R. N. CARRISS (*Defendant*) .....APPELLANT;

AND

EVELYN BUXTON (*Plaintiff*) .....RESPONDENT.

1958

*Jan. 30, 31
Jun. 3

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Negligence—Dangerous premises—Liability as between invitor and invitee —Charge to jury.

Hotels and hotelkeepers—Duty of keeper to guest—Nature of duty to make premises safe—"Warranty"—Whether duty relevant on pleadings and charge to jury.

Municipal corporations—By-laws—Effect of by-law prescribing duties in respect of gas-burning appliances—Whether breach of by-law gives rise to civil liability.

The plaintiff's husband, while a lodger in the defendant's hotel, died of asphyxia caused by inhaling gas that escaped from a defective stove in the room occupied by him. The plaintiff sued for damages on her own behalf and on behalf of her infant children, and the trial judge charged the jury that the defendant owed two duties to his lodger: (1) his duty as invitor to invitee to use reasonable care to prevent

*PRESENT: Rand, Locke, Cartwright, Fauteux and Abbott JJ.

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damage from unusual danger of which the defendant knew or ought to have known, and (2) a duty under a municipal by-law requiring owners of buildings to "maintain all gas appliances installed therein and any safety devices attached to such appliances in safe working condition". The jury found that the defendant had been negligent in "not conforming with by-laws", and that the deceased had not been guilty of contributory negligence. Judgment was entered for the plaintiff and this judgment was affirmed by a majority of the Court of Appeal.

Held (Locke J. dissenting): The appeal should be dismissed.

Per Rand J.: Since the technical rules of pleading had been abolished, the claim here must be taken as the ordinary case of a person entering into the relation of a guest of an innkeeper at the usual charge and for the usual services. At the trial, however, all consideration of a "contractual relation" between the parties had been excluded, and no resort was permitted to the "warranty" of the fitness of the premises for the purposes for which they were taken, and it was assumed that the only duty available to the plaintiff was that of invitor to invitee, under *Indermaur v. Dames* (1866-7), L.R. 1 C.P. 274; L.R. 2 C.P. 311. *Maclenan v. Segar,* [1917] 2 K.B. 325, was distinguished as being an action in contract against an innkeeper. If the rule in the latter case had been applied, liability would have been indisputable, since the duty laid down by it was one of reasonable care in relation to the premises furnished to guests, exercised by every person concerned at any time in their construction, maintenance or operation. It was admitted here that the condition of the stove was most dangerous, and that condition could have been discovered by adequate inspection. The municipal by-law did not go beyond the requirement that reasonable care—in this case of the highest degree—be exercised by the proprietor and all persons under his direction. It was clear from the charge that the jury were not given to understand that there was an absolute duty under the by-law to maintain in all events a proper adjustment in the gas stove; the by-law was to be only evidence of negligence. In the light of this instruction, the jury's finding amounted to one of negligence, and the evidence to support that finding was overwhelming. The evidence not only justified but required a finding that the defendant should have known of a danger that was patent to any reasonable inspection and that, through his negligence, he was responsible for its consequences. It was not necessary, for the purposes of this case, to decide whether the duty of an innkeeper went beyond that.

Per Cartwright, Fauteux and Abbott JJ.: On the pleadings as they stood, the trial judge should have put the case to the jury as one governed by the principles stated in *Francis v. Cockrell* (1870), L.R. 5 Q.B. 184, 501. The rule in that case was stated in Winfield on Tort, 6th ed., at p. 672, as follows: "Where A enters B's structure under a contract entitling him to do so, *it is an implied term in the contract that the structure shall be reasonably fit for the purpose for which it is intended; but this does not extend to any unknown defect incapable of being discovered by reasonable means.*" This statement of the rule could be accepted for the purposes of this appeal as not unduly favourable to the plaintiff and it was not necessary to decide whether the judgment in *Maclenan v. Segar, supra,* should be accepted in its entirety. If the jury had been so charged they must inevitably have found for the

plaintiff, in view of the evidence as to the nature of the defect in the gas stove and the length of time that it had existed. Therefore, even assuming that the trial judge did not charge the jury correctly as to the effect of the by-law, the appeal should nevertheless be dismissed on the ground that there had been no substantial wrong or miscarriage of justice.

Per Locke J., *dissenting*: The trial judge's charge as to the duty owed by the defendant under the by-law amounted to misdirection which was not corrected by a subsequent statement by him that the jury were entitled to take a breach of the by-law into consideration "as a factor of negligence". What he stated as the duty under the by-law, if it existed, was an absolute one, and was much higher than that of invitor to invitee, under *Indermaur v. Dames, supra,* or that of innkeeper to guest, under *Francis v. Cockrell, supra,* and *Maclenan v. Segar, supra.* But a breach of the by-law could not give rise to liability in a civil action since (1) it was passed for the protection of the public generally, and prescribed penalties for infractions, and (2) the enabling sections of the city charter, under which it was passed, did not empower the city council to create duties a breach of one of which would be a private wrong conferring a right of action for damages resulting from the breach. *Tompkins v. The Brockville Rink Company* (1899), 31 O.R. 124; *Orpen v. Roberts et al.,* [1925] S.C.R. 364 at 370-1, applied. The jury should have been told that the by-law was admissible in evidence only to show that in the opinion of the city council certain standards of care were considered necessary to prevent injury from escaping gas. Their findings, in the circumstances, amounted to no more than a finding that the gas stove had not been maintained in the state required by the by-law, and this was not sufficient to support a verdict in favour of the plaintiff. No question could arise on this appeal as to the sufficiency of the plaintiff's pleadings to support a cause of action on the implied warranty of innkeeper to guest since that issue, with the consent of plaintiff's counsel at the trial, was not submitted to the jury and the plaintiff must be bound by the way in which her case had been conducted at the trial. *Scott v. The Fernie Lumber Company, Limited* (1904), 11 B.C.R. 91 at 96; *David Spencer Limited v. Field,* [1939] S.C.R. 36 at 42, applied. This was not a case of applying the rule laid down in *Andreas v. The Canadian Pacific Railway Company* (1905), 37 S.C.R. 1 at 10, that the jury, having found negligence under only one of the heads submitted to them, must be taken to have negatived all others, because here the jury's attention had been focused on the by-law. There should be a new trial.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], affirming a judgment of Clyne J. entered on the findings of a jury. Appeal dismissed, Locke J. dissenting.

William Leonard Buxton, the plaintiff's husband, a logger at that time unemployed, rented a housekeeping room in the Lincoln Hotel in Vancouver, of which the defendant Carriss was lessee and manager. He paid a week's rent in advance on the morning of Saturday, June 5, 1954, and was

[1] (1957), 24 W.W.R. 263, 11 D.L.R. (2d) 766.

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assigned a room that had been vacant for about a week and had previously been occupied by one Knutson. The room was equipped with a two-burner gas stove working off a coin meter. Attached to the stove was a safety device installed in March 1954 in compliance with a municipal by-law. This device was intended to prevent the flow of gas to the burner if the pilot light on the stove was not burning.

When the plaintiff and her husband were taken to the room on the Saturday morning, Carriss showed them how to operate the stove. The plaintiff swore in her evidence that there was difficulty at that time in lighting the right-hand burner, and that it "popped out". Mr. and Mrs. Buxton left the hotel and did not return until the middle of the night, at which time Mrs. Buxton turned on the stove, with difficulty, and left it burning for about 45 minutes. She spent the night at the hotel with her husband and left early the following morning to be with her children, who were staying with friends in Vancouver.

On the Sunday night Buxton returned to his room accompanied by one Dawson, and Dawson gave evidence at the trial as to the difficulty Buxton had in lighting the stove. He said that it would "flare up, just pop around and dance and go out". He also said that Buxton complained to persons in the hotel office about this difficulty. Knutson swore that during his occupancy of the room he had never used the right-hand burner.

On Tuesday morning, June 8, Carriss noticed a smell of gas in the corridor outside Buxton's room. He opened the room with the housekeeper's key and found Buxton lying dead on the bed, fully clothed. The room was filled with gas, the right-hand burner of the stove was turned on, but no gas was then coming from the stove. The stove was inspected that afternoon by the city police and the same difficulty was experienced in lighting the right-hand burner. The adjustable port which controlled the mixture of air and gas was found to be out of its proper position, and there was expert evidence to the effect that an incorrect mixture of air and gas would interfere with the combustibility, and further uncontradicted evidence that the condition of the port must have existed for a considerable time. The medical evidence was to the effect that Buxton died of asphyxia due to carbon monoxide poisoning.

The plaintiff sued on her own behalf and on behalf of her three infant children under the *Families' Compensation Act,* R.S.B.C. 1948, c. 116. The action was originally brought against Carriss and two other defendants but was discontinued against the other defendants at the trial. The jury awarded damages amounting in all to $39,865.

A. W. Johnson, for the defendant, appellant.

D. McK. Brown, and *T. Griffiths,* for the plaintiff, respondent.

RAND J.:—This is an appeal from a judgment[1] finding the appellant Carriss, as keeper of an inn, liable in damages for the death of the respondent's husband while a guest. Involved in the question of the degree of care chargeable against an innkeeper and the effect of a by-law of the City of Vancouver, was a matter of pleading on which much argument was made differentiating such a claim in contract from that in tort, and this should be dealt with first.

It should be recalled that the *Judicature Act,* for the purposes of determining the substantive rights of parties, abolished the technical rules of pleading at common law and under the various common law procedure statutes, and prescribed, among other things, that what must be alleged in a statement of claim are those matters of fact upon which liability is predicated. It may be that for special or subsidiary purposes a distinction is called for in the aspect of liability on which a plaintiff puts his claim; but to say that, on a statement of all the facts from which a contract appears and from which at the same time a common law duty arises, it would be fatal to omit such an allegation as, for example here, that the deceased was a guest "for reward" when that was one of the first matters proved, and in fact admitted, is to restore the evil which it was the primary object of the *Judicature Act* to banish. I take the claim to be that of the ordinary case of a person entering into the relation of a guest of an innkeeper at the usual charge and for the usual services.

The result of the exclusion, at the trial, of all consideration of a "contractual relation" between the parties was that no resort was permitted to be made to what is called a "warranty" of the fitness of the premises for the purposes

[1] (1957), 24 W.W.R. 263, 11 D.L.R. (2d) 766.

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for which they were taken. From this it was assumed that only the duty between an invitor and an invitee was available to the plaintiff, under the rule of *Indermaur v. Dames*[1], a case of an open shaft in a sugar refinery into which had fallen a gas-fitter representing the seller of a gas-regulator who was on the premises for the purpose of testing the device and whose employer was to be paid according to the economy effected in gas-consumption. *Maclenan v. Segar*[2] was distinguished as being an action against an innkeeper in contract.

This distinction takes us back to the early forms of action in which a claim was made against one who had "undertaken" to do some act affecting the person or property of another in the course of which the performance was alleged to have miscarried. The action for the generality of such claims was in assumpsit, a special form of case, which, in the course of time, became also the form for breach of a promise purely as well as breach in performance. In actions against persons engaged in common employment the form seems to have been limited to case as distinguished from assumpsit.

The legal relation of guest to innkeeper arose out of the historical conditions of England and the extent of liability is that imposed by the common law. Innkeepers, generally, are insurers of the goods of travellers who come to their inns; and they are responsible to some degree short of insurers for their care and safety. That early history is sketched in the introduction to Beale on Innkeepers and Hotels, 1906, and the development of the duty toward guests put up in a common room in which all slept on the floor to that in the accommodation of a modern hotel has brought with it aspects of liability which were not then encountered. It remains only to add that the cause of action against an innkeeper was for breach of duty arising from "the custom of the realm" which meant simply the general custom, *i.e.*, the common law: the duty was the creation of that custom and law.

Another element which must be kept in mind is that the innkeeper, subject to certain exemptions, is bound to accept all travellers without distinction and that obligation

[1] (1866), L.R. 1 C.P. 274, affirmed (1867), L.R. 2 C.P. 311.

[2] [1917] 2 K.B. 325.

becomes a material element in the aspect of contract. Strictly speaking, a contract is entered into by both of two persons freely and voluntarily, but an innkeeper has not that liberty of action, nor are the terms of the ordinary engagement agreed upon; once the relation is established, the liability arises by law. Since it is so prescribed, the action should, strictly speaking, be classified as in tort; but early in the 19th century *Bretherton et al. v. Wood*[1], a case of common carrier, recognized that the action could be laid in either tort or contract. The point of significance there was in the joinder of parties; in contract, all must have been made parties, in tort that was not necessary. But it was never suggested that the duty in the one case was different in scope from that in the other. Alternative claims can now be included in an action and these points of dispute of the past are, for purposes of substance, buried.

What is called a "warranty", certainly in ordinary usage, is appropriately so called only as an express or implied term or assurance in contract where a result or condition rather than a service is paid for, and when dealing with the basic duties imposed by law on a common employment, that word does no more than define the scope of liability which the law imposes. No doubt that scope can be modified by terms that give a contractual colour to the relation. Whether we should view the transaction as a contract incorporating the common duty as part of its terms is doubtful, if for no other reason than the cases of infants or others incapable of contracting, and those of furnishing gratuitous services. But this does not affect collateral agreements providing for, among other things, special times, places or facilities, which create duties preliminary to entering upon the undertaking. I can see no objection to treating modifying terms as themselves merged in the legal incidents. In contracts involving a duty of care, as, for example, in *Francis v. Cockrell*[2], the implied terms are to be deduced from the total circumstances of each situation. But the duty of an innkeeper toward his guest in a personal aspect, whatever its relation in scope to that of a common carrier to a passenger is, at least, not less than that of an invitor to an invitee and, for the purposes here, that is sufficient.

[1] (1821), 3 Brod. & Bing. 54, 129 E.R. 1203. [2] (1870), L.R. 5 Q.B. 501.

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If we were to apply the rule of *Maclenan v. Segar, supra,* reasonable care exercised in relation to the premises furnished to guests, that is, exercised by every person at any time concerned in their construction, maintenance or operation but excluding latent defects not discoverable by any reasonable means or caused by unauthorized action of third persons, then liability would be indisputable. The condition of the port admitting air to the gas flow just before it entered the burner was conceded to be most dangerous; the aperture was so far opened that the quantity of air admitted was sufficient to destroy the combustibility of the mixture; the gas, in effect, was drowned out, and the flame, at best a partial combustion at times obtainable only by matches, was so weak and separated from the burner as to be extinguishable by a wave of the hand. It tended to go out when the gas supply was running low, a supply controlled by a meter operated by the deposit of 25c pieces. That the defective condition was brought about by an intermeddler is excluded.

Nor is there any question of latency or technical complication. The port consists simply of an enlarged rounded metal attachment, with a disc face, screwed into the short pipe leading to the burner a few inches from the manual valve admitting the gas. The disc face has small arc-shaped slots through which air passes into the pipe and the apertures are opened or closed by means of a small circular plate movable through the arc; and the plate is held in position by a set-screw.

The room had been occupied by a previous guest for about seven months ending May 31, 1954. As a witness for the defendant, he stated that at no time during his occupancy had he used the right-hand, the defective, burner. In March 1954 a safety device had been installed which stopped the flow of gas to the stove unless an attached pilot light was burning and part of the operation of which was that the pilot light would keep the burners alight. But even if working perfectly, the pilot light could not function as intended unless the gas-air mixture was in the appropriate proportions.

In this background also was the by-law which required the gas stove to be "maintained in safe working condition". Its enactment resulted from a series of deaths from monoxide in the city which in 1953 reached 86 and in 1954, 67.

With such a record before them, all users of gas and particularly those in charge of public sleeping quarters were made conscious of the deadliness of free gas. Carriss knew this, but it is a commentary on his sensitiveness to it that the introduction of the devices required by the by-law was made by him only just before the expiration of the period allowed, when he "beat the deadline" as he expressed it.

The by-law does not, as I interpret it, go beyond the requirement that reasonable care—in this case of highest degree—be exercised by the proprietor and all persons under his direction in all respects of maintenance and operation, excluding independent contractors in relation to work that requires high technical skill and excluding defects in appliances or devices which are not discoverable by ordinary means. As is evident, the adjustment here was not one for a highly skilled technician; any interested owner making a modicum of examination of the air-port and seeing its function could adjust it himself. Its operation is immediately reflected in the flame produced. All it needs is some attention and at the most a few words from a gas-fitter to see its purpose and the means of bringing about what is required. To one concerned to maintain its safety, though ignorant of its mechanism, the improper adjustment as "something wrong" would appear in a testing by the resulting combustion: the flame would "pop out" and it would have to be lighted and relighted before the "popping out" ceased for any length of time. This, to any proprietor, would be a demonstration of a condition of danger. To be informed on this adjustment by a gas-fitter would be part of the instruction which every such proprietor, or some one for him, should have sought and obtained unless a periodic inspection was provided for which was not the case here.

On Saturday morning when the room was engaged, such a condition was, by the evidence of Mrs. Buxton, disclosed: the flame would "pop out"; the same thing was said by her to have happened early Sunday morning about 2.15 o'clock; the same by Dawson on Sunday evening; and the same admittedly on Tuesday afternoon when the inspection was made by the police and the gas inspector. On Saturday morning the deceased is said to have remarked to Carriss that something appeared wrong, evidence which the latter denies; on Sunday night the deceased, according to Dawson,

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complained to two persons apparently in charge of the office; but Carriss, admitting that a man and wife, employed as night housekeepers, would properly have been in the office, denied having been notified of any complaint.

Dawson spent most of Sunday with the deceased. He had, over a period of two years, been a visitor of a guest of the hotel and had frequently seen a man and wife, the housekeepers, in the office. On Sunday evening, in the course of leaving the house with the deceased, the latter stepped to the office window and made the complaint. Dawson stood aside. Although he heard the conversation, he did not actually see the persons within and his belief that, from their voices, they were the former housekeepers was erroneous. The latter had in fact left the hotel two years before and had been succeeded by another man and wife. Counsel declined to cross-examine Dawson and reserved his objection that the evidence was inadmissible because Dawson had not seen the two persons, and that it had not been shown that they were employed by Carriss: on the truth or falsity of the alleged statement by the deceased no questions were ventured. That the statements if made were to persons apparently in charge is not now challenged. The defence to the jury, based on the general circumstances and the fact that the persons whose voices they were thought by Dawson to be were not in fact theirs but others, was that the testimony of both the respondent and Dawson was fabricated. The caretakers were not called, although Carriss, urging his ignorance of the complaint, had looked for their names in the telephone directory but gave it up on account of there being so many "Johnsons". But he made no enquiry of the plasterers' union to which Johnson belonged or the taxi-drivers' union to which Mrs. Johnson belonged: nor did he advertise for information of their address. Moreover the trial judge, on admitting the evidence—under a particular of negligence alleging that the defendant failed to take "adequate or any precautions to protect the users thereof from death or injury from asphyxia from cooking gas"—assured counsel that he would be given opportunity, if necessary, to furnish evidence in reply. This took place on Thursday: on Friday, after an argument of law, the Court adjourned until Monday for the addresses and the charge; no request was made for further time nor is it stated that any effort was made to

produce the Johnsons. Neither the respondent nor Dawson had been present at the examination of the stove on Tuesday afternoon, June 8, and their description of how the gas in the right burner behaved is almost in the same words as that of detective Mackay, that is, that matches were required to set it aflame, that the flame would flicker and then "pop out".

The trial judge left the question of liability on the footing of two duties, one as invitor and the other, that created by the by-law. The former was stated as follows:

> At common law the duty which the invitor, that is to say, Carriss, owed to the invitee is this: Buxton, using reasonable care for his own safety, was entitled to expect that Carriss would use reasonable care to prevent damage from unusual danger which he, Carriss, knew or ought to have known about. Now let me repeat that again in different words. Carriss owed Buxton a duty to use reasonable care to make the room safe from any unusual danger, which Carriss knew, or ought to have known about. Now that is the duty which Carriss owed to Buxton at common law.

Then he dealt with the by-law:

> He also owed him another duty under the by-law. The by-law, which was passed by the City of Vancouver, imposed on Carriss a further duty, and you will see this clause in exhibit 16, By-law 3406, on page 2 of that by-law, and I am reading from clause 9:
>
> > The owner of a building shall maintain all gas appliances installed therein and all safety devices attached to such appliances in safe working condition.

At the conclusion of the charge, Mr. Johnson, for Carriss, drew attention to the fact that no reference to any difference in the degree of care required by these duties had been made, but the answer of the trial judge was that he thought

> the clearest way in which I can detail that to you, gentlemen, is that you are entitled to take a breach of the by-law—if you find that such a breach did occur, you are entitled to take that into consideration as a factor of negligence.

and with this the matter ended.

Previously in the charge the trial judge had pointed out the defence of Carriss that he knew nothing of the defective adjustment, and on this he remarked:

> . . . and you must ask yourselves, did he know about it or should he have known about it. He says he never received any complaint about the burner at any time. He says that Knutson occupied the room, and that Knutson said he never made any complaint and there was no reason to complain about the efficiency of the gas stove. Knutson said, of course, that he never used the right burner, that he always used the left. You must ask yourselves, was the right-hand burner in a defective condition when Buxton and his wife rented the room, or did it become defective by reason of Buxton or his wife tampering with it.

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The jury acquitted Buxton of coming to his death by his own act and of contributory negligence. They found Carriss guilty of negligence in "not conforming with by-laws of the City of Vancouver".

From these excerpts it is quite apparent that the jury was not given to understand that there was an absolute duty under the by-law to maintain in all events a proper adjustment in the gas stove. If that had been so, apart from the question of Buxton's own act, deliberate or negligent, now excluded, the issue of negligence would have been superseded; in the absolute sense, there was unquestionably a default, and there would have been left only the issue of suicide or contributory negligence; but the by-law was to be only evidence of negligence. In the light of those last words to the jury the finding is that of negligence, and the evidence of it is overwhelming.

Carriss had taken over the hotel in 1947, and at that time the stove was in the room. From then until June 8, 1954, so far as the evidence shows, he had given not the slightest examination of the working of the stove or of any adjustment connected with it. Apparently there had been no complaints and, as he thought, no occasion to examine it. Not until March 1954, when the safety device was installed, was any kind of work related to it. That device had nothing directly to do with the air adjustment. The evidence of the gas-fitter who installed it was, at the highest, that the defective burner had then been lighted by the pilot flame. That the screw had not been touched at that time is indicated by its condition on June 8 when it was loosened by using a screwdriver only with difficulty in a surrounding of hardened grease which broke off in flakes. The evidence of the previous inmate was to the effect that when the gas was at its highest pressure the left burner could be lighted by the pilot flame but as the pressure got low even that was uncertain. It should be mentioned also that in March the gas-fitter had been called back for a faulty installation of the device or adjustment in another room. In the presence of all these facts, the failure of Carriss for several years to make any examination of such a dangerous agency and the continued existence, over an undetermined period, of the condition found, one which does not lend itself to explanation or excuse, and for which none was offered, not only

justified but required a finding that, within the direction given, he should have known of a danger that was patent to any reasonable inspection, and, through his negligence, was responsible for the consequences. For the purposes of this case, that sufficiently states the standard of duty of, or the warranty by, an innkeeper toward his guest. Whether the duty goes beyond that is a question upon which it is unnecessary to enter; it is at least not less than that.

The appeal extended also to the amount of damages awarded: but I am quite unable to say that the Court of Appeal was wrong in holding them not to be unreasonably high.

I would dismiss the appeal with costs.

LOCKE J. (*dissenting*):—I agree with Mr. Justice Davey, who dissented from the judgment of the majority of the Court of Appeal[1], that there should be a new trial of this action. In these circumstances, I refrain from discussing the evidence given at the trial except to the extent that it is necessary to explain my reasons for reaching this conclusion.

It is necessary in view of what occurred at the trial to examine the pleadings with some care. The action was brought by the widow of the deceased William Buxton on behalf of herself and the infant children of the marriage, under the provisions of the *Families' Compensation Act*, R.S.B.C. 1948, c. 116. Under s. 5 of that statute such actions must be commenced within twelve calendar months after the death of the deceased person, a circumstance that had a bearing upon what took place at the conclusion of the plaintiff's case.

The action was started within one year of the death and by the endorsement on the writ the plaintiff claimed

> damages caused by the negligence of the Defendants, their servants and agents whereby the said William Buxton, deceased, met his death on the 8th day of June, A.D. 1954.

[1] (1957), 24 W.W.R. 263, 11 D.L.R. (2d) 766.

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The statement of claim alleged that the defendant Carriss was "the occupier and manager of the hotel premises known as the 'Lincoln Hotel', at 106 West Hastings Street, in the City of Vancouver", and further that:

> On or about the 8th day of June, A.D. 1954, one, William Leonard Buxton, the lawful husband of the Plaintiff herein, was the occupant and the tenant of Room 214 at the aforesaid premises

when he met his death in the said room, due to asphyxia.

These allegations were followed by paragraphs in which the plaintiff said that she pleaded By-law 2483 and various amendments to that by-law and gave lengthy particulars of the negligence of the defendant upon which the claim was based against him. While the statement of claim did not say so, the by-law referred to was a by-law of the City of Vancouver, which was put in evidence at the trial.

The case was tried before Clyne J. and a common jury. The City by-laws referred to in the statement of claim were put in evidence, though their admission was objected to by counsel for the defence. In my opinion, they were properly admitted for the limited purpose hereinafter referred to.

Before the conclusion of the plaintiff's case and during a rather lengthy discussion as to the admissibility of the by-laws, the learned judge observed that the action was founded in tort and not in contract upon an implied warranty, counsel for the plaintiff taking the attitude that *Francis v. Cockrell*[1] did not apply. He had understood from counsel for the plaintiff that the plaintiff's case was one as to which the principle in *Indermaur v. Dames*[2] applied.

Later in the proceedings, however, and before the case went to the jury, counsel asked leave to amend the statement of claim by adding a paragraph reading:

> Alternatively, the plaintiff claims damages for the breach of the implied warranty of the safety of the hotel premises for the use thereof by the deceased as the occupant or tenant thereof.

and a further paragraph reading:

> Alternatively, the plaintiff says that at all material times the said deceased was the lawful occupant for hire of the said room No. 214 in the said hotel premises and that the said defendant Carriss was in breach of the implied warranty that the said premises and the gas appliances therein, and all modifications thereto, were in a safe working condition for use by the said deceased for the purpose for which they were installed.

[1] (1870), L.R. 5 Q.B. 184, affirmed *ibid.*, 501.

[2] (1866), L.R. 1 C.P. 274, affirmed (1867), L.R. 2 C.P. 311.

In *Francis v. Cockrell, supra,* Kelly C.B. in the Exchequer Chamber said in part (p. 508):

> First, there is the principle which I hold to be well established by all the authorities, that one who lets for hire, or engages for the supply of any article or thing, whether it be a carriage to be ridden in, or a bridge to be passed over, or a stand from which to view a steeplechase, or a place to be sat in by anybody who is to witness a spectacle, for a pecuniary consideration, does warrant, and does impliedly contract, that the article or thing is reasonably fit for the purpose to which it is to be applied; but, secondly, he does not contract against any unseen and unknown defect which cannot be discovered, or which may be said to be undiscoverable by any ordinary or reasonable means of inquiry and examination.

Montague Smith J. said (p. 513):

> . . . the proper mode of stating it is, the defendant promised that due care and skill had been used in the construction of the building; or the obligation may be put in the other form, that the building was reasonably fit for the use for which it was let, so far as the exercise of reasonable care and skill could make it so.

In *Maclenan v. Segar*[1], where the action was against an innkeeper by a guest of the hotel, McCardie J. followed *Francis v. Cockrell* and distinguished *Indermaur v. Dames.* The headnote accurately summarizes the decision and reads:

> By reason of the contractual relationship existing between an innkeeper and a guest in the inn there is an implied warranty by the innkeeper that the inn premises are, for the purpose of personal use by the guest, as safe as reasonable care and skill on the part of any one can make them, but the innkeeper is not responsible for defects which could not have been discovered by reasonable care or skill on the part of any person concerned with the construction, alteration, repair, or maintenance of the premises.

Any difficulty in dealing with the application to amend arose from the fact that the limitation period of one year had long since expired. During the discussion the learned judge said in part:

> You have to plead a contract and if liability is contractual there must be a contract before the Court which the Court can deal with. If the liability is in negligence then, of course, it is a different cause of action.

and expressed the view that the proposed amendments set up a new cause of action. In the result, the application to amend was refused. The learned judge pointed out that in opening the case to the jury counsel for the plaintiff had stated that the claim was in negligence and the relationship one to which the principle in *Indermaur v. Dames, supra,*

[1] [1917] 2 K.B. 325.

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applied, and that he proposed to put the matter to the jury on that footing. Counsel for the plaintiff said that he was content with this.

In the charge to the jury the learned trial judge said in part:

> At common law the duty which the invitor, that is to say Carriss, owed to the invitee is this: Buxton, using reasonable care for his own safety, was entitled to expect that Carriss would use reasonable care to prevent damage from unusual danger which he, Carriss, knew or ought to have known about.

This clearly was based upon the principle stated by Willes J. in *Indermaur v. Dames* at p. 287.

The charge then continued:

> He also owed him another duty under the by-law. The by-law, which was passed by the City of Vancouver, imposed on Carriss a further duty, and you will see this clause in exhibit 16, By-law 3406, on page 2 of that by-law, and I am reading from clause 9:
>
> > The owner of a building shall maintain all gas appliances installed therein and any safety devices attached to such appliances in safe working condition.
>
> The by-law applies not only to the owner, but it applies to the occupier; in other words, the by-law applies to Carriss.
>
> Now Carriss was obliged by law to maintain all gas appliances in the room, including both the stove and the safety device, in safe working condition.
>
> Now those are the two duties which Carriss owed to Buxton. In order to succeed in this case the plaintiff must prove that the defendant failed in one or both of those duties, and that the failure in such duty caused the death of her husband. If his death was caused by failure of duty by Carriss in this way, under the Families Compensation Act the widow and children are entitled to damages.

After reviewing the evidence at some length, the learned judge continued:

> But on these facts, gentlemen, and on the law as I have given it to you, it is for you to say whether the plaintiff has proved her case, that is to say, that her husband met his death by reason of the failure on the part of Carriss to perform his duty to maintain those premises in a safe condition against any danger which he knew, or ought to have known, as whether, having a regard to the by-law, *the failure on his part to keep the appliance in a safe working condition resulted in Buxton's death.*

(The italics are mine.)

Of the five questions submitted to the jury, only the first two need be considered. These read:

1. Was the defendant, Carriss, guilty of negligence which caused or contributed to the death of Buxton?
2. If so, what was such negligence?

The form of these questions had been agreed upon by counsel for the parties. Before the jury went out, the learned trial judge asked if there were any objections to his charge. Counsel for the defendant said that he was not sure whether the jury had been instructed as to whether

there is any difference between the obligation under the by-law and the common law obligation which your Lordship has pointed to.

To this, Clyne J. replied:

Well no, I think the clearest way in which I can detail that to you, gentlemen, is that you are entitled to take a breach of the by-law—if you find that such a breach did occur, you are entitled to take that into consideration as a factor of negligence. Now I think that is the most general way in which I can put it.

Counsel for the plaintiff said nothing as to this aspect of the matter.

The answer made by the jury to the first question was in the affirmative. To the second question the answer was:

Not conforming with by-laws of the City of Vancouver.

Other answers found that Buxton had not come to his death by his own deliberate act, acquitted him of contributory negligence and assessed the damages.

When these answers were read, counsel for the defendant asked that the answer to question 2 be clarified. As to this, the foreman of the jury said:

. . . we discussed that and he didn't conform to the City by-laws in respect to that, in respect to the stove and the safety device.

and continued:

Further, my Lord, the by-law called for it to be maintained, which he didn't do.

The learned judge then said:

I take it you mean in a safe working condition.

to which the foreman replied:

In safe repair, yes, my Lord.

Judgment was then directed to be entered for the damages found by the jury.

On appeal[1], O'Halloran J.A., with whom Bird J.A. agreed, did not discuss the question as to the sufficiency of the pleadings to enable the plaintiff to claim damages upon the implied contract and, as the matter was not mentioned in the dissenting judgment of Davey J.A., we have not the

[1] (1957), 24 W.W.R. 263, 11 D.L.R. (2d) 766.

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benefit of the opinion of the Court of Appeal on the subject. After saying that, in his opinion, the jury's verdict was supported by the evidence, O'Halloran J.A. said that it was contended by the appellant's counsel that the breach of the duty imposed by the by-law did not give rise to a cause of action for damages and that a breach of the by-law rendered the appellant only liable to a penalty. As to this, the learned judge said[1]:

> In my judgment the by-law did no more than repeat the duty at common law. It would be a different matter of course if the duty relied on by the jury was something outside of the common law and created only by by-law. This distinction is to be appreciated in reading the leading decisions.
>
> It is true in answering the specific question the jury mentioned the by-law as such, but the jury was answering the question as laymen and not as lawyers. The reference to the by-law was, in fact, superfluous, since as already stated, the jury defined the negligence as failure to maintain the stove and safety device in safe repair. That, as I see it, was non-compliance with the common-law duty.

With great respect, I am unable to agree with this. If, as it was contended on behalf of the plaintiff in the action and as the jury had been instructed in the charge, the obligation imposed by clause 9 of By-law 3406 was to

> maintain all gas appliances installed therein and any safety devices attached to such appliances in safe working condition

that duty differed materially from that of an invitor, as stated by Willes J. in *Indermaur v. Dames, supra,* and by Kelly C.B. and Montague Smith J. in *Francis v. Cockrell, supra,* and by McCardie J. in *Maclenan v. Segar, supra,* as to the duty of an innkeeper.

As between invitor and invitee, the latter was entitled to insist upon the exercise of reasonable care by the former to prevent damage from unusual danger of which the occupier knew or ought to have known.

As between innkeeper and guest, there is an implied warranty that the inn premises are as safe as reasonable care and skill can make them and, as pointed out by Chief Baron Kelly in *Francis v. Cockrell* at p. 508, the warranty does not extend to any unseen or unknown danger which could not be discovered by any ordinary or reasonable means of enquiry and examination.

[1] 24 W.W.R. at pp. 264-5.

The duty under the by-law if it existed was, as it was explained to the jury, absolute and the innkeeper would not be excused by the fact that the danger was one of which he neither knew nor ought to have known, or that the defect was one which reasonable enquiry and examination would not have revealed: *Galashiels Gas Co. Ltd. v. O'Donnell or Millar*[1]. Unless in the present matter Buxton had deliberately turned on the gas without lighting it and allowed it to escape into the room with the intention of destroying himself, or unless he was guilty of contributory negligence, if the breach of the by-law gave rise to a right of action there was no escape for the defendant upon the evidence in this case under the terms of the by-law unless, indeed, what was stated in absolute terms to them by the trial judge as to the nature of the duy imposed by the by-law was qualified by what was said by him after the questions had been submitted but before the jury went out, which I have quoted above.

In view of the positive terms in which the effect of the by-law had been stated in the earlier part of the charge, it is not my opinion that to say to them that they were entitled to take a breach of the by-law into consideration "as a factor of negligence" would explain to the jury what should in my opinion have been explained, that the by-law was only admissible in evidence to show that, in the opinion of the city council, certain standards of care were regarded as necessary to prevent injury from escaping gas. That the jury did not so understand is made perfectly clear by the answer made by the foreman of the jury after they had given their verdict, which I have quoted above.

Since in the opinion of the majority of the Court the duty under the by-law was the same as at common law, they did not consider it necessary to deal with the question as to whether a breach of the by-law gave rise to a right of action if damage resulted from non-compliance with it. Davey J.A., in his dissenting judgment, did so and was of the opinion that while it was admissible as evidence of the general character of the gas stove and as presenting a standard of reasonableness upon which the jury might act, the council was not empowered by the Vancouver charter to impose duties the breach of which would be a private

[1] [1949] A.C. 275, [1949] 1 All E.R. 319.

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wrong conferring a right of action for damages resulting from such breach. Being of the opinion that the effect of the charge to the jury was to instruct them that the liability under the by-law was absolute, he considered there should be a new trial.

By-law 3406 of the City of Vancouver was passed on October 19, 1953, and amended an earlier by-law, no. 2483, passed by the city council on December 28, 1937.

The earlier by-law was apparently passed by the city council under the powers vested in it by paras. 104 and 209 of s. 163 of the *Vancouver Incorporation Act 1921*, 2nd sess. (B.C.), c. 55. Paragraph 298 of s. 163 authorized the council to pass by-laws inflicting "reasonable fines and penalties not exceeding one hundred dollars and costs" for any breach of the by-laws of the City. Paragraph 300 authorized the council to inflict reasonable punishment by imprisonment for breach of any of the by-laws or for non-payment of the fine inflicted for any such breach.

The by-law contained, *inter alia*, regulations governing the installation of equipment designed for the use of gas, provided for periodical inspections and for the imposition of fines, upon conviction before the mayor, police magistrate or any two justices of the peace for any breach, and upon default in payment, imprisonment.

By c. 55 of the statutes of 1953 the Act of 1921 was repealed and the Act to be cited as the *Vancouver Charter* enacted. It was under the new Act that By-law 3406 was passed. Section 306(*o*) empowered the council to make by-laws:

> For regulating the installation and use of gas or oil ranges, gas or oil heaters, gas or oil furnaces, and other appliances using gas or oil for the production of heat, and the piping and other apparatus connected therewith.

Section 333 replaced s. 298 of the 1921 Act and empowered the council to inflict penalties not exceeding $100 and costs or imprisonment for any period not exceeding 2 months, for an offence against any by-law or for the non-payment of a fine, and further provided that, in cases where the offence was of a continuing nature, a fine not exceeding $50 for each day such offence was continued might be imposed.

A further section of the *Vancouver Charter*, s. 334, reads:

> Where an offence is committed against any by-law passed in the exercise of the powers of the Council, in addition to any other remedy provided or penalty inflicted, the continuance of such offence may be restrained by action at the instance of an owner-elector or of the city.

The question as to whether a breach of a by-law subjects the person committing such breach to an action for damages as well as making him liable to a fine or imprisonment, where the by-law is one passed by a municipal body, is not quite the same as the question as to whether the breach of a statutory duty gives such a right of action.

In the case of a municipal by-law, there is further the question to be determined as to whether upon the true construction of the Act constituting the municipality it is clear that it was intended to vest in it the power to create the cause of action.

Where the duty is created by statute and a penalty is imposed for any breach, the question as to whether a breach gives, in addition, a right of action to an individual suffering injury in consequence must depend upon the object and language of the particular statute.

In *Rex v. Robinson*[1], Lord Mansfield said:

> The rule is certain, "that where a statute creates a new offence, by prohibiting and making unlawful any thing which was lawful before; and appoints a specific remedy against such new offence, (not antecedently unlawful,) by a particular sanction and particular method of proceeding, that particular method of proceeding must be pursued, and no other." And this is the resolution in *Castle's case,* Cro. Jac. 643.

As pointed out in Beven on Negligence, 4th ed. 1928, at p. 397, Lord Tenterden C.J. was simply reiterating this when in *Doe dem. Murray v. Bridges*[2], he said:

> And where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner.

In *Atkinson v. The Newcastle and Gateshead Waterworks Company*[3], the defendants were charged by the *Waterworks Clauses Act, 1847,* with an obligation to fix and maintain fire-plugs and to keep their pipes to which fire-plugs were fixed at all times charged with water at a certain pressure and to allow all persons to use the same for extinguishing fire without compensation. A monetary penalty recoverable summarily before two justices was imposed on the undertakers for neglect of each of these duties and they were further liable to forfeit to the town commissioners and "to every person having paid or

[1] (1759), 2 Burr. 800 at 803, 97 E.R. 568 at 570.
[2] (1831), 1 B. & Ad. 847 at 859, 109 E.R. 1001 at 1006.
[3] (1877), 2 Ex. D. 441.

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tendered the rate" a penalty of 40s. a day for each day during which such neglect continued. The plaintiff brought an action for damages against the company for not keeping its pipes charged as required by the Act, whereby his premises situate within the limits of the defendant's Act were burned down. It was held that the plaintiff had no right of action. The headnote to the report reads in part:

> The mere fact that the breach of a public statutory duty has caused damage does not vest a right of action in the person suffering the damage against the person guilty of the breach; whether the breach does or does not give such right of action must depend upon the object and language of the particular statute.

In *Clegg, Parkinson & Co. v. Earby Gas Company*[1], the action was brought against the company under the *Gasworks Clauses Act, 1871,* for damages sustained by a consumer by reason of the company's failure to give him a supply of gas sufficient in amount and in purity to satisfy the provisions of the Act. The Act provided penalties for failure to comply with the obligation of the gas company in this respect. Wills J., after saying that, in his opinion, the principle applied that where a duty is created by statute which affects the public as the public, the proper remedy if the duty is not performed is to indict or take the proceedings provided by the statute, said in part (pp. 594-5):

> . . . where there is an obligation created by statute to do something for the benefit of the public generally or of such a large body of persons that they can only be dealt with practically, en masse, as it were, and where the failure to comply with the statutory obligation is liable to affect all such persons in the like manner, though not necessarily in the same degree; there is no separate right of action to every person injured, by breach of the obligation, in no other manner than the rest of the public.

Wright J. said (p. 595):

> The general rule of law is that, where a general obligation is created by statute and a specific remedy is provided, that statutory remedy is the only remedy.

There are certain statutory duties, however, created for the protection of a particular class of persons where such an action lies.

In *Groves v. Wimborne (Lord)*[2], the Court of Appeal held that an action lay at the suit of a workman injured in a factory through a breach by his employer of the duty to maintain fencing for dangerous machinery imposed upon him by a section of the *Factory and Workshop Act, 1878.*

[1] [1896] 1 Q.B. 592. [2] [1898] 2 Q.B. 402.

The basis of that decision was that the statute created a new duty for the protection from injury of a particular class of persons who came within the mischief which the Act was designed to prevent. While the Act provided also for the imposition of fines, it had held that this did not prevent the bringing of the action. It cannot, however, be said that the persons who may use gas ranges or come upon premises where they are used are members of a class such as the factory workers in *Groves' Case*. The power given by para. (*o*) of s. 306 of the *Vancouver Charter* is obviously given to enable the council to pass by-laws for the protection of the public generally.

In the case of a by-law of a municipal corporation, there is a further matter to be considered, namely, as to whether the Act of the Legislature, construed as a whole, shows clearly that it was intended to authorize the council not merely to impose penalties for breaches of the city by-law but also to vest rights of action in persons suffering from their breach.

I have examined with care the *Vancouver Incorporation Act, 1921,* and the *Vancouver Charter* of 1953 and, other than the right given by s. 334 to an owner-elector to bring an action to restrain a breach of a by-law, I can find no indication that it was intended to confer any such power upon the city.

As is pointed out by Mr. Justice Davey, s. 189 of the *Vancouver Charter* enacts that the council may provide for the good rule and government of the city, and it must be taken that the power to pass by-laws dealing with a vast number of activities is intended to be used for that purpose.

In *Tompkins v. The Brockville Rink Company*[1], a by-law of the Town of Brockville passed under the provisions of the *Consolidated Municipal Act, 1892,* set apart certain areas as fire-limits where no wooden buildings could be erected and provided that buildings erected in contravention thereof might be pulled down at the cost of the owner and a penalty of $50 imposed. The defendants were engaged in erecting a rink on their lands which the plaintiff alleged was a wooden building within the meaning of the by-law, that his property would be depreciated by its erection in contravention of the by-law and claimed an injunction

[1] (1899), 31 O.R. 124.

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and order for the removal of the building and damages. Meredith C.J. held that the action did not lie. That learned judge said in part (p. 130):

> When one looks at the number of acts lawful to be done at common law which municipal councils are by the Municipal Act permitted to prohibit or to regulate, and the number of duties which do not exist at common law which they are permitted to impose in respect of persons and property within their jurisdiction, one is startled by the proposition that in each case a duty is imposed for the failure to perform which an action lies by one who is injured owing to the nonperformance of it.
>
> The by-law in question seems to me not to have been designed primarily or at all to keep down the fire insurance rates which the owners of property whether adjacent or near to a building proposed to be erected should be required to pay upon their property, but to have had a broader and more public purpose in view, namely, to prevent the spread of a conflagration in the more thickly built up parts of the municipality, the danger of which would be increased by the erection of wooden buildings and buildings constructed of material easily ignited by contact with fire.
>
> Nor can it have been intended, I think, that one who had erected a building in contravention of the provisions of such a by-law, the erection of which had excited no apprehension of danger from fire, nor led to any steps being taken for its pulling down or removal, should be liable to compensate every one who should be injured by fire communicated to his property owing to the inflammable character of the building erected, involving, it may be, the loss of many thousands of dollars.

The judgment in *Tompkins' Case* was considered at length by Duff J. (as he then was) in delivering the judgment of the majority of this Court in *Orpen v. Roberts et al.*[1] After referring to the contention of the appellant that any person whose property might suffer in value, by reason of the failure of some other proprietor to observe the building restrictions, has a right to invoke the jurisdiction of the Courts to prevent by an injunction the obnoxious act in respect of any loss actually suffered, Duff J. said (pp. 370-1):

> It is legitimate to observe that this construction if it were to prevail, would be an unfortunate construction. As Meredith C.J. said, in *Tompkins v. The Brockville Rink Company,* when one considers the different kinds of acts and conduct which municipal councils in Ontario are by statute permitted to prohibit or to regulate, and the multiplicity of duties they have authority to impose upon property owners and others within their jurisdiction, one is rather "startled by the proposition that in each case a duty is imposed for the failure to perform which an action lies by one who is injured owing to the non-performance of it."

It should be noted that in *Orpen's Case* the section of *The Municipal Act* (s. 401) under which the by-law was passed authorized the imposition of penalties but provided that a

[1] [1925] S.C.R. 364, [1925] 1 D.L.R. 1101.

breach of the by-law might be restrained at the instance of the municipal corporation, in that respect differing from s. 334 of the *Vancouver Charter*. What was said, however, in relation to the claim for damages appears to me directly in point in the present matter.

Further support of this view is to be found in the judgment of the Court of Appeal in *Phillips v. Britannia Hyyienic Laundry Company, Limited*[1]. In that case, the effect of a regulation made by the Local Government Board under statutory powers was considered. The regulation provided that:

> The motor car and all the fittings thereof shall be in such a condition as not to cause, or to be likely to cause, danger to any person on the motor car or on any highway.

A motor lorry, through no fault of its owners, was in such a condition as to cause danger to persons on it, in that one of its axles was defective. The axle broke and a wheel came off and damaged another vehicle. In an action by the owner of the damaged vehicle against the owners for a breach of the regulation it was held that it was not intended by the Act or the order that everyone injured through a breach of the order should have a right of action for damages; but that the duty imposed by the order was a public duty only to be enforced by the penalty imposed for a breach of it, and not otherwise. Bankes L.J. referred to what had been said by Lord Tenterden in *Doe dem. Murray v. Bridges, supra,* and said (p. 840):

> The injury here was done to the appellant's van; and the appellant, a member of the public, claims a right of action as one of a class for whose benefit cl. 6 was introduced. He contends that the public using the highway is the class so favoured. I do not agree. In my view the public using the highway is not a class; it is itself the public and not a class of the public. The clause therefore was not passed for the benefit of a class or section of the public. It applies to the public generally, and it is one among many regulations for breach of which it cannot have been intended that a person aggrieved should have a civil remedy by way of action in addition to the more appropriate remedy provided, namely a fine.

Atkin L.J. said in part (p. 842):

> It is not likely that the Legislature, in empowering a department to make regulations for the use and construction of motor cars, permitted the department to impose new duties in favour of individuals and new causes of action for breach of them in addition to the obligations already well provided for and regulated by the common law of those who bring

[1] [1923] 2 K.B. 832.

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vehicles upon highways. In particular it is not likely that the Legislature intended by these means to impose on the owners of vehicles an absolute obligation to have them road-worthy in all events even in the absence of negligence.

In the present matter, Davey J.A. has said[1]:

> Clear and unambiguous language, wanting in respect of sec. 306(*o*), would, I think, be required to confer an extraordinary authority so far removed from the apparent purpose of the Act permitting the council to create new causes of action that would interfere with private rights and duties under general provincial law as between invitor and invitee, or in other well known legal relationships.

With this statement of the law I am in complete agreement and I agree with Mr. Justice Davey that the verdict in this matter should not be permitted to stand.

No question arises upon this appeal as to the sufficiency of the respondent's pleadings to support a cause of action on the implied warranty as between a guest and an innkeeper. That issue was not put to the jury, with the consent of counsel for the plaintiff at the trial, and was accordingly not dealt with by the jury. Parties must be bound by the manner in which their case is conducted at the trial and, having consented to the case going to the jury upon the two asserted causes of action, namely, as between invitor and invitee and upon what was contended to be the absolute duty imposed by the by-law, the respondent cannot now be heard to say that the verdict might have been sustained as a claim upon an implied warranty. The rule in *Scott v. The Fernie Lumber Company, Limited*[2], as stated by Duff J. (as he then was) applies. The passage in that judgment to which I refer reads:

> It is, perhaps, needless to say that in these circumstances, but for the legislation hereinafter referred to, the rule long established, which holds a litigant to a position deliberately assumed by his counsel at the trial, would preclude in this Court any discussion of the sufficiency of the findings to support the judgment. The rule is no mere technicality of practice; but the particular application of a sound and all-important maxim—that litigants shall not play fast and loose with the course of litigation—finding a place one should expect, in any enlightened system of forensic procedure.

The rule so stated was referred to and adopted in the judgment of Davis J. in delivering the judgment of the majority of this Court in *David Spencer Limited v. Field et al.*[3]

[1] 24 W.W.R. at p. 268.
[2] (1904), 11 B.C.R. 91 at 96.
[3] [1939] S.C.R. 36 at 42, [1939] 1 D.L.R. 129.

In the present appeal, we are asked by counsel for the appellant to apply the rule stated by Taschereau C.J. in *Andreas v. The Canadian Pacific Railway Company*[1], where that learned judge said that the jury, having with clear instructions answered that the cause of the accident was the failure to reduce speed, must be considered as having negatived all the other charges of negligence. The rule is stated in similar terms by Davies J. in *Phelan v. The Grand Trunk Pacific Railway Company*[2], and was adopted by Anglin J. in that case and again in *The Canadian Pacific Railway Company v. Ouellette*[3]. It is, however, my opinion that the rule should not be applied in circumstances such as exist in the present case. It is quite true that the learned trial judge explained to the jury with perfect clarity the rule in *Indermaur v. Dames, supra,* but the charge was so precise on the duty under the by-law, which was said to be absolute, to maintain the gas range in safe working condition that it is apparent that the jury's attention was focused upon this aspect of the matter. As they found that Buxton had not committed suicide and had not been guilty of contributory negligence, they simply found that the gas stove had not been maintained in the state required by the by-law. That this is the case is demonstrated by the explanation made by the foreman of the jury in answer to a question put by the learned trial judge after they had returned with their answers.

In these circumstances, I think justice will be done between these parties by directing a new trial. I would allow the appellant his costs of the appeal to this Court and direct that the costs in the Court of Appeal and of the first trial be disposed of by the judge presiding at the new trial.

[1] (1905), 37 S.C.R. 1 at 10, 5 C.R.C. 450.

[2] (1915), 51 S.C.R. 113 at 116, 23 D.L.R. 90, 18 C.R.C. 233, 7 W.W.R. 1224.

[3] [1924] S.C.R. 426 at 432, [1924] 4 D.L.R. 234, 30 C.R.C. 200, reversed on other grounds [1925] A.C. 569, [1925] 2 D.L.R. 677, 30 C.R.C. 207, [1925] 2 W.W.R. 494, 39 Que. K.B. 208.

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The judgment of Cartwright, Fauteux and Abbott JJ. was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia[1] affirming, by a majority, a judgment of Clyne J. entered, pursuant to the answers of the jury, in favour of the respondent for damages for the death of her husband, William Leonard Buxton, hereinafter referred to as "the deceased". Davey J.A., dissenting, would have set aside the judgment and directed a new trial.

The pleadings, the relevant facts and the course followed at the trial are referred to in the reasons of my brothers Rand and Locke and I shall endeavour as far as possible to avoid repetition.

The action was brought against three defendants, but we are now concerned only with the claim against the appellant. The statement of claim is a lengthy document, but on this appeal the following portions only require consideration:

Paragraph 1 states on whose behalf the action is brought.

Paragraph 2 contains the statement:

> The Defendant Carriss is the occupier and manager of the hotel premises known as the "Lincoln Hotel", at 106 West Hastings Street, in the City of Vancouver.

Paragraph 3 is as follows:

> On or about the 8th day of June, A.D. 1954, one, William Leonard Buxton, the lawful husband of the Plaintiff herein, was the occupant and the tenant of room 214 at the aforesaid premises at 106 West Hastings Street, in the said City and Province, when the said William Leonard Buxton met his death in the said room in the said premises by asphyxia due to carbon monoxide poisoning.

Paragraph 5 is as follows:

> The said Deceased met his death solely by reason of the negligence of the Defendants and each of them and particulars thereof are hereinafter set out. And the Plaintiff pleads By-law 2483 and amendments thereto and the following words to be added, "and in particular amending By-laws No. 3406, 3432 and 3439 and in further particular By-law 3406(9).

Paragraph 7 reads in part:

> Particulars of the negligence of the Defendant Carriss are as follows:
>
> * * *
>
> (j) Providing or supplying housing accommodation without taking adequate or any precaution to protect the users thereof from death or injury by asphyxia from cooking gas.

[1] (1957), 24 W.W.R. 263, 11 D.L.R. (2d) 766.

The statement of claim concludes as follows:

9. As a consequence of the negligence of the Defendants and each of them as aforesaid, the Plaintiff and the said infant children have lost the care, maintenance and support that they and each of them may reasonably have expected from the said Deceased and further thereto the said Plaintiff has lost the comfort, solace and society of the said deceased.

WHEREFORE THE PLAINTIFF CLAIMS judgment on her own behalf and on behalf of and for the benefit of the aforementioned infant children for:

(a) Special damages;

(b) General damages;

(c) Costs;

(d) Such further and other relief as to this Honourable Court may seem just and meet.

In my opinion the statement of claim conformed to Order 19, r. 4 of the British Columbia Rules of Court which provides in part:

Every pleading shall contain, and contain only, a statement in summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved . . .

In the course of lengthy discussions between the Court and counsel at the conclusion of the plaintiff's case and again at the conclusion of the case for the defendant, counsel for the plaintiff took the position that the statement of claim, without the necessity of any amendment, stated facts which showed (i) that there existed the relationship of guest and hotelkeeper between the deceased and the appellant and, (ii) that the death of the deceased was caused by the failure of the appellant in supplying accommodation in the hotel to the deceased to take adequate, or any, precaution to protect the latter from death by asphyxia from cooking gas. In rejecting this contention the learned trial judge stressed the use of the present tense in the passage from para. 2 of the statement of claim quoted above, "The defendant Carriss *is* the occupier and manager of the hotel premises". No doubt it would have been preferable to use such words as "the defendant Carriss *was at all material times* the occupier", but when the statement of claim is read as a whole it is obvious that what is alleged is that the appellant was the hotelkeeper at the time of the fatality.

It was only after the learned trial judge had ruled that the statement of claim contained no allegation of the existence of a contract that counsel for the plaintiff asked for the

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amendment which was refused. It should not be held against him that thereafter he consented to the case being put to the jury as one to which the rule in *Indermaur v. Dames*[1] applied. He had made his position clear and the learned trial judge had ruled against him. In saying this I do not question the decision in *Scott v. The Fernie Lumber Company, Limited*[2], or "the rule long established, which holds a litigant to a position deliberately assumed by his counsel at the trial", referred to by Davis J. in *David Spencer Limited v. Field et al.*[3]; but that rule does not preclude counsel for the respondent from raising in this Court the very ground which he pressed vigorously, albeit unsuccessfully, at the trial.

In my opinion, on the pleadings as they stood, the learned trial judge should have put the case to the jury as one governed by the principles stated in *Francis v. Cockrell*[4].

The British Columbia practice is patterned on that of the Courts in England and the following expressions of opinion appear to me to be applicable to the circumstances of the case at bar.

In *Oakley v. Lyster*[5], Scrutton L.J. said at p. 151:

> Four or five hundred years ago if a person wanted justice from the King's Court he had to obtain a particular form of writ, and, if he chose the wrong one, his claim was not maintainable whatever the facts might be. Before the Common Law Procedure Act and the Judicature Act much the same thing happened. The plaintiff had to express his claim in a way that was legally accurate, and if he did not, a demurrer put an end to the action. Great injustice was thereby done. Now, the Courts find out the facts, and, having done so, endeavour to give the right legal judgment on those facts. So in this case I begin by ascertaining the facts in order to see whether the form in which the plaintiff is claiming is substantially right, or, if not substantially right, whether any injustice is done by giving him the real remedy which the facts justify.

In *United Australia, Limited v. Barclays Bank, Limited*[6], Lord Atkin, with whom Lord Thankerton and Lord Romer agreed, said at pp. 29-30:

> Concurrently with the decisions as to waiver of tort there is to be found a supposed application of election: and the allegation is sometimes to be found that the plaintiff elected to waive the tort. It seems to me that in this respect it is essential to bear in mind the distinction between

[1] (1866), L.R. 1 C.P. 274, affirmed (1867), L.R. 2 C.P. 311.
[2] (1904), 11 B.C.R. 91.
[3] [1939] S.C.R. 36 at 42, [1939] 1 D.L.R. 129.
[4] (1870) L.R. 5 Q.B. 184, affirmed *ibid.*, p. 501.
[5] [1931] 1 K.B. 148.
[6] [1941] A.C. 1, [1940] 4 All E.R. 20.

choosing one of two alternative remedies, and choosing one of two inconsistent rights. As far as remedies were concerned, from the oldest time the only restriction was on the choice between real and personal actions. If you chose the one you could not claim on the other. Real actions have long disappeared: and, subject to the difficulty of including two causes of action in one writ which has also now disappeared, there has not been and there certainly is not now any compulsion to choose between alternative remedies. You may put them in the same writ: or you may put one in first, and then amend and add or substitute another. I will cite one authority which has to deal with the question whether a claim for injury to a passenger was founded on contract or tort for the purposes of the County Courts Act. "At the present time a plaintiff may frame his claim in either way, but he is not bound by the pleadings, and if he puts his claim on one ground and proves it on another he is not now embarrassed by any rules as to departure" per Lord Esher in *Kelly v. Metropolitan Ry. Co.*, [1895] 1 Q.B. 944, 946.

The rule in *Francis v. Cockrell, supra*, is stated as follows in Winfield on Tort, 6th ed. 1954, at p. 672:

> Where A enters B's structure under a contract entitling him to do so, *it is an implied term in the contract that the structure shall be reasonably fit for the purpose for which it is intended; but this does not extend to any unknown defect incapable of being discovered by reasonable means.*

For the purposes of this appeal I accept this as stating the rule in terms not unduly favourable to the plaintiff, and I do not find it necessary to consider whether we should accept in its entirety the judgment of McCardie J. in *Maclenan v. Segar*[1].

The jury in their answers negatived the allegations of the defence that the deceased committed suicide or, alternatively, was guilty of contributory negligence. It appears to me that if they had been charged on the law as laid down in *Francis v. Cockrell*, as I think they should have been, the jury, having negatived the defences mentioned above, must inevitably have found for the plaintiff in view of the evidence as to the nature of the defect in the gas stove and the length of time that it had existed, which is summarized in the reasons of my brother Rand; and consequently, assuming for the purposes of this appeal that the learned trial judge did not charge the jury correctly as to the effect of the by-law, it is my opinion that the majority in the Court of Appeal were right in dismissing the appeal on the ground that there had been no substantial wrong or miscarriage of justice.

[1] [1917] 2 K.B. 325.

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I agree with my brother Rand that we cannot say that the Court of Appeal was wrong in holding the damages not to be unreasonably high.

Before parting with the matter I wish to mention the course followed at the trial after the jury had made their answers to the questions submitted to them. What occurred is set out in the reasons of my brother Locke. Counsel argued the appeal on the footing that what was said by the foreman formed part of the answers of the jury. For the reasons given by Meredith C.J.C.P. in delivering the judgment of the majority of the Appellate Division of the Supreme Court of Ontario in *Gray v. Wabash R.R. Co.*[1], it is my opinion that the proper course would have been for the learned trial judge to have instructed the jury as to the desirability of clarifying their answer to question 2 and to have sent them back to the jury-room to consider the matter further and to amplify their written answer if they saw fit to do so.

I would dismiss the appeal with costs.

Appeal dismissed with costs, LOCKE J. *dissenting.*

Solicitor for the defendant Carriss, appellant: A. W. Johnson, Vancouver.

Solicitors for the plaintiff, respondent: Griffiths & McLelland, Vancouver.

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[1] (1916), 35 O.L.R. 510.