, “common sense” and “experience”? Let the satirist Tom Lehrer sing it out:

On a morning bright and clear,  
I went out and shot the maximum the game laws would allow:

<sup>57</sup> Note on *Oliver v. Miles*, (1927) 27 *Columbia Law Review* 754, at 756.

<sup>58</sup> P. H. Osborne, *Law of Torts* (Toronto: Irwin Law, 2000) at 51.

<sup>59</sup> D. W. Robertson, “The Common Sense of Cause in Fact” (1997) 75 *Texas Law Review* 1765, at 1769-73.

<sup>60</sup> *Supra* note 43.

<sup>61</sup> *Supra* note 44.

<sup>62</sup> *Newis et ux. v. Lark & Hunt* (1571), 75 E.R. 609, at 621.

<sup>63</sup> *Schrump v. Koot* (1977), 82 D.L.R. (3d) 553 (Ont. C.A.).

<sup>64</sup> *Chappel v. Hart* (1998), 195 C.L.R. 232 (H. Ct. of Aust.); *Naxakis v. Western General Hospital* (1999), 197 C.L.R. 269 (H.Ct. of Aust.); and J. Gunson, “Turbulent Causal Waters: The High Court, Causation and Medical Negligence” [2001] 9 *Tort Law Review* 53, at 54-6.

<sup>65</sup> “Equity” in *Table Talk*, R. Milward (ed.) (1689) as found in M. B. Evans & R. I. Jack (eds.), *Sources of English Legal and Constitutional History* (Sydney: Butterworths, 1984) at 223-24. For the old English version of Selden’s comments, see: F. Pollock (ed.), *Table Talk of John Selden* (London: Quaritch, 1927), at 43.



Two game wardens, seven hunters, and a cow...

The law was very firm, it  
Took away my permit,  
The worst punishment I ever endured,  
It turned out there was a reason,  
Cows were out of season  
And one of the hunters wasn't insured.<sup>66</sup>

The Supreme Court of Canada took judicial notice that the woods in September 1948 were teeming with hunters;<sup>67</sup> and the appellant Cook said in evidence that shooting into a clump of trees in such conditions would have been a crazy thing to do.<sup>68</sup> Tom Lehrer published his parody in 1953, when even hunters were in greater danger than the wildlife. Can the reversal of the burden be justified on the basis of the inherent risk involved in the use of firearms for sport? The rationale here mirrored the most recent developments in liability for the use and provision of alcohol, which was recognised to be dangerous *per se* and that its abuse must attract liability. We have not yet gone to a reversed onus, but alcohol providers, commercial or social, must wonder what they can do to avoid liability.<sup>69</sup> The decisions here are explicable only in terms of “policy”, “experience” and “common sense”. These are pragmatic determinations, much as the decision in *Cook v. Lewis* was in its own day.

#### 4. COOK v. LEWIS AND SPOILIATION OF EVIDENCE

Justice Rand said of the appellant:

He has violated not only the victim's substantive right to security, but he has also culpably impaired the latter's remedial right of establishing liability. By confusing his act with environmental conditions, he has, in effect, destroyed the victim's power of proof.<sup>70</sup>

Dan Dobbs, in his treatise,<sup>71</sup> immediately made the connection between that judicial postulate and the causation problems facing plaintiffs in medical negligence

<sup>66</sup> “The Hunting Song”, copyright 1953 by Tom Lehrer at Graeme Cree, “Tom Lehrer Song Lyrics (With Annotations)”, <[www.members.aol.com/quentncree/lehrer/](http://www.members.aol.com/quentncree/lehrer/)>.

<sup>67</sup> *Supra* note 1, at 845.

<sup>68</sup> *Ibid.*, at 847.

<sup>69</sup> R. Soloman and J. Payne, “Alcohol Liability in Canada and Australia: Sell, Serve and be Sued”, [1996] *Tort L.R.* 188; J. Berryman, “An Innkeepers Liability for Punitive Damages in Canada: Pushing the Limits” (1998), 20 *Advocates Quarterly* 1. The case-law continues apace: *Calliou Estate (Trustee of) v. Calliou Estate*, [2002] 3 W.W.R. 655 (Alta. Q.B.) reviews all of the jurisprudence to date.

<sup>70</sup> *Supra* note 1, at 832.

<sup>71</sup> *Supra* note 7.

cases,<sup>72</sup> along with liability imposed for the negligent spoliation of evidence.<sup>73</sup> In the intentional<sup>74</sup> and negligent<sup>75</sup> spoliation case law, the plaintiff must contend with the defendant's destruction of evidence which would otherwise have allowed the plaintiff to recover in the principal action. For the plaintiff to succeed, the court must relax the burden of proof and require the plaintiff to show only "... that the underlying law suit was significantly impaired, that the spoliated evidence was material to that impairment, and that the plaintiff enjoyed a significant possibility of success in the underlying claim."<sup>76</sup> The court must then measure that chance of success in evaluating the remedy.

But the genesis of this concept can be traced to the century-old decision of the Supreme Court of Canada in *Lamb v. Kincaid*,<sup>77</sup> in which Justice Duff wrote:

Thus if a man by his deliberate tortious act destroys the evidence necessary to ascertain the injury he has inflicted, he must suffer all the inconvenience which is the result of his own wrong.<sup>78</sup>

As any serious student of law has to recognise, too often we spend our lives exhuming the wisdom of the past.<sup>79</sup>

Lastly, *Cook v. Lewis* and a duty to warn: obviously Robert Lewis in September 1948 was the victim of an unintended ambush. Even golfers, by custom, call out "fore" to warn others of their hooks and shanks. Of course, because hunting requires stealth, vocal warnings present an obstacle to success. But is there such a duty? The question which has occupied writers has been whether or not the duty to warn is restricted to defined relationships: *e.g.*, landowner and user, landlord and tenant, guardian and ward, schools and students, spouses *inter se* and their off-spring, and employers and employees. Or, is there an expanded notion which covers situations where the potential defendant, by involvement in an inherently dangerous activity which harms a plaintiff, thereby incurs responsibility for a failure to warn? In the principal case the defendants' actions created a dangerous situation – the discharge of firearms in the direction of

<sup>72</sup> *Ibid.*; V. Black and D. Klimchuck, "Comment on *Hollis v. Down Corning Corp.*" (1996) 75 *Can. Bar Rev.* 355.

<sup>73</sup> Dobbs, *supra* note 7.

<sup>74</sup> *Ibid.*, vol. 2 at 1280.

<sup>75</sup> *Ibid.*, at 1281.

<sup>76</sup> *Holmes v. Amerex Rent-A-Car*, 710 A. 2d 846 (D.C. App. 1998).

<sup>77</sup> [1907] 38 S.C.R. 516.

<sup>78</sup> *Ibid.*, at 540.

<sup>79</sup> R. J. Sommers and A. G. Seibert, "Intentional Destruction of Evidence: Why Procedural Remedies are Insufficient" (1999) 78 *Can. Bar Rev.* 38; R. D. Kligman, "Spoliation: Does the Punishment Fit the Crime?" (1999) 22 *Adv. Q.* 109; *Report on the Spoliation of Evidence* (BCLI Report No. 34)(Vancouver: British Columbia Law Institute, 2004).

the plaintiff – and they did nothing to protect the innocent plaintiff. The reasoning here was akin to the Good Samaritan obligation. Thus, where the defendant created a dangerous possibility, then there was a duty to take reasonable steps either to reduce the risk or to warn of the danger at hand. And this is particularly so where all parties are engaged in a risky common activity: hunting game at close quarters.

Recent developments have recognised that firearms, similar to alcohol, are socially dangerous *per se* and particularly dangerous when in the control of careless persons. Therefore, in the United States at least, there is the beginning of a trend to impose liability not only on dangerous users but also reckless providers.<sup>80</sup> The duties about to be imposed with respect to firearm provision and use appear destined to follow the earlier trend of liability for the careless delivery and abuse of alcohol. So where is Canada with regard to the duty to warn? Clearly there is a difference between a party's duty with respect to conduct that creates a risk and a duty in relation to the dangerous propensities of third parties. In the latter situation, the courts have utilised a restricted mode of analysis centred on the degree of control exercisable by the party subject to the duty, so as to excuse responsibility. But, if another question is asked – was the harm foreseeable? – then the result differs. It is this question which determines the liability of parties who themselves create the risk of harm and which requires some action to warn any potential victim.

## 5. CONCLUSION:

*Cook v. Lewis* can be read not only as protean in import but also almost criminal in its brevity of exposition. Its relatively few pages have presaged all manner of developments favourable to plaintiffs. It can be read as part of a common law continuum from certainty to probability, to possibilities and on to presumed causation. But a reversed burden is what still renders it a leading and controversial case in all jurisdictions.

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<sup>80</sup> *Kitchen v. K-Mart Corp.*, 697 So.2d 1200 (Fla. L. 1997); *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802 (E.D.N.Y.1999) *sub. nom. Hamilton v. Beretta USA Corp.*, 222 F. 3d 36 (2d Cir. 2000), 264 F. 3d 21 (2d Cir. 2001).