PANEL DISCUSSION ON MOTOR VEHICLE ACCIDENT LITIGATION

University of New Brunswick Faculty of Law, March 28, 1955.

Chairman: Professor William F. Ryan.

Panel: J. Paul Barry, Q.C., E. Neil McKelvey, Donald M. Gillis, Henry E. Ryan.

Chairman: This panel discussion is being sponsored by the Saint John Law Society, the Legal Education Section of the Canadian Bar Association and Continuing Legal Education Committee of the New Brunswick Barristers' Society.

We have as members of the panel J. Paul Barry, Q.C., Mr. Neil McKelvey, Mr. Donald Gillis and Mr. Henry Ryan. All have had experience in motor vehicle accident litigation, and I am sure we will profit from their experience.

Question 1

How do you go about collecting and organizing evidence in an automobile accident case?

Answered by Mr. Barry

There are different ideas on this. From an insurance standpoint, we get reports from insurance adjusters, which are more often than not inaccurate. I might illustrate what I mean. You get a report from a witness, gathered by an adjuster, who isn't trained, generally speaking, in taking a statement for use in court. You also find, I think, when acting for a plaintiff that the plaintiff wants to tell you everything in his favour. He wants to meet all of the arguments that he expects and convince you, no matter what you hear from other sources, that what he has said overcomes those arguments. The insurance adjuster gathers evidence from the standpoint that the company he represents is not liable. Now, neither the plaintiff, if you are acting for him, nor the insurance adjuster, if you are acting for the insurance company, has to present the case in court. That is the greatest problem that I find in beginning to get a picture of the case. The facts are presented to you by your client from his own standpoint without any appreciation of the other person's and the insurance adjuster is interested in getting a statement, which he presents also to the company, to support his recommendation that you deny liability.

You must see your witnesses. You must examine your witnesses in the same manner that you would examine witnesses for the opposite side. I think that you have to cross-examine the witnesses in your own office, at the same time explaining to them why you are doing it because they may resent it. Until you convince your own client, be he plaintiff or defendant, of the problem that he is up against, he will have no appre-

ciation of anything except his own viewpoint, and anybody who has been in an accident, almost without exception, maintains he is not to blame.

You must of course see the police report, if there is a police report, and there is today in nearly every accident case. The police report is usually objective.

You should visit the scene of the accident. It is no use, of course, for you to take the measurements and to see how far the visibility extends or where the buildings are. Your witnesses and your client must do that.

You have to have a plan of the scene of the accident because judges will ask for it: a plan of the area with the measurements, the width of the street, the height of the curb, the width of the sidewalk, the position of the buildings on the different corners concerned—most accidents occur at intersections—and the width of the shoulder. Are we to deal with injuries or damages in a motor vehicle accident case?

Chairman: I think you could mention that matter.

Mr. Barry: If it is with respect to a vehicle, our experience generally is that solicitors agree on the amount. If it is not agreed on, and in my experience in ninety-five percent of cases it is, you must call the mechanic or the service foreman of the garage who either estimated the repairs or did the repairs to establish exactly what the repairs consisted of and the cost and that this is a reasonable estimate and a reasonable repair bill. There is some difficulty encountered because some judges don't want to accept the opinion of car salesmen on depreciation, on what it was worth before and after the accident.

Mr. McKelvey: I have one thought that arises out of what Mr. Barry said about insurance adjusters. A solicitor who is acting for an insurance company has a great advantage over one who is not in that he does have adjusters who can produce the witnesses for him. You at least know who your witnesses are. On the other hand, if you are approached cold by a client, he wants you to do everything. He hasn't got anybody to gather the evidence. To my mind, the lawyer has not only to interview the witnesses but find out who the witnesses are. That means in a great many cases you have to visit the scene of the accident and find some housewife who happened to be looking out the window at the time it happened. If you don't do that you will find that the insurance adjuster has done it on the other side and will produce the witnesses that you wanted, or should have seen, if they are against you, so that you could avoid the litigation altogether.

Question 2

Smith, the owner, lends his car to Jones. Jones collides with Black's car which was borrowed and is being driven by White. Both cars are damaged and White is injured. If Smith sues White alone what should Black do? If Smith sues Black alone, what should White do? If Smith sues both Black and White what should each of them do?

Answered by Mr. Gillis

There are four people involved: two owners, and two drivers. When you consider this question with two owners and two drivers, there are three thoughts you should keep in mind; first, the Motor Vehicle Act that makes an owner liable for his driver's negligence. That is something new in the past year or so. Secondly, the Contributory Negligence Act, and, thirdly, what is now known as the Tortfeasors Act. I am assuming in this question there is contributory negligence.

Smith is one owner. He lends his car to Jones. Jones collides with Black's car. If Smith sues White alone what should Black do? Well, if I were Black's solicitor, I would apply to be added to the action as a co-defendant and counter claim. You could apply under Order 16, Rule 11. Then White well might be a joint tortfeasor with Jones, who is the driver of Smith's car; if so he probably should claim contribution or indemnity against Jones; I think it would be a proper case for White to bring Jones, the other driver, in as a third party; so we would add Black as co-defendant and take third party proceedings against Jones. In that way White would claim contribution or indemnity. That is what I would do.

Now, if Smith sues Black, that is one owner against the other, what should we do? White suffered damage. He has got a claim against Jones and against Smith. So the situation would be just reversed. I would suggest joining White as a co-defendant under Order 16, Rule 11. He and Black could counterclaim against Smith.

Now, if Smith sues both Black and White what are each of them to do? Each of them obviously could counterclaim against Smith because Smith is liable under the Motor Vehicle Act, and they could add our friend Jones, the driver, by counterclaim. But in that case I would still consider third party proceedings because they might want to claim contribution or indemnity from Jones. As I say, that would be my solution. It may not be the only one, but I can see nothing wrong with it.

Chairman: If Smith sues both Black and White do you think that Black, who is the owner of the car, could take third party proceedings against White?

Mr. Gillis: Well, he could. If it is a question of insurance he wouldn't, I wouldn't think. It would depend a good deal on the financial worth of our friends Smith and Jones. Black could take third party proceedings against White.

Chairman: Suppose Smith got a judgment against Black, and Black was required to pay the judgment?

Mr. Gillis: Yes, I think probably you should take third party proceedings and in that case obviously you wouldn't need an order, you would just issue your third party notice, under Order 16A, Rule 12. One co-defendant against another co-defendant.

Chairman: Do you think that Black and White are joint tortfeasors?

Mr. Gillis: I wouldn't say Black and White. We were talking about Jones and White.

Chairman: Might not Black take third party proceedings against White? You said, "Yes".

Mr. Gillis: Yes. It would be possible.

Mr. Barry: That is before he is joined as a co-defendant?

Mr. Gillis: No. He is a co-defendant.

Chairman: Would it be on the basis that they are joint tortfeasors? I am wondering if Black would have a claim against White on the ground that Black and White are joint tortfeasors?

Mr. Gillis: Why do you say Black and White are joint tortfeasors? The Motor Vehicle Act doesn't make them joint tortfeasors.

Mr. McKelvey: I think it is covered by the Tortfeasors Act. A tortfeasor liable in respect of that damage may recover against another tortfeasor, whether as a joint tortfeasor or otherwise.

Mr. Gillis: I would say Black is not a tortfeasor.

Chairman: Would you say Black is a tortfeasor only if there is a vicarious relationship?

Mr. Gillis: Yes.

Mr. Barry: There is some confirmation of what Prof. Ryan suggests: where the statute makes a person liable for his driver without a vicarious relationship by implication he is in the same position as a joint tortfeasor. We know that the owner of a car today is responsible for the act of the driver to whom he has no vicarious relationship. That being so and bearing in mind what Mr. McKelvey read from the Tortfeasors Act, if he is liable he is almost in the same position as a tortfeasor; in almost the same position as a master. The situation does exist in some other provinces and there is authority for what Prof. Ryan has suggested.

Mr. McKelvey: In other words he is sort of a statutory tortfeasor.

Mr. Barry: He is made statutorily liable.

I think, Mr. Chairman, that there are a lot of problems in question two.

Chairman: Would you suggest another approach?

Mr. Barry: If you could present to me one aspect, I would rather answer that.

Chairman: Let me put the first question: if Smith sues White alone what should Black do? As I understand Mr. Gillis he says that Black should apply to be added as a co-defendant. Would you agree with that approach?

Mr. Barry: If I were acting for Black I would issue a writ for Black against Jones and Smith.

Mr. Gillis: Then you have two actions.

Mr. Barry: But White is the only defendant of the other action.

Mr. Gillis: You have got two actions.

Mr. Barry: I appreciate that.

Mr. Gillis: You are disregarding the other action.

Mr. Barry: What should Black do? Sue Smith and Jones.

Mr. Gillis: What if you were acting both for White and Black?

Mr. Barry: I don't think I could act for both of them.

Chairman: Isn't there a possible conflict of interest?

Mr. Gillis: Not if Black is insured.

Mr. Barry: I don't think I could act for them even if they were both insured.

Mr. Gillis: How could there be a conflict?

Chairman: Black's car is driven by White; there is a relationship of bailment and there could be a conflict.

Mr. McKelvey: There could be a subrogation claim against the driver.

Mr. Barry: Let us take an actual case. All three of the panel are aware of this. The owner of a car loaned it to a friend of his and it was in a collision with another car driven by another person to whom that car was loaned. The owner, who was home in his bed, finds out in the morning that his car has been wrecked and he sues the driver and owner of the other vehicle. The driver of the other vehicle issues a third party notice against the driver of the car owned by the man who was home in bed. That vehicle is insured, so the driver is in effect being sued indirectly in a chain of relationship by the owner of the car he was driving. If a judgment goes against him, since he is an insured under the owner's policy, the owner of the car who started the action is going to recover part of the damage from the insurance company who insures him; so I give it as an illustration of how a conflict of interest could arise between Black and White.

The Chairman: There is an interesting House of Lords case on that type of situation, **Digby v. General Accident, [1942] 2 All E.R. 319.**

Question 3

Do you think that photographs taken after an accident are useful in establishing causation? How are such photographs put in evidence?

Answered by Mr. McKelvey

This one has the advantage of being a bit simpler than the last. I think what you mean here is in establishing liability. The answer to the question has to be yes, photographs are useful. But it has to be qualified because in many cases photographs are misleading. There are four factors that have to be borne in mind when dealing with

photographs. The first one is that when the photographs are taken they have to be taken with a view to their being used in evidence. Perhaps I can illustrate. A commercial photographer arriving on the scene of an accident will probably take a picture of the vehicles. If there is a body lying in the middle of the road he will take a picture of the body. But the lawyer is interested in such things as skidmarks or where are the cars in relation to the curb, things like that. You look at the thing from an entirely different angle. There was one case I remember, an intersection collision, and a photographer was on the scene within minutes. He didn't show any pictures at all of where the vehicles were. One was a fire engine and the other was a bus. He didn't bother looking at them, but he did go up the street and took pictures of the skidmarks made by one of the vehicles approaching the intersection. He knew what was necessary in evidence and these pictures were very useful.

The second factor is—show the vehicles, if possible, or landmarks if the vehicles are still at the scene, and if the question is where did the accident occur, you can sometimes get it from the position of the vehicles. If you have any landmarks and you have a picture showing that the left front wheel of the car is on the shoulder of the road or up on the curb or something like that, then it is very easy to reconstruct what happened. Another example of the same thing are skidmarks, if they are still on the road, or if the vehicle collided with anything you can show how it collided, for example, if he went through a guard rail.

The third factor is that they are useful to show the nature of the highway or the place where the accident happened. I remember a case where we were told that the accident occurred on an upgrade. There was some dispute as to whether there was any visibility. We argued that it was a straight hill with a knoll at the top and that the accident happened half-way up the hill. Pictures taken several months later showed that that hill was straight.

The fourth factor I think is important is to realize that pictures can be misleading. A local solicitor told me once that one of the factors involved in an action was whether the road was rough or smooth. Well, a photograph was taken from an angle quite close to the ground so that all the pebbles looked like rocks; looking at that picture the road looked very rough. You can do funny things with pictures. You can make pebbles look like rocks and by means of different types of lenses you can distort what you see. A picture, to be of any use at all, must be a straight lens so that a witness should be able to say that that is an exact photographic reproduction of what is there. If the opposing lawyer is the one who is putting pictures in evidence you should be very careful to make the photographer explain just how he took those pictures.

I think we might mention something about motion pictures. Our courts now will accept motion pictures. My view there is, motion pictures are no good in evidence unless the motion is important. There is no point in taking a motion picture of a road with no motion going

on. If motion or the way cars turn a certain corner is a factor, moving pictures can show it, but if on the other hand you are just taking a picture on a road or street there is no point in having a motion picture.

How do you put them in evidence? Well, that should be done by the photographer who can swear that that is what he saw when he took it and that it is a photographic reproduction of what he did see and he can also explain how he took it and what kind of lenses he used. If you haven't got the photographer than you can always do it by someone who was present when it was taken. He can't say that he took the picture or that is the picture he took but he can say that is what he saw when he was standing there. I think I have seen it done that way and our courts will accept it, but it is much better to have the photographer there.

Mr. Gillis: Must you have the photographer or someone who was there when the picture was taken in order to put it in evidence?

Mr. Barry: Anyone who can swear that the picture is a true representation of the scene.

Mr. McKelvey: I think you will agree that it is better to have the photographer there.

Mr. Barry: If he swears that it represents the scene, you take it for granted that it isn't distorted.

Mr. McKelvey: You run the risk of cross-examination on how accurate it is.

Mr. Gillis: If you get it into evidence who cares? There is another thing that occurred to me that I find useful in these photographs. I always like to have a picture of the automobile that was involved in the accident.

The Chairman: Have there been any expressions of judicial opinion on the weight to be given photographic evidence?

Mr. McKelvey: There is a recent Nova Scotia case in which Mr. Justice MacDonald went into it. He was talking about plans mainly but I think he mentioned photographs, too; he said they were very useful.

Mr. Gillis: Why shouldn't it be weighed the same as any other evidence?

Mr. Ryan: Because it can be very misleading.

Mr. Gillis: Any witness might lie, too, on the witness stand.

Mr. Ryan: You have him there and he is subject to cross-examination.

Mr. McKelvey: I think it is true they must be dealt with like any other evidence.

Mr. Gillis: I feel photographs can be conclusive in some respects. If it is a question of **which side of the road a motorist** was driving, if you have a picture of the skid marks on the left hand side, that is it.

Mr. McKelvey: You can, as I said, distort pictures. In many ways pictures can show what you want them to show and you have to be careful particularly if you are opposing, to cut down their usefulness.

Mr. Barry: But you have to answer the question, "Are photographs after the accident useful?" Yes, they are.

Question 4

(a) To be contributorily negligent must the plaintiff be guilty of breach of a duty of care owed by him to the defendant?

(b) "When a man steps into the road he owes a duty to himself to take care for his own safety, but he does not owe to a motorist who is going at an excessive speed any duty to avoid being run down." Denning, L.J., in **Davies v. Swan Motor Co. Ltd.,** [1949] 1 All E.R. 620 at 631. Do you agree?

The Chairman: I think the ordinary rule is that negligence consists of a breach of duty of care which one person owes to another person. If there is to be contributory negligence, must the plaintiff be guilty of a breach of duty of care to the defendant?

Answered by Mr. Ryan

Contributory negligence is raised in I would say at least ninety per cent of the automobile cases. There is a case that I would refer to and I think it probably answers the question without leaving very much doubt. It is **Nance v. British Columbia Electric Railway Co., Ltd.,** [1951] 2 All E.R. 448. That was in the Privy Council, by the way. The headnote states, and I think it is quite concise that:

> When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full. This, however, is not to say that in all cases the plaintiff who is guilty of contributory negligence owes to the defendant no duty to act carefully. Indeed, it would appear that in cases relating to running-down accidents such a duty exists. The proposition can be put even more broadly. Generally speaking, when two parties are so moving in relation to one another as to involve risk of collision, each owes to the other a duty to move with due care, and this is true whether they are both in control of vehicles, or both proceeding on foot, or whether one is on foot and other controlling a moving vehicle.

Chairman: That headnote answers the second part of the question as well as the first.

Mr. Ryan: I was just going to cover the quotation in part (b) of the question by reading in part the judgment of Viscount Simon. In the **Nance** case, Viscount Simon says after quoting Lord Justice Denning's proposition, "when a man steps from the kerb into the roadway, he owes a duty to traffic which is approaching him with risk of collision to exercise due care, and if a sentence of the judgment of Denning, L.J., in the **Davies** case . . . is to be interpreted in a contrary sense, their Lordships cannot agree with it." I think that answers the question.

The Chairman: You would say, then, in answer to the first part of the question that a plaintiff can be contributorily negligent by being careless for his own safety.

Mr. Barry: But isn't that a duty he also owes to the motor vehicle driver? The duty might be in one sense to take care for his own safety, but it is also a duty he owes to the public using the highway. It becomes a duty to the motor vehicle driver and he is expected to observe it.

Question 5

When a motorist is charged with having "care and control" while intoxicated what is the effect on a claim by him under a motor vehicle liability policy of (a) a conviction or (b) a plea of guilty?

Answered by Mr. Barry:

I think in either case he has got two and a half strikes on him. If he drives the car and it can be established that he was unable to drive it properly because of intoxication he has breached the statutory condition. It may be argued that this is splitting hairs, that he pleaded guilty because he didn't want to bother with the publicity and it was cheaper to do that than hire a lawyer and so on, but once he breaks the statutory condition he can expect no protection from the policy. The third party is entitled to recover under the policy up to standard limits only if the insured cannot pay and has no assets with which to pay the third party.

Mr. Gillis: I am fully in accord.

Mr. McKelvey: I agree with what you say, he has two and a half strikes against him because his insurer won't do anything to help defend the case if there has been a conviction or plea of guilty, but supposing it is a question of a court deciding whether there has been a breach of the conditions; now is a civil court entitled to take into consideration what a criminal court has done?

Mr. Gillis: You don't expect to get a sympathetic hearing in a civil case if you say, "My client wasn't intoxicated", and the judge says to you, "If he wasn't guilty, why did he plead guilty?"

Mr. McKelvey: I still say as a matter of law it has to be proven all over again in a civil court.

Mr. Barry: But as a matter of practice you have had it.

The Chairman: Is the conviction admissable in evidence in the civil case?

Mr. Gillis: On cross-examination I think it is. You can ask him and if he won't admit it you can prove it.

Mr. Barry: In the Canada Evidence Act it is almost the same. Confront him with the proposition; if you get a denial get a certificate.

Mr. McKelvey: But a plea of guilty wouldn't carry the same weight.

The Chairman: A plea of guilty may be an admission.

Mr. McKelvey: Is it an admission if you plead guilty to save the expense of time and publicity caused by a protracted case?

Mr. Gillis: An innocent man wouldn't plead guilty.

Mr. Barry: The court has got to assume that you know the full significance of the plea.

The Chairman: What is the effect of putting the question to the plaintiff, "Were you convicted of the crime of having care and control, etc.," and he says, "Yes"; now what does that go to? Does it just go to his credibility or is it admission as tending to prove one of the issues in the case?

Mr. Barry: If it is a plaintiff suing an insurance company, it is going to prove one of the issues in the case, a breach of the statutory condition on the ground that at the time of the accident for which he is claiming indemnity he was intoxicated so that he was unable to control the vehicle.

Mr. McKelvey: Suppose the conviction has been one of driving while impaired. The degree of intoxication that you have to prove in the Insurance Act is somewhat greater than on a charge of impairment. A conviction on an impairment charge would only apply to impairment of faculties, but not necessarily to the impairment of faculties to the extent that you have to prove under the Insurance Act.

Mr. Barry: You get into the criminal aspect of it. There is sometimes no relationship between the intoxication and the accident but if you are operating a car while unable properly to control it and the accident results in a civil action **prima facie** that is one of the causes.

Mr. McKelvey: Couldn't you be found guilty of care and control while intoxicated on a set of facts which would not involve a violation of that particular statutory condition of the insurance policy?

Mr. Barry: And an accident had occurred? It might be theoretically possible. It may be theoretically possible that the person who was convicted of care and control did not contribute to the accident at all, but I don't think that it would justify them in claiming indemnity from the insurance company because once they drive the car unable properly to control it they breach the contract.

The Chairman: Can't you be guilty under the Criminal Code without being impaired to such an extent that you are incapable of proper control?

Mr. Barry: Theoretically, yes.

The Chairman: Once you admit the possibility the issues are not the same.

Mr. Barry: You can conceive of situations where they are not necessarily the same. I can conceive of a person being guilty of either and not being responsible for the accident but I think, though, that if they are guilty of having care and control that in practical consequence they cannot succeed.

The Chairman: Why should a conviction by a judge or jury in a criminal case have weight in a civil case? The judge in the civil case must come to his own conclusion; why should he pay any attention or why should he be permitted to pay any attention to the verdict in the criminal court?

Comment from Audience: When you get a case decided you have got to accept it.

The Chairman: Not unless you have the same parties and issues or the judgment is **in rem.** The parties and issues are not the same in the criminal and civil cases.

Mr. Barry: I think the question is academic. Take an actual case. The plaintiff is confronted with the question, was he convicted of care and control as charged at the particular time and arrested at the scene of that accident, and he says yes.

The Chairman: That involves a statement that a criminal court came to the conclusion that he was guilty on the criminal charge.

Mr. Barry: You would have to ask, "How much did you have to drink?" You have to prove it again. You have answers, combined with his admission that he was convicted by a criminal court.

Question from Audience: Does he have to testify?

Mr. McKelvey: No.

Mr. Gillis: How is he going to succeed if he doesn't? How is he going to prove ownership of this vehicle?

Mr. McKelvey: I think the law is on Prof. Ryan's side.

Question 6.

Do you think that "reaction time tables" are useful? How should they be used? Do you ever consider calling expert witnesses on "reaction time"?

Answered by Mr. Gillis:

I am glad you said, "Do you think?" Personally, I don't, but I will say this: they are used. I have argued that they should not be but I am told that they are useful as a guide.

How should they be used? I don't know that that is too much of a problem. In one case a witness was asked, if going ten miles per hour in what distance could he stop his car. He said, "In six inches."

Do you ever consider calling expert witnesses on reaction time? I do and I think it would be very useful; unfortunately, around here we don't have such expert witnesses to call. They should be automotive engineers. If you look at the decision of the Supreme Court of Canada in **Adam v. Campbell,** [1950] 3 D.L.R. 449, Mr. Justice Cartwright goes into the question. That accident happened in Ontario and in that case they did call expert witnesses. The expert witnesses testified that at a certain speed the distance it would take that driver to stop was so much. That is exactly what we use in these reaction tables and they proved it there by an automotive engineer. But when the question was put to the expert witness, "What would be the reaction time for the emergency?" he said, "I don't know. I didn't test it but I think it would take longer." In that case Mr. Justice Cartwright said that was inadmissible because his evidence was not based on any test. It is my opinion on this case that the reaction time should be proved by an expert witness. I would like some day to call an expert witness on it.

Mr. Barry: I don't think myself that the tables are useful except sometimes to say that a witness is not telling the truth. It just shows that what he says cannot reasonably happen.

Mr. McKelvey: Does it actually impeach his truthfulness? He says, "It takes me three feet to stop going ten miles per hour," but he is not an automotive engineer. You produce a reaction table saying it takes twenty feet, but what does that prove?

Mr. Gillis: It shows he is exaggerating or a poor judge of distance.

Question 7.

As a matter of trial strategy, do you think it good tactics to plead contributory negligence if you are satisfied that the other party was solely to blame?

Answered by Mr. McKelvey:

What I think the question is directed at is this: if you are acting for one driver and you think the other man is definitely to blame 100%, should you admit the possibility that your man might have been partly to blame. I think that is what it means. It seems to me that you should in the case of pleadings. Supposing you are acting for the plaintiff and you think the defendant is 100% to blame. I don't think in your pleading you need to admit that your client might have been partly to blame. You state that the defendant was 100% to blame. You could rectify it in your reply. If you are acting for a defendant in your defence you have to admit your partial responsibility because you don't get the opportunity to rectify that in your reply. If you are just defending the claim you have to say in your counterclaim that the defendant was not to blame, the plaintiff was to blame 100%, or that the plaintiff was partly to blame. The answer to the question is that you have to do it in your

pleadings: if you are the plaintiff you can do it in your reply, if you are a defendant you don't get the second chance, you have to do it in the one chance that you have, the defence.

As a matter of trial strategy during the course of the trial there is a lot of room for doubt here whether you should argue that the other man is 100% to blame or whether you should admit that your own man might be partly to blame. My view is that you should mention the fact that if you are wrong in saying that the other party is 100% to blame that he was certainly parly to blame to the tune of 50%, 60%, 95% or whatever. If you argue before a judge the proposition that the other man was 100% to blame you give the judge the chance to say he agrees with you or he doesn't agree with you. If he doesn't agree with you there is the possibility that he may say he wasn't to blame at all. You should argue strenuously your own viewpoint that the other man was 100% to blame but add as an afterthought that if he wasn't 100% he was at least partly to blame. I don't feel you weaken your main argument and you give the judge the opportunity if he doesn't agree with you 100% perhaps he will pick 75% or 85% or something down the line until he finds something in your favour. Make sure you mention it in order to give the judge a chance to work his way down the line.

Mr. Barry: I don't agree at all. I wouldn't plead it if I thought the other party was solely to blame. I don't think it is good tactics to plead it, nor, if you have a good case, even to mention it. I suppose Mr. Gillis can give you the figures more accurately than I, but 85% of the cases are decided on contributory negligence. How does a court say 60, 40, 80, 20? They do, but I don't know how they do it. Mr. Gillis has had more experience with contributory negligence than I. You may plead it if you like.

Mr. McKelvey: You certainly have to allege that the other party was negligent. You don't have to mention contributory.

Mr. Gillis: In this case I agree with Mr. Barry. If you have a good case I wouldn't give anything away. I would avoid contributory negligence. In a weak case you well might plead contributory negligence.

Question 8.

Must "**res ipsa loquitur**" be specially pleaded? Would you agree that the doctrine is no more than "a rule of evidence, of which the essence is that an event which in the ordinary course of things is more likely than not to have been caused by negligence is by itself evidence of negligence"? Give some examples of situations in automobile accident cases that would give rise to a plea of **res ipsa loquitur.**

Answered by Mr. Ryan:

In my opinion it does not have to be specifically pleaded.

Mr. Barry: You don't have to plead it, but if you do not argue it you may be precluded from arguing it on appeal.

Mr. McKelvey: I have seen it pleaded in a good many cases.

Mr. Barry: It doesn't have to be. The word is "must."

Mr. Ryan: There is authority that it need not be pleaded in **Hanson v. Weinmaster,** [1951] O.W.N. 868.

I agree with the quotation. I might just refer to an authority, **Barkway v. South Wales Transport,** [1950] 1 All E.R. 392.

As an example, take a child walking along the street and a car comes up on the sidewalk and strikes him.

It would be a case of **res ipsa loquitur.** I would say if you were properly parked with your car on King St. in the day time and somebody comes along and runs into you, that would be an example. There are numerous cases where it would apply.

Mr. McKelvey: Is it possible to have **res ipsa loquitur** where you have two moving vehicles?

Mr. Ryan: I would say there is a possibility.

Mr. McKelvey: I can't see how there could be if there are two moving vehicles.

Mr. Gillis: What if one vehicle was on his own side of the road driving along, minding his own business, and another car comes around the curve on the wrong side going ninety-five miles an hour and the driver is intoxicated?

Mr. McKelvey: I don't see how it could possibly apply where you have two moving vehicles.

Mr. Gillis: Why don't you say it would not be so apt to apply?

Mr. Barry: I can see under the rule in the **London and St. Katherine Docks** case that if there are two controls the rule cannot apply.

Mr. Gillis: That is true. I don't think it happens too frequently.

Question 9.

Does the plea of "inevitable accident" involve more or less than a straight denial of negligence? If more, why use it?

Answered by Mr. Barry:

It involves more and the only reason I can think of to use it is to bring it to the attention of the Court.

Mr. Gillis: Why take that on yourself?

Mr. Barry: Only from a psychological standpoint if you have evidence to justify it.

Mr. Gillis: It is not necessary to plead it.

Mr. Barry: If you have the kind of a case to establish it I think it is more satisfactory to be able to prove a positive thing if you can than just to disprove an allegation. I have never used it because I have never been in a position to establish an inevitable accident.

Question 10.

Do you think **Bird v. Armstrong,** 27 M.P.R. 54, in effect abolishes the "last clear chance" doctrine in New Brunswick?

Answered by Mr. Gillis:

If you would ask me to state the answer with either "Yes" or "No", I would say, "Yes, it does". I am not convinced that that was a proper decision. What happened in that case was this:— the trial judge found both the defendant and the plaintiff guilty of negligence, the defendants negligent in that they left some unlighted piles of gravel on the road at night and the plaintiff in driving too fast. The trial judge said, "I believe that if he had been travelling at a reasonable rate of speed he could have avoided the accident." It strikes me that was the last clear chance but the Court of Appeal didn't see it that way. They said it was a case of contributory negligence. There still is, I think, in our law room for that doctrine and you will see in a recent case, the **Malenfant** case, decided a few weeks ago that Mr. Justice Kellock puts that proposition right back. He says, "If one person is negligent but the other person could have avoided it"—so there you are. As I say, our Court of Appeal seem to say there is no such thing as last clear chance any more, but I still feel that there will be a case that will go to the Appeal Court and the doctrine will come back. I think there is still a place in our law for it, but don't use the words "last clear chance".

The Chairman: If there is a doctrine of last clear chance would it apply only in a situation where the plaintiff was aware of the situation of danger created by the defendant or should it be extended to a case where the plaintiff ought reasonably to have been aware?

Mr. Gillis: Ought reasonably to have been aware according to the **Sigurdson** case.

Question 11.

Is violation of a section of the Motor Vehicle Act ever conclusive or **prima facie** evidence of negligence?

Answered by Mr. McKelvey:

The courts seem to hold that it is prima facie evidence of negligence. It must of course be a section of the Motor Vehicle Act pertaining to the rules of the road or the manner in which traffic is regulated on the highway—keeping to the right and driving around the middle point of an intersection for example. Two cases **LeBlanc v. S.M.T.** [1949] 23 M.P.R. 145, in our courts and **Kirby v. Kalyniak,** [1948] S.C.R. 544, in the Supreme Court of Canada hold that it is **prima facie** evidence of negligence. There may be some cases that say it is not evidence at all but I think the better view is it is **prima facie** evidence of negligence because when you are driving a vehicle on the highway you yourself are bound to obey the rules of the road and the other people are too; they owe a duty to you and you to them to abide by these rules. It is possible to conceive of cases in which it would be practically conclusive; for

example, driving around a blind curve on the left hand side of the road is a violation of the Motor Vehicle Act. If a collision results on the other end of the curve I think that is conclusive evidence of negligence. On the other hand merely on a stragiht stretch to travel on the left hand side of a road which happens to have a double white line on it, if the stretch is straight, is not necessarily conclusive. It may be **prima facie** but that's all.

Question 12.

Do you think that to violate statutory condition 2 (2) of a motor vehicle policy the owner who permits an intoxicated person or one who is unauthorized or unqualified to drive must know of the condition of that person when the permission is given.

Mr. Barry. Yes.

Mr. Gillis. Not necessarily; not when it is given. If he has reason to believe that that person might well become intoxicated it might have effect.

Mr. McKelvey: Knew or should have known, don't you think?

The Chairman: I think there is a recent decision in Saskatchewan in which it was held that knowledge is necessary.

Question 13.

A, the owner and driver of a car, collides with and causes $2,000 in damages to B's car. The insurer, liable for only $1,000, believes that A is wholly to blame and would like to settle for $2,000 to avoid costs. A, however, refuses to settle and insists that the insurer should defend. What should the insurer do?

Answered by Mr. Gillis:

What is the obligation of the insurer? My feeling is this. An insurer is legally bound under the contract of insurance to defend. There is no way out. They are going to incur costs and they can do whatever is possible to keep the costs down; they can make admissions. They are justified in doing that. If A is being obstreperous and insists on a defence, they must defend but can make such admissions as they deem advisable to keep the costs down.

The Chairman: Without necessarily disagreeing, may I raise a question on what Mr. Gillis has said. As I understand it, his answer was predicated on the assumption that under the insurance contract the insurance company is bound to defend. True there is the covenant in the contract that the insurance company undertakes to defend, but there is another covenant to the effect that the insurance company may settle on such terms as it deems expedient. If it thinks that certain terms are expedient, is it under an obligation to go on and perform its other promise to defend? Could it say, "I have the contractual right to settle. I advise settlement on these terms." If the insured refuses to put up the extra $1,000 then, of course, there can't be a settlement, but could it be argued that the insurance company performed its obligation under the contract by tendering performance of its promise to settle on such terms as it thinks expedient, provided, of course, that ultimately a court will find that an insurance company acted reasonably and in good faith?

Mr. Barry: There is some authority to that effect but apparently the court seemed to feel in a recent case that the obligation to defend is just as important as to settle on terms that it thinks fit and if the insured wants to be defended, his company has that obligation.

Mr. McKelvey: The agreement to settle can't permit the insurance company to settle for any figure it sees fit. If you have an insurance company whose coverage is only $1,000 and you have a claim that ought to be settled for $10,000, that covenant does not give the insurance company the right to settle for $10,000 of which the company pays only $1,000. They can't settle for $1,000 because the other party won't accept it.

Mr. Barry: They can either settle or defend. They can't do partly one and partly the other.

Mr. McKelvey: Could it be that the settlement clause applies only where the policy limit exceeds the claim?

The Chairman: The terms of the contract are "settle on such terms as it deems expedient."

Mr. McKelvey: But you have to restrict that. The insured doesn't agree that he will contribute the difference between the coverage and the settlement. There is nothing like that in the policy.

The Chairman: Yes, I see the force of that. If the proposed settlement exceeds the policy limit the insurer is not in a position to tender performance.

Question from Audience: Couldn't they defend the action and settle as soon as they get started?

Mr. Gillis: You could make a **bona fide** admission of liability to keep the costs down.

Mr. Barry: I would hesitate to do it if the insured said, "No."

Question 14.

A car owned and being driven by Mr. Smith and in which Mrs. Smith is a passenger collides with a car driven by Jones. Mrs. Smith was personally injured. Smith was grossly negligent and was two-thirds to blame; Jones who was also negligent was one-third at fault. Mrs. Smith sues Jones, and proves damages of $1,500. How much will she recover from Jones?

Answered by Mr. McKelvey:

I assume that she brings action against Jones and the judge in that action sets the liability of 2/3 Smith and 1/3 Jones. She can only recover 1/3 from Jones and the reason is that the Contributory Negligence Act, s. 3, says so.

The Chairman: I want to thank the panel for their very fine job. I think we have all profited from the discussion.