ANNUAL SURVEY OF CANADIAN LAW

TORTS: PART I

Colleen M. Edwards, M. Justin Hopkins,* Donna G. White**

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I. INTRODUCTION

Since the last survey was published in 1977,[1] tort law has developed significantly in a number of respects. The continuing extension of liability for professional negligence, most significantly in the areas of legal and medical malpractice, has figured prominently throughout this survey period.[2] Elsewhere in the law of negligence, certain classic concepts have been altered by the importation of recent changes from England. In the field of occupiers' liability, several important legislative changes have occurred, generally simplifying a rather obscure and technical subject. The tort of discrimination has come and gone. Finally, the law of damages has undergone extensive modifications in both personal injury and fatal accident cases. The Supreme Court of Canada has introduced a new approach with respect to the assessment of quantum of damages as well as principles and guidelines that have been "fine-tuned" by later decisions.

II. INTENTIONAL TORTS

A. *Assault and Battery*

The area of intentional torts has not witnessed a great deal of growth in recent years. However, in *Bettel v. Yim*[3] the court was called upon to evaluate the relevance of foreseeability of damage in the domain of intentional torts. The plaintiff, who was fifteen years old at the time, had been loitering around the defendant's store with a group of friends, throwing lighted matches into the store. One of the matches thrown by the plaintiff ignited a bag of charcoal on the floor just inside the door. The defendant then grabbed the plaintiff firmly by the collar with both hands and proceeded to shake him in order to obtain a confession. During the shaking the defendant's head came into contact with the plaintiff's nose, severely injuring it. While the plaintiff's action was framed in assault, Borins J. approached the matter as a battery action, stating that "in Canada it would appear that the distinction between assault and battery has been blurred and when one speaks of an assault, it may include a battery."[4] His Honour recited the principle, enunciated in *Cook*

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[1] Binchy, *Annual Survey of Canadian Law Torts – I & II*, 9 OTTAWA L. REV. 192, 339 (1977).

[2] This survey covers cases reported between Jun. 1977 and Nov. 1981. Specifically, the following law reports were searched: D.L.R. (3d), volumes 73-123; W.W.R., volumes [1977] 1 - [1981] 5; N.R., volumes 12-38. Cases reported elsewhere that are included in the survey were identified through secondary sources. In addition to periodical literature, a significant source of general information was C. WRIGHT & A. LINDEN, CANADIAN TORT LAW: CASES, NOTES AND MATERIALS (7th ed. 1980).

[3] 20 O.R. (2d) 617, 5 C.C.L.T. 66, 88 D.L.R. (3d) 543 (Cty. Ct. 1978).

[4] *Id.* at 621, 5 C.C.L.T. at 73, 88 D.L.R. (3d) at 547.

v. Lewis,[5] that once the plaintiff establishes that he was injured by the defendant the defendant will be liable unless he can successfully prove the lack of both intention and negligence on his part. In this case, while Yim had intentionally applied force to the plaintiff by grabbing and shaking him, the defendant's collision with the plaintiff's nose was clearly unintentional. The task before the court was to decide whether the two actions should be regarded as separate and distinct, rendering the defendant liable only for consequences which he intended or which were reasonably foreseeable results of the application of force, or whether the defendant should bear the responsibility for all the consequences which flowed from his intentional interference with Bettel's person. After an exhaustive review of the relevant authorities, Borins J. imposed liability on the basis that the defendant had committed a battery by grabbing the plaintiff. Although Yim did not subjectively intend to strike the plaintiff's nose, it was the end result of a chain of events set in motion by the defendant.

> The logical test is whether the defendant was guilty of deliberate, intentional or unlawful violence. . . . If he was, and a more serious harm befalls the plaintiff than was intended by the defendant, the defendant, and not the innocent plaintiff, must bear the responsibility for the unintended result. If physical contact was intended, the fact that its magnitude exceeded all reasonable or intended expectations should make no difference. . . . To import negligence concepts into the field of intentional torts would be to ignore the essential difference between the intentional infliction of harm and the unintentional infliction of harm resulting from a failure to adhere to a reasonable standard of care and would result in bonusing the deliberate wrongdoer who strikes the plaintiff more forcefully than intended. . . . Thus, the intentional wrongdoer should bear the responsibility for the injuries caused by his conduct and the negligence test of 'foreseeability' to limit, or eliminate, liability should not be imported into the field of intentional torts.[6]

In *Hatton v. Webb*[7] the court discussed the burden of proof upon a defendant in a battery case to establish the absence of both intention and negligence. The plaintiff, who worked as a waitress in a coffee shop, was sitting in a booth writing notes. There were no customers in the establishment except for the defendant, with whom the plaintiff had a friendly relationship. The defendant, who was seated some thirty feet from the plaintiff, asked her to come and sit with him. When she failed to answer, he rolled up a damp towel and threw it in her general direction. The towel hit the plaintiff in the back of the neck, causing her head to go forward. The defendant apologized and insisted that he had not meant to hit the plaintiff. The court applied the rule in *Cook v. Lewis*,[8] and

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[5] [1951] S.C.R. 830, [1952] 1 D.L.R. 1 (1951).

[6] *Supra* note 3, at 629, 5 C.C.L.T. at 83, 88 D.L.R. (3d) at 554-55.

[7] 7 A.R. 303, 81 D.L.R. (3d) 377 (Dist. C. 1977).

[8] *Supra* note 5, at 839, [1952] 1 D.L.R. at 15: "[W]here a plaintiff is injured by force applied directly to him by the defendant his case is made by proving this fact and the onus falls upon the defendant to prove that such trespass was utterly without his fault."

although the defendant was able to disprove intention he was held liable because he could not successfully establish that the plaintiff's injuries did not result from his negligence.[9]

The most noteworthy case in this area is the Supreme Court of Canada decision in *Reibl v. Hughes*.[10] Here, the plaintiff sought damages for both battery and negligence after suffering a stroke during an operation performed by a competent neurosurgeon. The stroke left him impotent and paralyzed on one side of his body. Although the plaintiff had formally consented to the surgery, he claimed that his was not "informed consent". Laskin C.J.C., speaking for a unanimous Court, stated that the facts did not disclose a valid cause of action in battery.

> The tort is an intentional one, consisting of an unprivileged and unconsented to invasion of one's body security. . . .
>
> [A]ctions of battery in respect of surgical or other medical treatment should be confined to cases where surgery or treatment has been performed or given to which there has been no consent at all or where, emergency situations aside, surgery or treatment has been performed or given beyond that to which there was consent.[11]

As Laskin C.J.C. pointed out, this test would cover situations where there was a misrepresentation relating to the surgery which was consented to and where a different surgical procedure or treatment was carried out. In situations such as the case at bar, it could not be said that "the consent was vitiated by the failure of disclosure so as to make the surgery or other treatment an unprivileged, unconsented to and intentional invasion of the patient's bodily integrity."[12] This case is discussed more fully below under the heading *Medical Malpractice*.

B. *False Imprisonment and Malicious Prosecution*

While no major innovations occurred in this area during the survey period, the case of *Carpenter v. MacDonald*[13] is of interest because of its unusual facts. The plaintiff husband and wife operated a rooming house.

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[9] With respect to damage awards in assault and battery cases, *see* Landry v. Patterson, 22 O.R. (2d) 335, 93 D.L.R. (3d) 345 (C.A. 1978) and Fenwick v. Staples, 18 O.R. (2d) 128, 82 D.L.R. (3d) 145 (Cty. Ct. 1977). In the latter case, although in a comparable situation exemplary damages would normally have been awarded, since the defendant had spent time in jail as a result of a criminal conviction for assault and exemplary damages would constitute a double punishment, they were not called for.

[10] [1980] 2 S.C.R. 880, 14 C.C.L.T. 1, 114 D.L.R. (3d) 1.

[11] *Id.* at 890, 14 C.C.L.T. at 12-13, 114 D.L.R. (3d) at 9-10.

[12] *Id.* at 891, 14 C.C.L.T. at 13, 114 D.L.R. (3d) at 10. *See also* Hopp v. Lepp, [1980] 2 S.C.R. 192, 13 C.C.L.T. 67, 112 D.L.R. (2d) 67.

[13] 21 O.R. (2d) 165, 6 C.C.L.T. 159, 91 D.L.R. (3d) 723 (Dist. C. 1978). A novel fact situation arose in Tanner v. Norys, 21 A.R. 372, [1980] 4 W.W.R. 33 (C.A. 1980), where the plaintiff sought damages for false arrest and imprisonment on the ground that the defendant psychiatrist had committed him to a mental institution against his will and contrary to the provisions of the Mental Health Act, 1972, S.A. 1972, c. 118 (*now* R.S.A. 1980, c. M-13).

Following a dispute concerning the non-payment of rent with one of their short-term lodgers, the plaintiffs evicted him, seized his goods and placed them in storage pending payment. In so doing, the plaintiffs claimed to be acting within their rights under the Innkeepers Act.[14] The lodger concerned returned to his room with the defendants, two uniformed police officers, who claimed that the plaintiffs' premises were governed by the Landlord and Tenant Act,[15] which required the plaintiffs to give the roomer notice before evicting him, and which did not entitle the plaintiffs to seize the roomer's goods. After repeated altercations with the officers concerning the parties' respective legal rights, Mr. Carpenter was charged with breaking, entering and theft of the lodger's goods and was placed in a police cell. The Carpenters instituted an action, *inter alia*, for false arrest and imprisonment and for malicious prosecution.[16] The court stated that in an action for false arrest, a police officer will be exempt from liability if he can successfully discharge the burden of showing that, although the person arrested did not in fact commit the offence, he had honestly and on reasonable grounds believed that the person had done so.[17] Similarly, in an action for false imprisonment, a defendant police officer would not be liable if he had reasonable and probable grounds for believing that the male plaintiff had committed the offence with which he was charged. Here, the officers admitted that had they believed that the Innkeepers' Act[18] applied, the charges would not have been laid against Mr. Carpenter. The question to be answered therefore was whether their belief that the Landlord and Tenant Act[19] applied was reasonable in the circumstances. The court found that in the face of the loud protestations of the male plaintiff, and the relative ease with which the issue could have been resolved by making some inquiries, the defendant officers' belief had not been reasonable. Thus, no excuse was available for their actions. Even if there had been a margin of doubt as to which statute was properly applicable, the drastic action taken by the police was wholly unreasonable in the circumstances.

The male plaintiff also succeeded in his action for malicious prosecution. He had established that the defendants were instrumental in

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[14] R.S.O. 1980, c. 217.

[15] R.S.O. 1980, c. 232.

[16] The plaintiffs' claims for damages for assault and for trespass failed.

[17] In Willan v. The Queen, 20 O.R. (2d) 587, 88 D.L.R. (3d) 120 (Cty. Ct. 1978), the plaintiff, who was on probation, was wrongfully arrested and imprisoned for failing to report to his probation officer. Willan had moved to another city and had been complying with the terms of his probation by reporting to a new probation officer. He was held in jail over the weekend due to the negligence of a senior probation officer who had reviewed his file and issued a warrant for the plaintiff's arrest without investigating the true nature of the circumstances. The plaintiff was awarded $1,000 in damages since the senior probation officer did not have reasonable and probable grounds for ordering his arrest even though the plaintiff was released as soon as the mistake was discovered.

[18] R.S.O. 1980, c. 217.

[19] R.S.O. 1980, c. 232.

instituting the legal proceedings against him. The court also found that the defendants had exhibited "some predominant wish or motive other than vindication of the law: some other motive than a desire to bring to justice a person the defendant honestly believe[d] to be guilty".[20] In such light, and from the absence of reasonable and probable cause, the court found that it could infer malicious intent on the part of the defendants.

In a subsequent case, *Kendall v. Gambles Canada Ltd.*,[21] the court stated that the onus of proving *malus animus* rested upon the plaintiff. In this case, the defendants' failure to prove justification for the imprisonment was insufficient proof of malice.

C. *Conversion and Detinue*

In *Ramia v. Burgess*[22] the plaintiffs sued several police officers for, *inter alia*, conversion of a motor vehicle belonging to one of the plaintiffs. They were occupants of a car stopped by one of the defendant police officers for speeding. The driver was ordered to accompany the officer to the police station for the purpose of taking a breathalyzer test. The officer then decided to have the vehicle towed away and impounded, although several of the other occupants had valid drivers' licences, were not impaired and were capable of taking charge of the vehicle. The occupants were assaulted, pulled out of the car and told to walk home or take a taxi. Coffin J.A. stated:

> At common law before a police officer can seize goods without a warrant, he must have reasonable and probable grounds for believing that a crime has been committed and . . . the article in question must be either "the fruit of the crime" or the instrument by which it was committed. In the alternative, it must constitute material evidence to prove the commission of the crime.[23]

The court found nothing in the evidence to bring the actions of any of the police officers involved within this test. Coffin J.A. then dealt with section 245(1) of the Nova Scotia Motor Vehicles Act,[24] which

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[20] *Supra* note 13, at 184, 6 C.C.L.T. at 180, 91 D.L.R. (3d) at 742.

[21] 11 Sask. R. 371, [1981] 4 W.W.R. 718 (Q.B.). *See also* Hayward v. F.W. Woolworth Co., 8 C.C.L.T. 157, 98 D.L.R. (3d) 345 (Nfld. S.C. 1979), where the plaintiff was awarded exemplary damages after being wrongfully arrested for shoplifting by an employee of the defendant store; Benedetto v. Bunyan, 30 A.R. 370, [1981] 5 W.W.R. 193 (Q.B.).

[22] 38 N.S.R. (2d) 200, 69 A.P.R. 200, 113 D.L.R. (3d) 9 (C.A. 1980). *See also* Prokopetz v. Richardson's Marina Ltd., [1979] 2 W.W.R. 239, 93 D.L.R. (3d) 442 (B.C.S.C. 1978) with respect to conversion and trespass to goods. With respect to the defence of abandonment, the Ontario Court of Appeal in Simpson v. Gowers, 32 O.R. (2d) 385, 121 D.L.R. (3d) 709 (1981) clarified that while the onus is on the plaintiff to prove conversion, the onus is upon the defendant to establish that the goods in question had been abandoned by the plaintiff. Also of interest are Kowal v. Ellis, [1977] 2 W.W.R. 761, 76 D.L.R. (3d) 546 (Man. C.A. 1977) and Canadian Laboratory Supplies Ltd. v. Englehard Indus. of Can. Ltd., [1979] 2 S.C.R. 787, 97 D.L.R. (3d) 1.

[23] *Supra* note 22, at 213, 69 A.P.R. at 213, 113 D.L.R. (3d) at 18-19.

[24] R.S.N.S. 1967, c. 191, *as amended by* S.N.S. 1977, c. 35, s. 27.

provides that a peace officer may seize a motor vehicle and impound it under certain circumstances. His Lordship stated that this provision might well serve to provide security for a fine or to facilitate the clearing from the road of a vehicle which had been abandoned or illegally parked. In these circumstances, however, the seizure was not justified and it was not necessary to have the car removed from the roadway. Consequently, the defendants' appeal from the trial judge's finding that the defendants were guilty of assault and conversion was dismissed.[25]

D. *Trespass to Land*

Developments with respect to this tort during the survey period are of interest in so far as they relate to the assessment of damages.[26] In *Malone v. The Queen*,[27] the Crown had obtained a deed to the plaintiff's property in 1959 from a person who falsely claimed to be a descendant of the former owner. Although the Crown had acted in good faith and had given valuable consideration for the property, the purported "vendor" had not been vested with title and was therefore unable to pass good title with the deed. Shortly after 1959, the Crown proceeded to establish a communications station consisting of several towers and buildings on the property. It was not until 1971 that the plaintiff, or anyone on her behalf, visited the land in question, and discovered the government facility, whereupon she instituted an action claiming damages for trespass. The court held that a trespass had undoubtedly been committed, but the real issue facing the court was the quantum of damages to be awarded. Addy J. stated that while a trespasser should not normally be allowed to make use of another person's land without compensating the owner for this use, the principle should not apply in this case, where neither the plaintiff nor the trespasser was aware of the trespass. However, since the plaintiff had become aware of the situation in 1971 and had demanded compensation or possession, she would be entitled to damages for deprivation of her property from 1971 on. Rather than awarding damages for trespass and reinstating the plaintiff's right to possession of her property, the court followed the principle established by the Supreme Court of Canada in *Jalbert v. The King*,[28] where, in similar circumstances, the Court declared that the lands in question had been

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[25] However, damage awards to the plaintiffs were reduced on appeal to $200 each from $1,000 each since they had suffered no residual injuries, "merely unpleasantness, inconvenience, and some humiliation".

[26] *See generally* O'Toole v. Waters, 34 N.S.R. (2d) 246, 96 D.L.R. (3d) 202 (S.C. 1979), which stated that the proper value of damages is the difference in the value of the land before and after trespass. *See also* Sulisz v. Flin Flon, [1979] 3 W.W.R. 728, 9 C.C.L.T. 89 (Man. Q.B.); Johnson v. British Columbia Hydro & Power Authority, 16 C.C.L.T. 10, 123 D.L.R. (3d) 340 (B.C.S.C. 1981). The latter case contains a useful discussion of the defence of acquiescence.

[27] 79 D.L.R. (3d) 677 (F.C. Trial D. 1977).

[28] [1937] S.C.R. 51, [1937] 2 D.L.R. 296.

effectively expropriated by the federal government as of the date of entry. In *Malone*, the plaintiff was awarded $24,000 as full compensation for the expropriation of her property from 1971, rather than from the date of entry in 1959, since in the intervening years she had exercised no proprietary rights or overt act of ownership.[29]

In *Joe v. Findlay*[30] the appellant, a registered member of the Squamish Indian Band, and his family proceeded to clear brush and settle in a mobile home on an unoccupied parcel of reserve land after failing in his attempt to have the band council assign him a homesite. The respondents, members of the band council, joined by the Attorney General of Canada, sought damages and a declaration that the appellant's possession of land was unlawful and constituted a trespass. The appellant raised the defence of lawful justification, but the British Columbia Court of Appeal ruled that the statutory right of indigenous persons to the use and benefit of reserve lands was a right conferred upon members of Indian bands in a collective sense, not individually. In the absence of a specific allotment by the band council with the approval of the minister, no individual band member was entitled to possession or occupation of reserve lands.[31]

III. Defences to Intentional Torts

A. *Justification and Lawful Authority*

In *Besse v. Thom*[32] the plaintiff claimed damages for false arrest and for assault after his leg was severely fractured during the course of an arrest by the defendant police officer. The plaintiff had become engaged in an argument with the defendant in a bar. On the basis of the usual indices of impairment (slurred speech, bloodshot eyes, unsteadiness and a strong smell of alcohol), the defendant policeman attempted to arrest

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[29] While the effective date of expropriation was deemed to be 19 Sep. 1971, no attempt was made to assess compensation according to the value of the land in that year. Instead, the plaintiff was awarded compensation on the basis of the value of the land at the time of the hearing. The difference between the price in 1971 and the price at the time of the hearing was deemed to express compensation for the interest the plaintiff would have been entitled to in addition to the basic 1971 value.

[30] [1981] 3 W.W.R. 60, 122 D.L.R. (3d) 377 (B.C.C.A.).

[31] Other cases during the survey period dealing with trespass to land are: Wildwood Mall v. Stevens, [1980] 2 W.W.R. 638 (Sask. Q.B. 1979); Bell Canada v. Cope (Sarnia) Ltd., 31 O.R. (2d) 571, 15 C.C.L.T. 190 (C.A. 1960), *aff'g* 11 C.C.L.T. 1970 (H.C. 1980). *See also* J. Magnet, *Intentional Interference with Land*, in STUDIES IN CANADIAN TORT LAW 287 (L. Klar ed. 1977) (hereafter cited as STUDIES IN CANADIAN TORT LAW).

[32] 96 D.L.R. (3d) 657 (B.C. Cty. Ct. 1979). On appeal, it was ordered that a new trial be held, since it was not clear from the trial judge's reasons whether he appreciated that it must appear to the arresting constable, not to the court, that the person arrested was *apparently* intoxicated (107 D.L.R. (3d) 694 (B.C.C.A. 1980)).

the plaintiff for being intoxicated in a public place.[33] The court was called upon to determine whether or not the plaintiff had actually been "intoxicated" at the time of his arrest, and ultimately whether or not the defendant could avail himself of the defence of lawful authority.[34] Before making such a determination, the court found it necessary to define "intoxicated" as established in the relevant statute[35] and concluded that it meant "the condition of being stupefied or drunk from the consumption of alcohol or a drug to such a marked degree that the person is a danger to himself or others or is causing a disturbance".[36] However, the court noted that the defendant could still avail himself of the defence if the plaintiff was *apparently* intoxicated in a public place.[37] On the balance of probabilities, the court found that the plaintiff was not *apparently* intoxicated. This finding was based on the testimony of various witnesses. A waitress who was present during the altercation stated that the plaintiff was "not sober, but not terribly drunk either". In finding the defendant liable, Hinds J. stated that while police officers have difficult duties to perform and must often make split-second decisions in the daily course of performing their duties, they must carry out these duties with care and caution. "They should not overreact; they should not take unreasonable offence at offensive comments. They should act with moderation and with responsibility."[38]

A novel case dealing with the defence of lawful justification was handed down by the Supreme Court of Canada in *Chartier v. Attorney General of Quebec*,[39] where the plaintiff was the victim of an incorrect identification by Quebec police and as a result was detained for thirty hours and charged with manslaughter. The charge was later withdrawn when another man confessed. An altercation on the highway had resulted in a man's death from a blow to the head. Four eyewitnesses came forth and provided the police with a description which formed the basis of a composite sketch. All four descriptions emphasized the pronounced baldness of the attacker but the composite sketch did not take this feature into account. The plaintiff was picked up by the police during the investigation. A series of unfortunate circumstances, including the plaintiff's mistake in accounting for his whereabouts at the time of the incident, resulted in his arrest and trial. When the error was discovered, an action was brought and in a five-four decision the Supreme Court of

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[33] Liquor Control and Licensing Act, 1975, S.B.C. 1975, c. 38, s. 48.

[34] If the person arrested was not in fact intoxicated at the time of the arrest, the arrest without a warrant would be unlawful notwithstanding that the police officer had reasonable and probable grounds for so believing.

[35] Liquor Control and Licensing Act, 1975, S.B.C. 1975, c. 38, s. 48.

[36] *Supra* note 32, at 665.

[37] The court based its view on the recent case of Regina v. Robertson, [1978] 5 W.W.R. 289, 42 C.C.C. (2d) 78 (B.C.C.A.), which held that a policeman is empowered to arrest without a warrant a person *apparently* intoxicated in a public place.

[38] *Supra* note 32, at 667. *See also* Moore v. Slater, 101 D.L.R. (3d) 176 (B.C.S.C. 1979).

[39] [1979] 2 S.C.R. 474, 104 D.L.R. (3d) 321 (1978).

Canada found the Attorney General of Quebec liable for the acts of the police and awarded the plaintiff $50,000 in damages. The actions of the police had flown in the face of all the evidence. The eyewitnesses' reports stated that the attacker was bald, whereas the accused had a full head of hair. Further, none of the eyewitnesses had picked the plaintiff out of a police line-up. In fact, one witness had stated definitely that none of the men in the line-up was the deceased's assailant.

With respect to the defence of lawful justification,[40] Pigeon J. for the majority stated:

> For a peace officer to have reasonable and probable grounds for believing in someone's guilt, his belief must take into account all the information available to him. He is entitled to disregard only what he has good reason for believing not reliable. Since the suspect was denying that he had been involved in the incident . . . all the descriptions provided by the eyewitnesses should have been checked before he was incarcerated. If this had been done the only conclusion that could have been reached is [that] . . this suspect could not be the true culprit.[41]

On the facts, the Court found the actions of the police officers involved to be totally unreasonable.

B. *Consent*

The defence of consent, as it relates to intentional torts, underwent a complete metamorphosis with the decision in *Reibl v. Hughes*.[42] Prior to this decision, the issue of informed consent played an important role in battery cases instituted against members of the medical profession. In *Reibl v. Hughes*, Laskin C.J.C. stated that the failure to disclose all attendant risks of surgery or treatment amounted to a breach of an anterior duty of care, not to a vitiation of consent. If the basic nature and character of the operation were explained and consented to by the patient then it could not be contended that the defendant was guilty of an invasion of the plaintiff's person to which consent had not been given. Informed consent, accordingly, is not an issue which generally should fall within the domain of intentional torts. "[U]nless there has been misrepresentation or fraud to secure consent to the treatment, a failure to disclose the attendant risks, however serious, should go to negligence

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[40] In *Hayward*, *supra* note 21, the plaintiff sought damages for false imprisonment after he was wrongfully arrested by a store employee of the defendant. The court stated that the common law defence of justification where a private person arrests another for a criminal offence has been abrogated by the Criminal Code. Therefore, where a defendant is unable to prove that the arrestee has in fact committed an indictable offence, the fact that he acted on reasonable and probable grounds is not sufficient to exculpate him from liability. For further discussion of "reasonable and probable grounds", *see* Schuck v. Stewart, [1978] 5 W.W.R. 279, 87 D.L.R. (3d) 720 (B.C.S.C.); *Carpenter*, *supra* note 13; *Benedetto*, *supra* note 21; *Kendall*, *supra* note 21.

[41] *Supra* note 39, at 499, 104 D.L.R. (3d) at 341-42.

[42] *Supra* note 10.

rather than to battery."[43] The topic of informed consent is discussed more extensively below under the heading *Medical Malpractice*.[44]

C. *Provocation*

In *Landry v. Patterson*,[45] the court held that provocation may operate to mitigate punitive, but not general, damages. MacKinnon A.C.J.O. postulated that there was something to be said for the approach taken in certain provincial jurisdictions, where provocation could be taken into account in assessing general damages since the plaintiff might be seen as partly responsible for the injuries he received. However, the court was obliged to follow *Shaw v. Gorter*[46] and held that once the tort of battery was established by the plaintiff, he was entitled to be compensated for injuries suffered.[47] However, in *Rouleau v. Rex Drive-In Theatre (1972) Ltd.*[48] a British Columbia court declined to follow the line of authority established in Ontario on this issue and instead adopted the reasoning of an earlier decision of the English Court of Appeal in *Murphy v. Culhane*.[49] In *Rouleau*, the court ruled that provocation could operate to reduce both general and punitive damages unless the plaintiff's conduct was to be regarded as trivial.[50]

IV. NEGLIGENCE

A. *Standard of Care*

1. *Professional Negligence*[51]

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[43] *Id.* at 891-92, 14 C.C.L.T. at 14, 114 D.L.R. (3d) at 11.

[44] *See* Hertz, *A Teacup Tempest: Onus to Prove Consent in Trespass to the Person*, 17 ALTA. L. REV. 318 (1979); Picard, *Onus of Proving Consent in Trespass to the Person: On Whom Does it Rest?*, 17 ALTA. L. REV. 322 (1979).

[45] *Supra* note 9.

[46] 16 O.R. (2d) 19, 77 D.L.R. (3d) 50 (C.A. 1977).

[47] *See also* Veinot v. Veinot, 22 N.S.R. (2d) 630, 81 D.L.R. (3d) 549 (C.A. 1977). This case also deals with self-defence and defence of property. Also of interest in this vein is Cullen v. Rice, 15 C.C.L.T. 180, 120 D.L.R. (3d) 641 (Alta. C.A. 1981).

[48] 16 C.C.L.T. 218 (B.C. Cty. Ct. 1980).

[49] [1977] 1 Q.B. 94, [1976] 3 All E.R. 533 (C.A. 1976).

[50] The court allowed a 25% reduction in the amount of general damages awarded by reason of the plaintiff's provocation.

[51] *See generally* Outerbridge, *Professional Negligence and Errors and Omissions Insurance: Panel Discussion*, in 1977 SPECIAL LECTURES L.S.U.C. 75; Prichard, *Professional Civil Liability and Continuing Competence*, in STUDIES IN CANADIAN TORT LAW, *supra* note 31, at 377; Drouin-Barakette-Jobin, *La Faute collective dans l'équipe de professionels*, 56 CAN. B. REV. 49 (1978); Rowan, *To Err is Too Human; L'erreur est humain*, 113 C.A. MAG. 58, 65 (1980).

(a) *Legal Malpractice*[52]

The responsibility of a lawyer to his client recently has come under close scrutiny by the courts of Canada as well as those of other jurisdictions.[53] During the survey period the courts have looked specifically at such questions as the scope of immunity, if any, of a lawyer in respect of his negligent performance as a barrister, and the nature of the cause of action against a lawyer who has negligently performed his duties as imposed by a contractual relationship with the client. Curiously, there has been a marked imbalance between judicial activity in this area and the academic commentary thereon. For legal malpractice generally, judicial activity[54] has far exceeded the meagre commentary.[55] Yet for barristers' immunity specifically, precisely the opposite has occurred.[56]

(i) *Barristers' immunity*[57]

While English jurisprudence on barristers' immunity recently has been moving towards the Ontario position, the Ontario position itself has

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[52] *See generally* Fera, *Negligence of Solicitors*, 25 CHITTY'S L.J. 325 (1977); Nightingale, *The Negligent Practice of Law in Canada: A Chronicle of Client Frustration*, 41 SASK. L. REV. 47 (1977).

[53] For discussion of recent developments in the United States, *see Symposium Legal Malpractice and Professional Responsibility*, 14 WILLAMETTE L. REV. 355 (1978).

[54] In addition to cases discussed elsewhere under this title, the following have been reported: Patchett v. Oliver, Shephard & Carr, [1977] 5 W.W.R. 299 (B.C.S.C.); Watton v. Parsons, 80 D.L.R. (3d) 297; Tracy v. Atkins, 83 D.L.R. (3d) 46 (B.C.S.C. 1978), *aff'd* 105 D.L.R. (3d) 632 (B.C.C.A. 1979); Enns v. Panjo, [1978] 5 W.W.R. 244 (B.C.S.C.); Whittingham v. Crease & Co., 6 C.C.L.T. 1, [1978] 5 W.W.R. 45, 88 D.L.R. (3d) 353 (B.C.S.C.); Bank of B.C. v. Holinaty, 91 D.L.R. (3d) 255 (B.C.S.C. 1978); P.A. Wournell Contracting Ltd. v. Allen, 100 D.L.R. (3d) 62 (N.S.S.C. 1979); Pacific Mobile v. Hunter Douglas, [1979] 1 S.C.R. 842, 26 N.R. 453; Canada Permanent Trust v. MacLeod, 103 D.L.R. (3d) 444 (N.S.S.C. 1979); Clarence Constr. v. Lavallée, 111 D.L.R. (3d) 582 (B.C.S.C. 1980); Mardo v. Perry, [1980] 3 W.W.R. 565 (B.C. Cty. Ct.); Gray v. Forbes, 17 B.C.L.R. 392, [1980] 3 W.W.R. 689 (S.C.); Ormindale Holdings Ltd. v. Ray, Wolfe, Connel, Lightbody & Reynolds, 116 D.L.R. (3d) 346 (B.C.S.C. 1980); Karpenko v. Paroian, 117 D.L.R. (3d) 383 (Ont. H.C. 1980); Lapierne v. Young, 117 D.L.R. (3d) 643 (Ont. H.C. 1980); MacDonald v. Lockhart, 118 D.L.R. (3d) 397 (N.S.C.A. 1980); Paye v. Dick, 12 C.C.L.T. 43 (Ont. H.C. 1980); McMorran's Cordava Bay Ltd. v. Harman, [1980] 2 W.W.R. 499 (B.C.C.A.); Jacks v. Davis, [1980] 6 W.W.R. 11, 112 D.L.R. (3d) 223 (B.C.S.C.); Fedak v. Monti, 16 C.C.L.T. 287 (Ont. H.C. 1981); Financeamerica Realty Ltd. v. Gillies, 32 Nfld. & P.E.I.R. 15, 91 A.P.R. 15 (Nfld. Dist. C. 1981).

[55] *See* authorities listed in note 52 *supra*.

[56] *Contrast* authorities listed in note 57 *infra* with cases under the title *Barristers' immunity*.

[57] *See generally* Sayias, *Liability of a Lawyer for Negligence in the Conduct of Litigation*, 8 MAN. L.J. 661 (1978); Hutchinson, *Comment*, 57 CAN. B. REV. 346 (1979); Klar, *Note on Barrister's Immunity from Suit*, 7 C.C.L.T. 21 (1979); Bogart, *Immunity of Advocates from Suit: the Unresolved Issue*, 29 U.N.B.L.J. 27 (1980).

been advancing during the survey period, maintaining the distance between their respective positions.[58] In the 1969 case of *Rondel v. Worsley*,[59] the House of Lords granted immunity from tort liability to advocates during the conduct of litigation. This blanket protection was clarified subsequently by the Court of Appeal in *Saif Ali v. Sydney Mitchell & Co.*,[60] where Denning L.J. stated that a barrister could not be sued for negligence "in any preliminary advice that he gives as to the parties to the litigation or the prospects of success or any other matter connected with litigation pending or contemplated".[61]

This approach contrasted sharply with that of the Ontario Court of Appeal in *Banks v. Reid*.[62] In that case,[63] Brooke J.A. held that immunity, if applicable at all, "should be confined to issues between a barrister and his client in the discharge of the barrister's duties before a Court and is dependent upon consideration of the barrister's duty to the Court and duty to his client".[64]

The gap between the English and Ontario positions was significantly narrowed by the House of Lords judgment in *Saif Ali*.[65] Reversing the Court of Appeal, the House of Lords consciously set out to restrict the scope of the immunity. Lord Diplock considered immunity to be exceptional, stating that he

> could not readily find today in the reasons that I have so far discussed convincing ground for holding that a barrister ought to be completely immune from liability for negligence for what he does in court in conducting criminal or civil proceedings — let alone for anything that he does outside court in advising about litigation whether contemplated or pending or in settling documents for use in litigations. . . .
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> The first is that the barrister's immunity from liability for what he says and does in court is part of the general immunity from civil liability which attaches to all persons in respect of their participation in proceedings before a court of justice; judges, court officials, witnesses, parties, counsel and solicitors alike.[66]

Lord Salmon added the following:

> I recognise [*sic*] that it is most unpleasant for a barrister to have to fight an allegation that he has been negligent, but such an experience is no more

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[58] For discussion of recent developments in England, *see* Hutchinson, *The Barrister's Immunity*, 128 NEW L.J. 144 (1978) and Catzman, *Comment*, 57 CAN. B. REV. 339 (1979).

[59] [1969] 1 A.C. 191, [1967] 3 All E.R. 993 (H.L. 1967).

[60] [1978] Q.B. 95, [1977] 3 All E.R. 744 (C.A.).

[61] *Id.* at 104, [1977] 3 All E.R. at 748.

[62] 18 O.R. (2d) 148 (C.A. 1977).

[63] The court in *Banks* held that it was negligence for a lawyer to represent a plaintiff at the same time as he was representing a man who ought to have been a defendant in proceedings which the plaintiff was contemplating. Liability was imposed on the basis that the plaintiff would have been successful in those proceedings had he been properly represented.

[64] *Supra* note 62, at 153.

[65] [1980] A.C. 198, [1978] 3 W.L.R. 849 (H.L. 1978).

[66] *Id.* at 221, [1978] 3 W.L.R. at 862.

> unpleasant for a barrister than it is for a physician or a surgeon, an architect or an accountant.[67]

The House of Lords deliberately avoided providing a catalogue of examples of what pre-trial work would be covered. The essence of the decision is that in England barristers' immunity is an abrogation of the general policy that persons should be subject to suit for their negligent work, and that immunity will only be circumspectly granted.

However, even this limited immunity has recently been resoundingly rejected by the Ontario High Court. In *Demarco v. Ungaro*,[68] the defendant lawyers brought a motion to strike out a statement of claim alleging negligence against them for failure to call certain important evidence in a case that they had lost. In a learned judgment dismissing the motion, Krever J. held that the immunity available to the English barrister has no place in Ontario:

> I have come to the conclusion that the public interest . . . in Ontario does not require that our Courts recognize an immunity of a lawyer from action for negligence at the suit of his or her former client by reason of the conduct of a civil case in Court. It has not been, is not now, and should not be, public policy in Ontario to confer exclusively on lawyers engaged in Court work an immunity possessed by no other professional person. Public policy and the public interest do not exist in a vacuum. They must be examined against the background of a host of sociological facts of the society concerned. Nor are they lawyers' values as opposed to the values shared by the rest of the community. In the light of recent developments in the law of professional negligence and the rising incidence of "malpractice" actions against physicians (and especially surgeons who may be thought to be to physicians what barristers are to solicitors), I do not believe that enlightened, non-legally trained members of the community would agree with me if I were to hold that the public interest requires that litigation lawyers be immune from actions for negligence. I emphasize again that I am not concerned with the question whether the conduct complained about amounts to negligence. Indeed, I find it difficult to believe that a decision made by a lawyer in the conduct of a case will be held to be negligent as opposed to a mere error of judgment. But there may be cases in which the error is so egregious that a Court will conclude that it is negligence. The only issue I am addressing is whether the client is entitled to ask a Court to rule upon the matter.
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> . . . .
>
> It is with a great sense of deference that I offer a few brief remarks on the grounds and consideration which formed the basis of the public policy as expressed by the House of Lords in *Rondel v. Worsley*. I am only concerned with the applicability of those considerations to Ontario conditions and have no hesitation in accepting them as entirely valid for England. With respect to the duty of counsel to the Court and the risk that, in the absence of immunity, counsel will be tempted to prefer the interest of the client to the duty of the Court and will thereby prolong trials, it is my respectful view that there is no empirical evidence that the risk is so serious that an aggrieved client should be rendered remediless. Between the dates of the decisions in *Leslie v. Ball*, 1863, and *Rondel v. Worsley*, 1967, immunity of counsel was not recognized in Ontario and negligence actions against lawyers respecting their conduct of

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[67] *Id.* at 228, [1978] 3 W.L.R. at 869.

[68] 21 O.R. (2d) 673 (H.C. 1979).

> Court cases did not attain serious proportions. Indeed, apart from the cases I have cited I know of no case in which a lawyer was sued for negligence as it applies to surgeons. Surgeons, it is claimed, are deterred from using their best judgment out of fear that the consequences will be an action by the patient in the event of an unfavourable result. This claim has not given rise to an immunity for surgeons. As to the second ground — the prospect of relitigating an issue already tried, it is my view that the undesirability of that event does not justify the recognition of lawyers' immunity in Ontario. It is not a contingency that does not already exist in our law and seems to me to be inherently involved in the concept of *res judicata* in the recognition that a party, in an action *in personam*, is only precluded from relitigating the same matter against a person who was a party to the earlier action. I can find no fault with the way in which Hagarty, C.J., dealt with this consideration in *Wade v. Ball et al.* (1870), 20 U.C.C.P. 302 at p. 304: "Practically, such a suit as the present may involve the trying over again of *Wade v. Hoyt*. This cannot be avoided." Better that than that the client should be without recourse.
>
> The third consideration related to the obligation of a lawyer to accept any client. Whether that has ever been the universally accepted understanding of a lawyer's duty in Ontario is doubtful. In any event, I do not believe such a duty exists in the practice of civil litigation and that is the kind of litigation with which I am now concerned.[69]

Although the decision has not passed without criticism,[70] the reasoning seems sound,[71] has since been followed[72] and is consistent with the trend towards widening professional liability.

(ii) *Cause of action*[73]

Despite considerable judicial attention during the survey period, the question of whether a lawyer is liable for negligence to a client in tort as well as in contract remains unresolved. The nature of the cause of action is important, not only for the purposes of pleading a cause of action known to law, but also where a limitation period may have expired in contract but not in tort, or where the recovery of damages may depend on the nature of the test being applied.[74]

In 1967, in *Schwebel v. Telekes*,[75] the Ontario Court of Appeal considered the case of a plaintiff who was suing the defendant for

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[69] *Id.* at 692-93.

[70] *See* Hutchinson, *supra* note 57.

[71] As evidenced by the extent to which the judgment is quoted in commentaries. *See, e.g.*, Hutchinson, *id.*; Sharpe, *Sue the Bungling Barrister*, 13 THE ADVOCATE 32, at 32-33 (1979); C. WRIGHT & A. LINDEN, *supra* note 2, at 7-19-21.

[72] Wechsel v. Stutz, 15 C.C.L.T. 132 (Ont. Cty. Ct. 1981) (no immunity from suit alleging negligence in failure to cross-examine).

[73] *See generally*, Irvine, *Contract or Tort: Troubles Along the Border*, 10 C.C.L.T. 281 (1979-80); Radomski, *Actions Against Solicitors — Contract or Tort?*, [1979-81] 2 ADVOCATES Q. 160.

[74] For the effect of cause of action on recovery of damages, *see* Kienzle v. Stringer, 14 R.P.R. 29 (Ont. H.C. 1980) (Cromarty J.) and the annotation accompanying the case.

[75] [1967] 1 O.R. 541, 61 D.L.R. (2d) 470 (C.A.).

negligence while acting as a notary on behalf of the plaintiff in a matrimonial settlement. The legal issue was whether or not the limitation period had expired, which depended upon whether the plaintiff was suing in contract or tort. Laskin J.A., as he then was, found that "the only circumstances that could bring any duty of the defendant to the plaintiff herein into operation was her contracting for the defendant's assistance."[76] Relying on the English Court of Appeal decision in *Groom v. Crocker*,[77] which dealt with a solicitor-client relationship, Laskin J.A. concluded that "the duty of care arose by virtue of the contractual relationship and had no existence apart from that relationship."[78]

In 1972 *Schwebel* found support from the Supreme Court of Canada both in *J. Nunes Diamonds v. Dominion Electric Protection Co.*,[79] where it was held that a tort action was inapplicable "to any case where the relationship between the parties is governed by contract, unless the negligence relied on can properly be considered as an independent tort unconnected with the performance of that contract",[80] and in *Carl M. Halvorson Inc. v. Robert McLellan & Co.*[81] In 1973, *Schwebel* was followed in *Farmer v. H.H. Chambers Ltd.*[82]

In the 1976 case of *Dominion Chain Co. v. Eastern Construction Co.*,[83] however, a majority of the Ontario Court of Appeal held that for those who profess special knowledge and skill, liability is concurrent.[84] In so doing, the court relied upon the principle in the English case of *Brown v. Boorman*,[85] which seemed to say that there is always a choice as to whether to sue in contract or tort.

This notion of concurrent liability for those who profess special skill and knowledge was recognized that same year in England by the Court of Appeal in *Esso Petroleum Co. v. Mardon*.[86]

Thus the question of cause of action was an open one at the beginning of the survey period. During the survey period, the higher Canadian courts favoured the view that liability is limited to contract.

In the Supreme Court of Canada case of *Smith v. McInnis*,[87] the plaintiff brought an action against the defendant solicitor who joined another. The issue arose as between the defendant and the third party in

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[76] *Id.* at 543, 61 D.L.R. (2d) at 472.

[77] [1939] 1 K.B. 194, [1938] 2 All E.R. 394 (C.A. 1938).

[78] *Supra* note 75, at 543, 61 D.L.R. (2d) at 472.

[79] [1972] S.C.R. 769, 26 D.L.R. (3d) 699.

[80] *Id.* at 777-78, 26 D.L.R. (3d) at 727-28.

[81] [1973] S.C.R. 65, 29 D.L.R. (3d) 455.

[82] [1973] 1 O.R. 355, 31 D.L.R. (3d) 147 (C.A.).

[83] 12 O.R. (2d) 201, 68 D.L.R. (3d) 385 (C.A. 1976).

[84] In the dissent, Wilson J.A., as she then was, suggested that while the law imposes a duty on contracting parties to be bound by arrangements that they have entered into, this is not the duty which the law of tort and the action of negligence were designed to enforce.

[85] 11 Cl. & Fin. 1, 8 E.R. 1003 (H.L. 1844).

[86] [1976] Q.B. 801, [1976] 2 All E.R. 5 (C.A.).

[87] [1978] 2 S.C.R. 1357, 4 C.C.L.T. 154, 91 D.L.R. (3d) 190.

respect of an expired limitation period. The majority of the Court found it unnecessary to address specifically the issue of what the cause of action was. However, Pigeon J. in dissent stated:

> I have to agree that the liability of a solicitor to his client for negligence in his duty to give advice, or otherwise, is in contract only, not in tort. I adhere to the view I have previously expressed in other cases, that a breach of duty may constitute a tort only if it is a breach of duty owed independently of any contract with the claimant, "an independent tort", as I said in *Nunes Diamonds Ltd. v. Dom. Elec. Protection Co.* In the case of a solicitor retained to give advice, his duty to advise properly arises only under contract and I do not see how liability can arise otherwise than on a contractual basis as was held in the case of a consulting engineer in *Halvorson Inc. v. McLellan & Co.*[88]

In *Messineo v. Beale*,[89] Arnup J.A. for the majority[90] of the Ontario Court of Appeal stated that he agreed that "the basis of liability of the defendant solicitor lies in breach of contract. In this respect the cases appear to be uniform."[91]

Zuber J.A. in dissent, disagreed:

> A solicitor, being one of those who profess skills in a calling, is liable for failure to exercise those skills in both tort and contract. This concurrent liability in tort and contract was dealt with in depth by Jessup, J.A. in *Dom. Chain Co. v. Eastern Constr. Co.* I subscribed to his reasons in that case, and also in *Dabous v. Zuliani*. (An appeal to the Supreme Court of Canada in *Dom. Chain* was dismissed without determination of this issue.) While *Dom. Chain* and *Dabous* were concerned with the liability of engineers and architects, the principle espoused is not so confined. The concept of concurrent liability in both tort and contract for those who profess special knowledge and skill was also recognized by the English Court of Appeal in *Esso Petroleum Co. v. Mardon.*[92]

A similar approach to that of the majority in *Messineo*[93] was unanimously adopted by the New Brunswick Supreme Court, Appellate Division, in *Royal Bank of Canada v. Clark.*[94] There the court expressly approved *Schwebel.* Hughes C.J.N.B. put it as follows: "A solicitor's liability to his client for professional negligence is based on breach of the terms of his engagement, the liability being contractual in nature."[95]

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[88] *Id.* at 1377, 4 C.C.L.T. at 174, 91 D.L.R. (3d) at 204.

[89] 20 O.R. (2d) 49, 5 C.C.L.T. 235, 86 D.L.R. (3d) 713 (C.A. 1978).

[90] Martin J.A., concurring.

[91] *Supra* note 89, at 52, 5 C.C.L.T. at 241, 86 D.L.R. (3d) at 717.

[92] *Id.* at 54, 5 C.C.L.T. at 243, 86 D.L.R. (3d) at 718.

[93] It should be noted that the award in *Messineo* was nominal damages as the plaintiff, on the facts, had not suffered any damage. If the cause of action sounded in negligence, then in the absence of any damages all elements of the cause of action were not established. The effect of this is important in that the action should then have been properly dismissed, quite probably with an award of costs against the plaintiff. As it was, the plaintiff succeeded in breach of contract, but there was no award as to costs at trial.

[94] 22 N.B.R. (2d) 693, 39 A.P.R. 693, 88 D.L.R. (3d) 76 (C.A. 1978), *aff'd* 105 D.L.R. (3d) 85 (S.C.C. 1979).

[95] *Id.* at 700, 39 A.P.R. at 700, 88 D.L.R. (3d) at 81.

However, there is recent authority, albeit from less persuasive levels in British Columbia,[96] Newfoundland[97] and England,[98] for following the *Dominion Chain — Esso Petroleum* approach to lawyer negligence.

In the English decision of *Midland Bank Trust Co. v. Hett, Stubbs & Kemp*,[99] Oliver J. of the Chancery Division attempted to reconcile the results in *Esso Petroleum* and the prior English cases, including *Groom*, upon which *Schwebel* had been based. Oliver J. held that the *Hedley Byrne*[100] judgment was such that the *Hedley Byrne* principle could not be confined to cases where there was no contractual relationship, which Oliver J. considered would be the effect if the *Groom* line of authority were followed.

With respect, that would not be the effect of *Groom*. It would be this: if there is a negligent misstatement by a lawyer to his client in the context of his retainer, then it is a breach of contract situation; if there is a negligent misstatement by a lawyer to his "client" either outside, or prior to, his retainer, then *Hedley Byrne* applies, notwithstanding that there is a contract between the lawyer and his client. This is what the Supreme Court of Canada suggested in *J. Nunes Diamonds* and what in fact occurred in *Esso Petroleum*.

Nevertheless, *Midland Bank* has been well received in England,[101] and has been followed there in *Ross v. Caunters*,[102] a decision which itself has been equally well received.[103] These decisions have been applauded for including legal malpractice in the general extension of professional liability.

The recent Canadian authorities for the concurrent remedy theory are the decisions of the British Columbia Supreme Court in *Jacobson Ford-Mercury Sales Ltd. v. Sivertz*[104] and of the Newfoundland Trial Division in *Power v. Halley*.[105]

In *Sivertz* the court rejected *Schwebel* and *Groom*, holding that they had been displaced by *Dominion Chain* and *Esso Petroleum*. Instead it chose to follow *Midland Bank*, expressly adopting the language of Mifflin C.J.T.D. in *Power* to that effect.[106] *J. Nunes Diamonds* was

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[96] Jacobson Ford-Mercury Sales Ltd. v. Sivertz, 10 C.C.L.T 274, [1980] 1 W.W.R. 141, 103 D.L.R. (3d) 480 (B.C.S.C. 1979).

[97] Power v. Halley, 18 Nfld. & P.E.I.R. 531, 47 A.P.R. 531, 88 D.L.R. (3d) 381 (Nfld. S.C. 1978).

[98] Batty v. Metropolitan Property, [1978] 2 All E.R. 445, [1978] 2 W.L.R. 500 (C.A.); Midland Bank Trust Co. v. Hett, Stubbs & Kemp, [1979] Ch. 384, [1978] 3 All E.R. 571 (1978).

[99] *Id.*

[100] [1964] A.C. 465, [1963] 2 All E.R. 575 (H.L. 1963).

[101] *See* Stanton, *Note: Solicitors and Professional Liabilities A Step Forwards*, 42 MODERN L. REV. 207 (1979).

[102] [1979] 3 All E.R. 580, [1979] 1 W.L.R. 605 (Ch. D.) (Megarry V.C.).

[103] *See* Dias, *Comment: Common Law in Chancery — Negligence of Solicitors*, [1980] CAMB. L.J. 45.

[104] *Supra* note 96.

[105] *Supra* note 97.

[106] *Supra* note 96, at 279-80, [1980] 1 W.W.R. at 146, 103 D.L.R (3d) at 484

distinguished on the ground that there did not "exist any fiduciary relationship between the parties, such as exists where a professional man is sued for want of competent skill or proper care . . . ",[107] a tack which is strongly redolent of that taken by Zuber and Jessup JJ.A. in *Dominion Chain*. Kirke Smith J.'s remarkably forceful conclusion was this:

> In the result, I conclude that, in the case of a professional man such as the defendant [solicitor] the plaintiff client can claim either in contract or in tort, basing that claim on whichever foundation gives him the more favourable position. . . .[108]

At least for the time being in Canada, higher courts and academics support the proposition that the cause of action against a lawyer for his negligent performance sounds in contract and not in tort. As Professor Klar has stated,

> in view of the definitiveness of Mr. Justice Pigeon's views and in view of the opinion of the majority of the Ontario Court of Appeal in *Messineo v. Beale* . . . a persuasive case for holding that a solicitor's liability is in contract alone has certainly been made [in Canada].[109]

(iii) *Property transactions*

In *Islington Investments Ltd. v. Day Ault & White*,[110] Keith J. of the Ontario High Court underlined the importance of solicitor diligence in property transactions. In that case, the defendant solicitor delayed securing a consent to the severance of two parcels of the plaintiff's land pursuant to the Planning Act.[111] This delay entitled the purchasers to refuse to close the transactions since final consent had not been secured by the contract date. Holding the defendants liable in negligence to the plaintiff, Keith J. stated:

> One is reminded of the lesson implicit in Aesop's ancient fable of the Tortoise and the Hare. It simply does not lie in his mouth to seek to justify himself on the footing that he thought he had ample time. The decision he required was not under his control and it behooved him to lose no time in the preparation and presentation of the necessary applications.[112]

Under the circumstances of the case, however, the award against the defendant was extremely small. The property market had slumped since the signing of the contract so that the damages normally would have been substantial. But here the would-be purchasers were "shell" corporations, without assets, rendering the contract of no practical use to the

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[107] *Id.* at 279, [1980] 1 W.W.R. at 146, 103 D.L.R. (3d) at 484.

[108] *Id.*

[109] Klar, *Annotation*, 5 C.C.L.T. 235, at 237 (1978). *Cf.* Irvine, *Annotation*, 12 C.C.L.T. 44 (Ont. H.C. 1980).

[110] 7 C.C.L.T. 46 (Ont. H.C. 1978).

[111] R.S.O. 1980, c. 379.

[112] *Supra* note 110, at 62.

plaintiff. Rejecting the contention that these circumstances should not be taken into consideration, Keith J. conceded that

> [t]his would undoubtedly be true if the Court were dealing with an action by the plaintiff against the purchasing companies directly. Similarly, by way of example, in an action for damages for personal injuries, the Court assesses the quantum of damages without regard to either liability or collectability [113]

But, as His Lordship noted,

> this is a very different case. Here the plaintiff is not pursuing the purchasers, but rather the solicitors as a result of whose negligence it was deprived of a legally valid cause of action. The question then that must be asked and answered, is what dollar and cents value do you attach to what the plaintiff lost by reason of being deprived of a legally valid cause of action against worthless defendants?[114]

Applying this standard, the court awarded the plaintiff only the value of the deposit the purchasers would have forfeited had the plaintiff been entitled to hold them to the contract.

(b) *Medical Malpractice*[115]

Although medical malpractice has been the subject of considerable litigation during the survey period,[116] with the notable exception of the issue of informed consent, nothing substantial in the law has changed.

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[113] *Id.* at 64.

[114] *Id.*

[115] *See generally* Black, *Negligence*, [1977] 3 LEGAL MED. Q. 123; Dumont, *La Négligence médicale: Symptômes et causes d'une crise*, 47 ASSURANCES 44 (1979); Haunholter, *Negligence and the Pharmacist*, [1978] 2 LEGAL MED. Q. 2; E. PICARD, LEGAL LIABILITY OF DOCTORS AND HOSPITALS IN CANADA (1978); Magnet, *Preventing Medical Malpractice in Hospitals: Perspectives from Law and Policy*, [1979] 3 LEGAL MED. Q. 197; Teplitsky & Weisstub, *Torts: Negligence Standards and the Physician*, 56 CAN. B. REV. 121 (1978); S. STRAUSS, THE PHARMACIST AND THE LAW (1980).

[116] In addition to cases discussed elsewhere under this title, *see*: Joseph Brant Memorial Hosp. v. Koziol, [1978] 1 S.C.R. 491, 2 C.C.L.T. 170, 77 D.L.R. (3d) 161 (1977); Laurent v. Theoret, [1978] 1 S.C.R. 605, 17 N.R. 593, 3 C.C.L.T. 109 (1977); Dale v. Munthali, 21 O.R. (2d) 554, 90 D.L.R. (3d) 763 (C.A. 1978); Williams v. Jones, 79 D.L.R. (3d) 670 (B.C.S.C. 1977); Holmes v. Board of Hosp. Trustees, 17 O.R. (2d) 626, 5 C.C.L.T. 1, 81 D.L.R. (3d) 10 (C.A. 1977); Kapur v. Marshall, 19 O.R. (2d) 478, 4 C.C.L.T. 204, 85 D.L.R. (3d) 566 (H.C. 1978); Dorion v. Orr, 20 O.R. (2d) 71, 86 D.L.R. (3d) 719 (H.C. 1978); Kangas v. Parker, [1978] 5 W.W.R. 667 (Sask. C.A.); Leonard v. Knott, [1978] 5 W.W.R. 511 (B.C.S.C.), *aff'd* [1980] 1 W.W.R. 673 (B.C.C.A.); Powell v. Guttman, [1978] 5 W.W.R. 228, 6 C.C.L.T. 183, 89 D.L.R. (3d) 180 (Man. C.A.); Zimmer v. Ringrose, 13 A.R. 181, 89 D.L.R. (3d) 646 (S.C. 1978); Workman v. Greer, 90 D.L.R. (3d) 676 (Man. C.A. 1978); Goff v. Barker, 92 D.L.R. (3d) 125 (Ont. H.C. 1978); Strachan v. Simpson, [1979] 5 W.W.R. 315 (B.C.S.C.); Whitson v. Deane, 95 D.L.R. (3d) 184 (B.C.S.C. 1979); Cook v. Abbott, 11 C.C.L.T. 214 (N.S.S.C. 1980); Moffatt v. Witelson, 111 D.L.R. (3d) 712 (Ont. H.C. 1980); Meyer v. Gordon, 17 C.C.L.T. 1 (B.C.S.C. 1981).

(i) *Informed consent*[117]

While the issue of informed consent has long been the subject of academic and judicial interest in the United States,[118] it was not until the 1976 case of *Kelly v. Hazlett*[119] that the issue began to receive similar attention in Canada. However, since this initial re-evaluation by the

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[117] *See generally* Calabresi, *The Problem of Malpractice: Trying to Round Out the Circle*, 27 U. TORONTO L.J. 131 (1977); Picard, *The Tempest of Informed Consent*, in STUDIES IN CANADIAN TORT LAW, *supra* note 31, at 129; Castel, *Informed Consent*, 16 ALTA. L. REV. 293 (1978); Jazvac, *Informed Consent: Risk Disclosure and the Canadian Approach*, 36 U. TORONTO FAC. L. REV. 191 (1978); Sharpe, *Informed Consent: Some Consensus, More Confusion*, 3 CAN. LAWYER 3:10 (1979); S. SHARPE, INFORMED CONSENT: ITS BASIS IN TRADITIONAL LEGAL PRINCIPLES (1979); Scaletta, *Informed Consent and Medical Malpractice: Where Do We Go From Here*, 10 MAN. L.J. 289 (1980); Magnet, *Recent Developments in the Doctrine of Informed Consent to Medical Treatment*, 14 C.C.L.T. 61 (1980-81).

[118] *See, e.g.*, Plante, *An Analysis of "Informed Consent"*, 36 FORDHAM L. REV. 639 (1968); Waltz & Schenneman, *Informed Consent to Therapy*, 64 N.U.L. REV. 628 (1970); Riskin, *Informed Consent: Looking for the Action*, [1975] U. ILL L. FORUM 580; Schneyer, *Informed Consent and the Dangers of Bias in the Formation of Medical Disclosure Patterns*, [1976] WIS. L. REV. 124; Jacobson, *Informed Consent — Hospitals?* 23 FED. INS. COUNS. Q. No. 2, 9 (1972); Gough, *Recent Uses and Misuses of the Informed Consent Doctrine*, 10 FORUM 383 (1974); Markham, *The Doctrine of Informed Consent — Fact or Fiction?*, 10 FORUM 1073 (1975); Capron, *Informed Consent in Catastrophic Disease Research and Treatment*, 123 U. PA. L. REV. 340 (1976); Alsbrook, *Informed Consent: A Right to Know*, 40 INS. COUNS. J. 580 (1973); Stewart, *The Doctrine of Informed Consent*, 43 INS. COUNS. J. 118 (1976); Goldstein, *For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain*, 84 YALE L.J. 683, at 690 (1975); Seidelson, *Medical Malpractice: Informed Consent Cases in "Full-Disclosure" Jurisdictions*, 14 DUQUESNE L. REV. 309 (1976). *See also* the *Notes* in 23 EMORY L.J. 503 (1974), 27 BAYLOR L. REV. 111 (1975), 6 LOYOLA U.L. REV. (L.A.) 384 (1973), 83 YALE L.J. 1632 (1974), 18 ST. LOUIS U.L.J. 256 (1973), [1974] UTAH L. REV. 851, 48 N.Y.U.L. REV. 548 (1973), 54 NEB. L. REV. 66 (1975), 10 SAN DIEGO L. REV. 913 (1973), [1973] U. ILL. L. FORUM 739, 61 CALIF. L. REV. 634 (1973), 28 MERCER L. REV. 377 (1976), 8 ST. MARY'S L.J. 499 (1976), 12 CALIF. W.L. REV. 406 (1976).

[119] 15 O.R. (2d) 290, 1 C.C.L.T. 1, 75 D.L.R. (3d) 536 (H.C. 1976).

Ontario High Court,[120] decisions during the survey period, in particular those of the Supreme Court of Canada[121] in the cases of *Hopp v. Lepp*[122] and *Reibl v. Hughes*,[123] have effectively reformulated the principles applicable to a patient's consent to medical treatment.[124]

The principles in contention in the issue of informed consent have been the appropriate form of action, the required standard of disclosure and the standard by which a plaintiff must prove the causal connection, *i.e.*, that he would have refused the procedure had he been properly informed.

Form of action

The form of the action is important in that if the case can be pleaded in battery, the plaintiff need only prove that what was done differed

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[120] In *Kelly*, the plaintiff had a deformity in her right elbow, from which she suffered stiffness and a numbness in her hand. The defendant orthopaedic surgeon recommended an operation to cure these symptoms but was reluctant to correct the deformity itself as that would require that the elbow be in a cast over a long period, with which he believed the plaintiff would not be able to cope

The plaintiff agreed that only the first operation should be performed, but on the morning of the operation, when already under sedation, she insisted that the deformity be corrected as well. Despite the defendant's efforts to dissuade her, she was adamant and the defendant acquiesced, realizing "that she was not understanding what [he] was attempting to communicate. . ." (*id.* at 297, 1 C.C.L.T. at 10, 75 D.L.R. (3d) at 543) The defendant did not inform the plaintiff that correcting the deformity risked additional stiffness.

The operation was performed: the plaintiff did suffer additional stiffness and an action was brought against the defendant in battery and negligence, succeeding in negligence.

On the question of the appropriate form of action, Morden J. favoured the approach proposed by Plante, *supra* note 118, whereby battery would only lie where "the basic nature and character of the operation performed [differed] substantially [from] that of which the plaintiff was advised . . ." (*id.* at 313, 1 C.C.L.T. at 27, 75 D.L.R. (3d) at 558). This approach seemed to "strike a reasonable balance in the complex of interests, rights and duties subsisting in the patient-doctor relationship, as well as being consistent with basic concepts of the law of torts . . ." (*id.* at 313, 1 C.C.L.T. at 27, 75 D.L.R. (3d) at 558).

On the question of the required standard of disclosure, Morden J. rejected the objective theory of consent favoured in the United States, preferring in its stead the view that this was "substantially a matter of medical judgment as opposed to being one of absolute and invariable content . . ." (*id.* at 319, 1 C.C.L.T. at 34, 75 D.L.R. (3d) at 565).

Finally, on the question of the standard by which a plaintiff must prove the causal element, Morden J. favoured a subjective approach. This was in contrast to the objective approach taken in the United States that was based on the assumption that the hindsight of a self-interested plaintiff cannot be trusted.

[121] For commentary, *see Comment*, 15 U.B.C.L. REV. 447 (1981)

[122] [1980] 2 S.C.R. 192, 13 C.C.L.T. 66, 112 D.L.R. (3d) 67

[123] *Supra* note 10.

[124] For a judicial review of the law as it now stands, *see* White v. Turner, 15 C.C.L.T. 81 (Ont. H.C. 1981) (Linden J.).

substantially from that to which he had assented. The obstacles of medical evidence and causation are circumvented and the onus with regard to consent placed on the defendant.

The appropriate form of action was a major issue in *Reibl*. In that case, the plaintiff had undergone an endarterectomy and, as a result, had suffered a stroke and paralysis. The risk of such a consequence had not been disclosed.

At trial,[125] Haines J. held the physician liable not only in negligence but in battery as well, having found that risks which were "an integral feature of the nature and characterization of the operation" had not been "plainly and unambiguously brought home to [the patient]",[126] the lack of proper information having vitiated the apparent consent where the case was pleaded in battery.

Changing perspectives, the Court of Appeal[127] reversed that decision, having found the physician's effort to inform the patient sufficient to validate his consent. Although as Brooke J.A., with Blair J.A. concurring, pointed out, the question of appropriate form of action was irrelevant since battery had not been pleaded in the first place; the Court of Appeal, relying on the American case of *Cobbs v. Grant*,[128] did consider negligence the appropriate form in most cases.

On final appeal,[129] Laskin C.J.C. upheld the Court of Appeal, holding battery inappropriate in most situations. In rejecting the action, the Chief Justice found first that the degree of failure to disclose that would vitiate an apparent consent was too ambiguous to be practicable and second, that the tort of battery was by its very nature generally inappropriate for the area.[130] Battery would be appropriate "where there was misrepresentation of the surgery or treatment for which consent was elicited and a different surgical procedure or treatment was carried out".[131]

As laid down by the Court, the test of the appropriate form of action is: has surgery or treatment been performed or given "to which there has been no consent at all", or has it only been performed or given "beyond that to which there was consent".[132]

Taken in conjunction with the principles set out in *Kelly* by Morden and Haines JJ. in *Reibl*, the test of the Chief Justice would seem to be a workable instrument for the courts to use when called upon to answer this question of the appropriate form of action.[133]

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[125] 16 O.R. (2d) 306, 78 D.L.R. (3d) 35 (H.C. 1977).

[126] *Id.* at 312, 78 D.L.R. (3d) at 42.

[127] 21 O.R. (2d) 14, 6 C.C.L.T. 227, 89 D.L.R. (3d) 112 (C.A. 1978).

[128] 502 P. 2d 1 (Cal. 1972).

[129] *Supra* note 10.

[130] *See* text accompanying note 11 *supra*.

[131] *Id.* at 891, 14 C.C.L.T. at 13, 114 D.L.R. (3d) at 10.

[132] *Id.* at 890-91, 14 C.C.L.T. at 13, 114 D.L.R. (3d) at 10.

[133] Where no question of informed consent arises, it was already clear that unpermitted contact with the body could constitute battery as well as negligence. *See* Allan v. New Mount Sinai, 11 C.C.L.T. 299, at 310 (Ont. H.C. 1980) (Linden J.) and the commentary thereon by Picard in 12 C.C.L.T. 1 (1980).

Standard of disclosure

Traditionally, Canadian courts not only opted for a professional standard of disclosure,[134] but indeed held it up as though it were some sort of absolute defence to an action in negligence.[135] Strictly applied, all such a standard required of a physician was to disclose whatever information his professional colleagues in similar circumstances would have disclosed, irrespective of the needs or desires of a reasonable patient. As Morden J. in *Kelly* clearly stated in explaining what was then the law in Ontario,

> the duty to disclose the collateral risks inherent in any proposed procedure is substantially a matter of medical judgment as opposed to being one of absolute and invariable content unlike the law in some U.S. jurisdictions where the duty is based on a notion of what a reasonable patient might be expected to wish to hear in order to make up his mind. . . .[136]

The American standard referred to is known as the "full", or "objective" standard, and has its origin in the case of *Salgo v. Leland Stanford Jr. University Board of Trustees*.[137] Under this competing standard, a physician is obliged to disclose whatever information a reasonable man in the position of a patient would require in order that he may make a rational decision whether or not to submit to a suggested treatment.

Though the two standards could logically merge, with the reasonable physician disclosing the information required by the reasonable patient, the freedom of a physician operating under the professional standard to ignore a patient's information needs surely increases the likelihood of his doing so. Thus, for the sake of the conceptual uniformity a professional standard gave the law, the patient was quite literally placed at the "reasonable" physician's mercy — whether he chose to be either responsive or oblivious to his patient's information needs.

Early in the survey period, the likelihood of the American objective standard overturning the traditional Canadian subjective standard seemed remote.

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[134] Picard, *supra* note 117, at 139.

[135] Which, of course, it is not. Courts reserve the right at any time to set a higher standard of care than that set by the profession itself. *See, e.g.*, Crits v. Sylvester, [1956] O.R. 132, 1 D.L.R. (2d) 502 (C.A.), *aff'd* [1956] S.C.R. 991, 5 D.L.R. (2d) 601; Johnston v. Wellesley Hosp., [1971] 2 O.R. 103, 17 D.L.R. (3d) 139

[136] *Supra* note 119, at 319, 1 C.C.L.T. at 34, 75 D.L.R. (3d) at 565

[137] 317 P. 2d 170 (Cal. Dist. Ct. App. 1957).

First there was the trial decision in *Reibl*, where Haines J.'s embrace of Morden J.'s ruling in *Kelly* revealed no sympathy whatsoever for the objective standard.[138]

There followed the case of *Cryderman v. Ringrose*,[139] which involved a slightly more onerous subjective standard but only as demanded by its particular facts. The defendant physician performed an operation on the plaintiff to sterilize her. Although his operation involved a new and experimental method which the physician had been developing and involved the risk of silver nitrate damage to the uterus, the plaintiff was not informed of any of this. The damage did occur, with numerous deleterious consequences, and the plaintiff brought a successful action in negligence.

After reviewing the law, Stevenson D.C.J. held the required standard to be "that of a reasonable medical man considering all the circumstances, including the seriousness of the condition, the rules, the patient's capacity to comprehend and decide the question involved and the likely effect on her of the knowledge of the risks involved".[140] The court noted that when, as in the present case, an experimental procedure is employed, "the common law requires a high degree of . . . disclosure to the patient of the fact that the treatment is new and risky."[141] In light of this, the court stated:

> The risk of the interest in the experiment conflicting with the interest in the patient's welfare must necessarily be considered when a doctor is prescribing *his* new process as distinct from the objectivity that is presumed in the use of someone else's new process. The disclosure must be critically analyzed when a new procedure is prescribed by its inventor.[142]

Other important distinctions in this case were that the treatment was elective, that there was no demonstrated necessity in its performance and that the plaintiff, as a nurse, would probably have understood and appreciated information on the nature of the operation.

Emphasizing that this was an exceptional case, the court concluded by following the *Kelly* line with the statement that in "the vast majority

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[138] *Supra* note 125, at 313, 78 D.L.R. (3d) at 42-43:
The scope of this professional duty of care is defined by the evaluation of a variety of interrelated factors which bear uniquely on each case, factors such as the presence of an emergency requiring immediate treatment; the patient's emotional and intellectual make-up, and his ability to appreciate and cope with the relevant facts; the gravity of the known risks, both in terms of their likelihood and the severity of this realization. The difficulty evident for the independent evaluation of these factors by a lay tribunal has caused the law of this jurisdiction to leave the definition of the scope of this duty in any particular case a matter essentially of medical judgment, one to be determined by the Court on the basis of expert medical evidence.

[139] [1977] 3 W.W.R. 109 (Alta Dist. C.). *See also* a similar decision in Dendass (Tylor) v. Yackel, [1980] 5 W.W.R. 727, 12 C.C.L.T. 147 (B.C.S.C.).

[140] *Id.* at 118.

[141] *Id.*

[142] *Id.*

of cases"[143] a doctor would not be liable where he had complied with accepted standards. The only reason that the defendant was unable to rely on such compliance here was that there was no "established practice" for such experimental treatment. The finding of liability was affirmed on appeal.[144]

Perhaps only taking the *Kelly* doctrine to its logical extreme was the decision of the British Columbia Supreme Court in *McLean v. Weir*,[145] in which Gould J. made the pronouncement that "[t]he less the courts try to tell doctors how to practice medicine the better."[146] In that case, the defendant physician, before performing a diagnostic surgical procedure upon the plaintiff, informed him of some of the risks inherent in the process. However, he neglected to mention the "one in a thousand"[147] chance that paralysis might result. Paralysis did in fact occur but the physician was found not liable. Explaining the finding, Gould J. made the following remarks:

> How much to tell a patient has long been an ethical and sometimes a legal problem of the medical profession. Insofar as the communication goes beyond mere communication and touches directly upon health and treatment, the communication is part of the therapy of medicine. The less the courts try to tell doctors how to practice medicine the better. As was held in *Kenny v. Lockwood* . . . , barring negligence in word or economy of truth the bona fide opinion of a competent practitioner as to what his patient should be told should carry respect of the court to the degree of a sizeable reluctance on the part of the latter to substitute its opinion for that of the doctor. Was there "economy of truth", as used in *Kenny v. Lockwood*, in [the defendant's] failure to warn the patient of a "one in a thousand" chance? No cases were cited to me to suggest any such concept, and I decline to interpret the "informed consent" theory as requiring such remote warnings. I think that a legal requirement for such a warning would deter the effective practice of progressive medicine.[148]

Apparently Gould J. considered that once a communication went "beyond mere communication and touch[ed] directly upon health and treatment", it should be regarded as "part of the therapy of medicine" and outside the issue of informed consent. Gould J. has done no less here than foresaken the policy rationale of the concept of informed consent that a patient is an autonomous person[149] who should make the ultimate decision, based on adequate information, as to whether or not he should accept the treatment proposed. It is wrong to ignore this right simply because the physician in informing his patient of the risks of treatment is performing a therapeutic function.

This judgment was affirmed on appeal,[150] though Carrothers J.A. attempted to restrict his reasons to those established in the more moderate

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[143] *Id.*
[144] [1978] 3 W.W.R. 481, 89 D.L.R. (3d) 32 (Alta. C.A.)
[145] [1977] 5 W.W.R. 609, 3 C.C.L.T. 87 (B.C.S.C.)
[146] *Id.* at 627, 3 C.C.L.T. at 108.
[147] *Id.*
[148] *Id.*
[149] Capron, *supra* note 118, at 364.
[150] [1980] 4 W.W.R. 330 (B.C.C.A.).

case of *Kelly*. The points emphasized were that the defendant's explanation "avoided rare and unexpected complications which would serve only to make the patient anxious and apprehensive",[151] and that the nature and extent of the explanation were "in keeping with the practice of other specialists . . . ".[152]

Thus it came as something of a surprise when the Supreme Court of Canada in *Hopp v. Lepp* broke with the traditional professional standard and approved the application of the American objective standard.

In that case, the defendant orthopaedic surgeon performed a disc operation on the plaintiff in a Lethbridge hospital. The defendant gave an explanation of the operation and then, in response to questions from the plaintiff, told him that the operation was not serious and that he could do it as well as any doctor in Calgary. The plaintiff failed to inform the defendant of the advantage of having the operation performed in Calgary where medical specialists would be available in the event of complications. Thus informed, the plaintiff signed his consent.

Laskin C.J.C. began by disapproving of the reasons for judgment of the Ontario case of *Male v. Hopmans*,[153] in which Aylesworth J.A. held that a physician was under no duty to disclose the particular risk where, in the physician's opinion, the patient was too ill to give consideration to the form of imperative therapy. Laskin C.J.C. proceeded then to defend the new standard against which disclosure of Canadian physicians is to be measured:

> I am far from persuaded that the surgeon should decide on his own not to warn of the probable risk of hearing or other impairment if the course of treatment contemplated is administered. A surgeon is better advised to give the warning, which may be coupled with a warning of the likely consequence if the treatment is rejected. The patient may wish to ask for a second opinion, whatever be the eminence of his attending physician. It should not be for that physician to decide that the patient will be unable to make a choice and, in consequence, omit to warn him of risks.[154]

Defining "probable" risks as "those that, if [the patient] was informed about them, would reasonably be expected to affect the patient's decisions to submit or not to a proposed operation or treatment",[155] the Chief Justice equated such risks with "material risks" and quoted with approval from the American case of *Canterbury v. Spence*[156] that "[a] risk is . . . material when a reasonable person, in what the physician knows or should know to be the patient's position, would be likely to attach significance to the risk or cluster of risks in deciding whether or not to undergo the proposed therapy."[157]

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[151] *Id.* at 336.
[152] *Id.*
[153] [1967] 2 O.R. 457, 64 D.L.R. (2d) 105 (C.A.).
[154] *Supra* note 122, at 208, 13 C.C.L.T. at 85, 112 D.L.R. (3d) at 79-80.
[155] *Id.* at 208, 13 C.C.L.T. at 85, 112 D.L.R. (3d) at 80.
[156] 464 F. 2d 772 (D.C. Cir. 1972).
[157] *Supra* note 122, at 208, 13 C.C.L.T. at 85, 112 D.L.R. (3d) at 80.

The materiality of a risk is a question of fact. "[E]vidence of medical experts of custom or general practice as to the scope of disclosure cannot be decisive, but at most a factor to be considered."[158] The particular risks to be disclosed must be determined "in relation to the circumstances of each particular case",[159] with special attention to be given to the gravity of the consequences should the risk materialize.[160] Risks inherent in any procedure need only be disclosed where required by specific questions. The physician's duty is to disclose risks that are or should have been known to the physician "and which are unknown to his patient".[161]

In *Reibl*, Laskin C.J.C. offered justification and further explanation of the new position:

> To allow expert medical evidence to determine what risks are material and, hence, should be disclosed and, correlatively, what risks are not material is to hand over to the medical profession the entire question of the scope of the duty of disclosure, including the question whether there has been a breach of that duty. Expert medical evidence is, of course, relevant to findings as to the risks that reside in or are a result of recommended surgery or other treatment. It will also have a bearing on their materiality but this is not a question that is to be concluded on the basis of the expert medical evidence alone. The issue under consideration is a different issue from that involved where the question is whether the doctor carried out his professional activities by applicable professional standards. What is under consideration here is the patient's right to know what risks are involved in undergoing or foregoing certain surgery or other treatment.[162]

Commentators have argued that the decisions in *Hopp* and *Reibl* are so imprecise on this question that the issue has not been resolved.[163] Admittedly, the Supreme Court was not as explicit as could have been expected. However, in light of its approval of *Canterbury* and reference to the inviolability of the person, the unavoidable implication is that the objective standard of disclosure has been established in Canada.

Standard for causation

Where there has been a breach of a physician's duty of disclosure, sounding in negligence, the court must determine whether or not the patient would have withheld his consent had he been properly informed.

Until recently, Canadian courts applied a subjective standard to evaluate the causal link, focussing on the individual patient, attempting to appreciate his perspective so as to be able to determine what he would have decided. As commented upon elsewhere,[164] this subjective standard

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[158] *Id.* at 209, 13 C.C.L.T. at 86, 112 D.L.R. (3d) at 80.
[159] *Id.* at 210, 13 C.C.L.T. at 87, 112 D.L.R. (3d) at 81.
[160] *Id.* at 209, 13 C.C.L.T. at 86, 112 D.L.R. (3d) at 81.
[161] *Id.* at 196, 13 C.C.L.T. at 73, 112 D.L.R. (3d) at 70.
[162] *Supra* note 10, at 894-95, 14 C.C.L.T. at 16-17, 114 D.L.R. (3d) at 13.
[163] *See, e.g.*, Magnet, *supra* note 117.
[164] Picard, *supra* note 117, at 142.

checked the broader range of discretion allowed a physician by the professional standard of disclosure.

The subjective standard had its defects, however, as was clearly brought out in *Canterbury*:

> [A] technique which ties the factual conclusion on causation simply to the assessment of the patient's credibility is unsatisfactory. . . . [When] causality is explored at a post-injury trial with a professedly uninformed patient, the question whether he actually would have turned the treatment down if he had known the risks is purely hypothetical. . . . [The] answer which the patient supplies hardly represents more than a guess, perhaps tinged by the circumstances that the uncommunicated hazard has in fact materialized.
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> . . . .
>
> In our view, this method of dealing with the issue on causation comes in second-best. It places the physician in jeopardy of the patient's hindsight and bitterness. It places the fact finder in the position of deciding whether a speculative answer to a hypothetical question is to be credited. It calls for a subjective determination solely on testimony of a patient-witness shadowed by the occurrence of an undisclosed risk.[165]

Recognizing such defects, two recent decisions[166] deviated from the subjective standard precedent, developing in its stead some interesting measures half-way toward an objective standard.

The first was that of the Ontario Court of Appeal in *Reibl*, which weighed the Canadian subjective standard against the American objective standard as developed in the cases of *Canterbury*, *Cobbs v. Grant*[167] and *Barnette v. Potenza*.[168] This was Brooke J.A.'s conclusion: "It is never too late in the day to change. I think a safe practice here is to test the plaintiff's case objectively before proceeding to consider it subjectively."[169]

In *Petty v. MacKay*,[170] the British Columbia Supreme Court followed this lead. *Petty* was a case of elective cosmetic surgery to the abdomen of a professional nude dancer, which, though performed with satisfactory skill and care, was unsuccessful.

The court found that the plaintiff had not been properly informed of the risks of such surgery. Referring to the decision in *Reibl*, Anderson J. felt that insofar "as the state of the law seems uncertain",[171] he was free to apply the objective standard formulated in *Cobbs* to the question of causality to be qualified only by the consideration that "the particular circumstances of each plaintiff must be taken into consideration in applying the objective test".[172] The balance envisaged in this case was to look to a patient's hindsight evidence only

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[165] *Supra* note 156, at 790-91.
[166] *See also Dendass (Tylor)*, *supra* note 139.
[167] *Supra* note 128.
[168] 359 N.Y.S. 2d 432 (Sup. Ct. 1974).
[169] *Supra* note 127, at 27, 6 C.C.L.T. at 243, 89 D.L.R. (3d) at 125.
[170] 14 B.C.L.R. 382, 10 C.C.L.T. 85 (S.C. 1979).
[171] *Id.* at 392, 10 C.C.L.T. at 97.
[172] *Id.*

> where the objective test created a situation of uncertainty. If on an objective analysis it appeared that the scales were evenly balanced, the scales might be tipped in favour of a plaintiff who gave "hindsight" evidence that she would not have consented if she was aware of the risks.[173]

The decision of the Supreme Court in *Reibl* swept aside the traditional subjective standard, ignored the transitional approach begun by Brooke J.A. and laid down a purely objective standard. In the words of Laskin C.J.C.:

> If the Canadian case law has so far proceeded on a subjective test of causation, it is in courts rather than this one that such an approach has been taken. . . . [T]he matter is *res integra* here. . . . I think it is the safer course on the issue of causation to consider objectively how far the balance in the risks of surgery or no surgery is in favour of undergoing surgery.[174]

The Chief Justice went on to emphasize that as with the application of any objective standard, the circumstances of the particular patient are still relevant.

> [T]he objective standard would have to be geared to what the average prudent person, in the patient's particular position, would agree to or not agree to, if all material or special risks of going ahead with the surgery or foregoing it were made known to him. Far from making the patient's own testimony irrelevant, it is essential to his case that he put his own position forward.[175]

Applied to the facts of this case, the circumstances found relevant to the issue of causation were that Reibl was within one and a half years of pension eligibility, that there was neither a neurological deficit nor any emergency, that the risks of surgery were material and that the procedure was not aimed at alleviating the patient's primary complaint of migraine headaches.

This objective standard is logically superior to the subjective standard.[176] Stripped of the protection of unverifiable personal experience, both patient and physician may be evaluated by the court against the court's own experience. Moreover, the increased burden the objective standard places on a patient alleging a causal element balances the increased burden the standard places on the treating physician at the time of risk disclosure.

(ii) *Inherently dangerous drugs*

In *Crossman v. Stewart*,[177] the defendant physician, upon discovering that the drug chloroquine could cause permanent blindness, had the plaintiff for whom he had prescribed the drug examined by an

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[173] *Id.* at 392, 10 C.C.L.T. at 96-97.

[174] *Supra* note 10, at 897-98, 14 C.C.L.T. at 19-21, 114 D.L.R. (3d) at 15-16.

[175] *Id.* at 899, 14 C.C.L.T. at 21, 114 D.L.R. (3d) at 16.

[176] It has been applied most recently in Videto v. Kennedy, 4 Legal Med. Q. 44 (Ont. C.A. 1981), *rev'g* 27 O.R. (2d) 747, 107 D.L.R. (3d) 612 (H.C. 1980).

[177] 5 C.C.L.T. 45, 82 D.L.R. (3d) 677 (B.C.S.C. 1977).

ophthalmologist. However, because the defendant was ignorant of the fact that the plaintiff had continued to use the drug after the prescription had expired, he failed to interpret the ophthalmologist's report correctly. As a result, the plaintiff was never warned of its dangerous side effects. Illegally obtaining the drug from a drug company salesman, the plaintiff continued to use the drug and ultimately suffered permanent blindness.

In imposing liability, Henderson J. of the British Columbia Supreme Court stated that

> the standard of care required is not a standard of perfection. On the other hand, the standard of care, having regard to the inherent danger involved in the use of the drug, must, of necessity, be very high. In other words, the standard of care is much higher in cases where the use of a drug may cause substantial permanent damage.[178]

By failing to recognize that the ophthamologist's report indicated that the plaintiff was taking the drug on her own, albeit without a prescription, the defendant had failed to discharge the high duty of care imposed on him when treatment involved the use of a potentially dangerous drug.

In the circumstances of this case, the defendant was found only one-third at fault. For imprudently procuring medication illegally and taking it beyond the period of time prescribed, the plaintiff was two-thirds liable.

(iii) *Psychiatric negligence*

In *Harris v. Bellisimo*,[179] the Ontario High Court considered the question of how a psychiatrist or psychologist should treat a patient who has shown a suicidal intent.

In that case the plaintiff's husband, while being treated as an out-patient for paranoid schizophrenia by the co-defendant psychiatrist and psychologist, shot and killed himself. At the time of his suicide, except for his known purchase of a shotgun, the deceased was considered to be stable by the psychologist, who, three days before, under the psychiatrist's instructions, had conducted a complete assessment. There had been a serious altercation during the assessment but the plaintiff's husband surrendered the shotgun and the psychologist was of the opinion that, all factors considered, there was no need for hospitalization. After the assessment, however, the plaintiff's husband acquired a second gun and committed suicide, leaving his wife an apparently "rational" suicide note.

The plaintiff brought an action in negligence against both the psychiatrist and the psychologist, but was successful against neither. Against the psychiatrist, it was argued, *inter alia*, that he ought to have played a more active role in the assessment, having regard to the relative

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[178] *Id.* at 56, 82 D.L.R. (3d) at 686.

[179] 18 O.R. (2d) 177, 82 D.L.R. (3d) 215 (H.C. 1977) (Griffiths J.).

inexperience of the psychologist on whom he had relied. This argument was rejected by the court, which found that the psychiatrist was fully justified in his confidence in the psychologist's competence and that his instructions to him in regard to the assessment had been "clear, concise, unambiguous and not open to misinterpretation".[180]

Against the psychologist it was argued, *inter alia*, that he should be liable for his error in judgment in not hospitalizing the husband. Williams J. noted first that such a step involved disadvantages as well as advantages:

> Obviously, if the therapist feels that there is a real risk of suicide or is in doubt about this, he should opt for hospitalization. On the other hand, modern psychiatry recognizes that close observation, restrictions, restraint of the patient may be anti-therapeutic and aggravate the feelings of worthlessness which, in themselves, intensify the risk of suicide. In this case there was the risk that hospitalization, whether voluntary or involuntary, would have been a blow [to the patient's] self-esteem and pride, would have interfered with his long-term vocational rehabilitation and, most significantly, would have destroyed the strong therapeutic bond that existed between [the patient] and [the psychologist].[181]

The court found that in deciding not to hospitalize the husband following his purchase of the first gun, the psychologist had acted in acccordance with the accepted practice of psychology and psychiatry at the time and was therefore not liable for his error in judgment.[182] Expert evidence indicated that, in general, when a gun is taken from a mentally ill patient, the patient does not go out and purchase another. Moreover, the court found that the husband had genuine reasons for being depressed,[183] so that his decision to commit suicide was not "irrational".[184] In these circumstances, it was reasonable as a matter of common practice for the psychologist to have believed that his therapeutic relationship with the husband was intact.

The decision seems good both on its facts and as a matter of policy. To impose liability in such a case would probably lead psychiatrists and psychologists to hospitalize patients for the slightest cause, merely to protect themselves from liability. The damage this would cause the

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[180] *Id.* at 192, 82 D.L.R. (3d) at 230.

[181] *Id.* at 194, 82 D.L.R. (3d) at 233.

[182] *Cf.* Worth v. Royal Jubilee Hosp., 4 Legal Med. Q. 59 (B.C.C.A. 1981) in which an attending psychiatrist was found not liable for the injuries suffered by his patient because he met his professional duty of reasonable skill and care.

[183] The plaintiff's husband was underemployed, in financial difficulty and in fear of destitution for his family.

[184] *Cf.* Swami v. Lo, 10 B.C.L.R. 41, 11 C.C.L.T. 210, 105 D.L.R. (3d) 451 (S.C. 1979) (Gould J.) in which suicide was found to constitute *novus actus interveniens* where the deceased had been suffering from depression but had "had much to be depressed about".

patients and their families surely would outweigh the dubious benefits of such overly zealous hospitalizing.[185]

2. *Schools*

Early in the survey period several decisions demonstrated the policy of Canadian courts of imposing a very high standard of care on those responsible for children at school.[186] Specifically, the general rule is that school staff are obliged to act as "a careful and prudent parent"[187] would.[188]

The situations in which this standard of care is imposed were extended in *Geyer v. Downs*.[189] In this case, a pupil was injured in the school playground. Notwithstanding that the injury occurred *before* the commencement of classes, the court held the school liable.[190]

In *Pellerin v. Herbert*,[191] the New Brunswick Court of Queen's Bench seemed to impose a school's high standard on a member of the

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[185] *Cf.* Tarnsoff v. Board of Regents of Univ. of Cal., 13 Cal. 3d 177, 118 Cal. Rptr. 129, 529 P. 2d 553 (1974), *varied on rehearing*, 17 Cal. 3d 425, 131 Cal. Rptr. 14 (1976), discussed in the previous *survey*, *supra* note 1, at 220-21. For analyses of the rehearing, *see* Sloan & Klein, *Psychotherapeutic Disclosures: A Conflict Between Right and Duty*, 9 U. TOLEDO L. REV. 57 (1978); Olander, *Comment*, 15 SAN DIEGO L. REV. 265 (1978); *Notes* in 29 HASTINGS L.J. 179 (1977), 126 U. PA. L. REV. 204 (1977).

[186] For cases on the general liability of schools, *see* Piszel v. Board of Education for Etobicoke, 16 O.R. (2d) 22, 77 D.L.R. (3d) 52 (C.A. 1977) (high school held liable for student's injury suffered while wrestling at a competitive level without proper wrestling mats); Carrière v. Board of Gravelbourg School Dist. No. 2244 of Sask., [1977] 5 W.W.R. 517, 79 D.L.R. (3d) 662 (Sask. C.A.) (school authority held liable for damages sustained by teacher injured on a snow bank which she had to climb in the course of supervising children using a skating rink); Cropp v. Potashville School Unit No. 25, 4 C.C.L.T. 12, 81 D.L.R. (3d) 115 (Sask. Q.B. 1977) (Noble J.) (school held liable to student who fell on temporary walkway of loose crushed stone which defendant admitted was unsafe); Boese v. Board of Education of St. Paul's Roman Catholic Separate School Dist. No. 20, 97 D.L.R. (3d) 643 (Sask. Q.B. 1979) (especially onerous obligation on school authorities to supervise pupils participating in athletic activities).

[187] For developments in standard of care for parents, *see* Floyd v. Bowers, 6 C.C.L.T. 65, 89 D.L.R. (3d) 559 (Ont. H.C. 1978); Lelarge v. Blakney, 23 N.B.R. (2d) 669, 44 A.P.R. 669, 92 D.L.R. (3d) 440 (C.A. 1978).

[188] *See, e.g.*, Eaton v. Lasuta, 2 C.C.L.T. 38, 75 D.L.R. (3d) 476 (B.C.S.C. 1977) (Murray J.) (plaintiff, "a tall [pre-teenage] girl, unco-ordinated, gangling, awkward and not athletically inclined" injured during "piggy-back" race at school sports day; school not negligent since a careful and prudent parent "would not hesitate to allow his 12-year-old daughter to engage in a 'piggy-back' race on a grass hockey field on a sunny afternoon"). *See also* Myers v. Peel County Bd. of Education, 5 C.C.L.T. 271 (Ont. C.A. 1978), *aff'd* 37 N.R. 227, 123 D.L.R. (3d) 2 (S.C.C. 1981).

[189] 17 A.L.R. 408, 52 A.L.J.R. 142 (H.C. 1977).

[190] *Cf.* Bourgeault v. Board of Education of St. Paul's Roman Catholic School Dist. No. 20, 82 D.L.R. (3d) 701 (Sask. Q.B. 1977) (Hughes J.) (school held not liable to plaintiff student who fell from a ladder in gymnasium while unsupervised 20 minutes after class had been dismissed).

[191] 18 N.B.R. (2d) 631 (Q.B. 1977) (Richard J.).

public who entered a school yard. In that case, the defendant drove his truck into the school yard to pick up his granddaughters and injured a child. Holding the defendant liable in negligence, Richard J. stated:

> The duty of a driver of a vehicle in a school yard, at noon time when some 300 children are expected to leave the school, is indeed one close to absolute liability. I would place it in an even higher category than the duty to drivers of busses [*sic*] or automobiles on the road in areas where children usually gather. . . .[192]

3. *The Young*

While the well established subjective criterion of responsibility for negligent children[193] has been confused during the survey period, it seems to have emerged intact.[194]

The principle was affirmed by the Ontario High Court in *Walker v. Sheffield Bronze Powder Co.*[195] The issue in that case was whether a nine-year-old child was contributorily negligent when he entered the defendant's premises, opened a barrel stored inside and lit a match to the airhole, igniting the contents of the barrel, exploding it and injuring himself. In a conclusion that, it is submitted with respect, flies in the face of common sense, Holland J. held that the case was "borderline" and absolved the plaintiff of any contributory negligence.[196]

In the Supreme Court of Canada case of *Wade v. C.N.R.*,[197] Laskin C.J.C., dissenting,[198] further considered this question of subjective responsibility. At trial the plaintiff, a mentally retarded eight-year-old boy, was found not contributorily negligent in attempting to mount a

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[192] *Id.* at 635.

[193] *See* McEllistrum v. Etches, [1956] S.C.R. 787, 6 D.L.R. (2d) 1

[194] In Childs v. Ramey, 23 N.S.R. (2d) 259, 32 A.P.R. 259 (S.C. 1977) (Cowan C.J.T.D.), the subjective criterion was applied to the plaintiff child, a seven and one half-year-old cyclist. In *Childs*, the plaintiff was held entirely responsible for the accident. In Bernard v. Thompson, 12 Nfld. & P.E.I.R. 452 (P.E.I. S.C. 1976) (Trainor C.J.P.E.I.), a child mini-bicyclist was found guilty of contributory negligence with no apparent account being taken of her age. In Pellerin v. Herbert, *supra* note 191, the objective standard of "a normal 12-year-old child" was applied to the plaintiff. In Guimond v. Gallant, 19 N.B.R. (2d) 23, 30 A.P.R. 243 (Q.B. 1977), however, the same judge, Richard J., applied the subjective standard, after a detailed analysis of the subject. To confuse matters entirely, Richard J. reverted to the objective formula of "a 12-year-old child" in Martin v. Theriault, 19 N.B.R. (2d) 280, 30 A.P.R. 280 (Q.B. 1977), although he referred to *McEllistrum* at a later stage in his judgment. In Strehlke v. Camenzind, [1980] 4 W.W.R. 464, 111 D.L.R. (3d) 319 (Alta. S.C.), the subjective criterion was applied to the defendant young children who had set fire to a house while playing with matches.

[195] 16 O.R. (2d) 101, 2 C.C.L.T. 97, 77 D.L.R. (3d) 377 (H.C. 1977)

[196] *Id.* at 109, 2 C.C.L.T. at 108, 77 D.L.R. (3d) at 385

[197] [1978] 1 S.C.R. 1064, 3 C.C.L.T. 173, 80 D.L.R. (3d) 214

[198] Spence and Dickson JJ. concurred with Laskin C.J.C. The majority, because it absolved the defendant of liability, did not address the issue of the plaintiff's contributory negligence.

moving freight train. The Nova Scotia Appeal Division reversed this finding.[199] MacKeigan C.J.N.S. stated that he could "not imagine that a normal eight-year-old boy would not know that it was highly dangerous to jump on a train".[200]

Laskin C.J.C. rejected this approach, stating that he could

> not see how an issue of a particular child's capability for negligence can be considered on a so-called normal basis of age only, if the evidence shows that the child's intelligence and education point to a capacity below that of other children of his age.[201]

Laskin C.J.C. quoted the *Restatement of the Law of Torts*[202] as supporting such a proposition. Considering the plaintiff's particular circumstances, Laskin C.J.C. could not find any basis

> for the Appeal Division's substitution of its own view of the matter, a view based on an objective test and, moreover, a view not informed by the opportunity and advantage of seeing and hearing the boy. It was the jury that had this very important opportunity and advantage, and it was the jury alone that was in a position to take it into account in coming to the conclusion on the question of capacity.[203]

This affirmation of the subjective approach is significant in that it is the only recent pronouncement of a Supreme Court Justice on the question.

In *Teno v. Arnold*,[204] the Supreme Court of Canada upheld Zuber J.A.'s "pied piper" theory of liability for adults attracting and imperilling children that was imposed at the Court of Appeal level.[205]

The defendant in the case was an ice cream street vendor who used lights and bells on his truck to attract his infant clientele. A small child was injured when crossing the road with his mother after purchasing an ice cream. Finding that, as a single operator, the defendant could not sell ice cream and ensure that his customer crossed the road safely, Zuber J.A. held him partially liable[206] for the child's injuries, explaining that "[a] pied piper cannot plead his inability to take care of his followers when it was he who played the flute."[207] This aspect of the case was affirmed by the Supreme Court of Canada.[208]

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[199] 14 N.S.R. (2d) 541 (C.A. 1976).

[200] *Id.* at 575.

[201] *Supra* note 197, at 1076, 3 C.C.L.T. at 181, 80 D.L.R. (3d) at 223.

[202] 2 RESTATEMENT OF THE LAW OF TORTS 283 (American Law Institute 1st ed.) and 2 RESTATEMENT OF THE LAW OF TORTS 283A (American Law Institute 2nd ed.).

[203] *Supra* note 197, at 1076, 3 C.C.L.T. at 182, 80 D.L.R. (3d) at 223.

[204] [1978] 1 S.C.R. 287, 3 C.C.L.T. 272, 83 D.L.R. (3d) 609.

[205] 11 O.R. (2d) 585, 67 D.L.R. (3d) 9 (C.A. 1976).

[206] Zuber J.A. found that the mother was also at fault.

[207] *Supra* note 205, at 594, 67 D.L.R. (3d) at 18.

[208] The finding of fault on the part of the mother was reversed on the facts.

4. *The Disabled*

In *Crawford v. City of Halifax*[209] the partially blind plaintiff fell over a video camera lying beside an open manhole.[210] The defendant, who had set up the camera to monitor sewer activity, had placed pylons nearby to warn pedestrians of the danger.

Relying on the leading English authority of *Haley v. London Electricity Board*,[211] the Nova Scotia Supreme Court found that the precautions were inadequate and imposed liability. Glube J. considered that the plaintiff "might not have touched the pylons or the T.V. camera"[212] even if he had been using a cane and so was not contributorily negligent.

B. *Proof of Negligence*

1. *Res Ipsa Loquitur*[213]

(a) *Medical Malpractice*[214]

Hobson v. Munkley[215] offers a clear judicial analysis of *res ipsa loquitur* in the medical context.[216] In this case the defendant surgeon performed a tubal ligation on the plaintiff, removing the Fallopian tube and ovary and performing a biopsy on a cyst. Prior to this operation, the

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[209] 27 N.S.R. (2d) 202, 41 A.P.R. 202, 81 D.L.R. (3d) 316 (S.C. 1977) (Glube J.).

[210] It is possible that the plaintiff simply fell into the manhole.

[211] [1965] A.C. 778, [1964] 3 All E.R. 185 (H.L. 1964).

[212] *Supra* note 209, at 211, 41 A.P.R. at 211, 81 D.L.R. (3d) at 324.

[213] Undiscussed reported cases in which the maxim of *res ipsa loquitur* was a primary issue include: Temple v. City of Melville, [1978] 5 W.W.R. 671, 7 C.C.L.T. 1 (Sask. Dist. C.), *aff'd* [1979] 6 W.W.R. 257, 105 D.L.R. (3d) 305 (Sask. C.A.) (flood causing break in municipal water main held an occurrence that could have happened without negligence); Guerard Furniture Co. v. Horton, 90 D.L.R. (3d) 379 (B.C. Cty. Ct. 1978) (maxim held not to apply where cause of accident unknown); Elfassy v. Sylben Invs. Ltd., 21 O.R. (2d) 609, 91 D.L.R. (3d) 96 (H.C. 1978); Pleasant Valley Motel (1972) Ltd. v. LePage, 94 D.L.R. (3d) 73 (B.C.S.C. 1979) (fire of unknown origin starting in defendants' truck and spreading to plaintiff's motel held not to give rise to maxim); Smith v. Gray, 22 A.R. 163, 100 D.L.R. (3d) 487 (S.C. 1979) (gross negligence causing injury to gratuitous passenger); Genik v. Ewanylo, [1980] 6 W.W.R. 158, 12 C.C.L.T. 121 (Man. C.A.) (maxim applied to find gross negligence).

[214] Undiscussed reported cases involving consideration of the maxim of *res ipsa loquitur* in the medical context include: *Kangas*, *supra* note 116 (unknown cause of death; maxim inapplicable); *Kapur*, *supra* note 116; Dunn v. Young, 19 O.R. (2d) 708, 86 D.L.R. (3d) 411 (Cty. Ct. 1977); Rietze v. Bruser (No. 2), [1979] 1 W.W.R. 31 (Man. Q.B. 1978) (doctor failing to show performance of bone graft consistent with no negligence). For a thorough academic analysis of *res ipsa loquitur* in the medical context, *see* E. PICARD, *supra* note 115, at 204.

[215] 14 O.R. (2d) 575, 74 D.L.R. (3d) 408 (H.C. 1976).

[216] Professor Jacobs praised the decision for its "careful analysis of the maxim and [its] logical application of it". *See* Jacobs, *Annotation*, 1 C.C.L.T. 163 (1977).

plaintiff's left ureter was in good condition; afterwards, inexplicably, it was not.

The plaintiff's argument of *res ipsa loquitur* failed. Krever J. for the Ontario High Court noted that while "[t]he view that once prevailed, that *res ipsa loquitur* has no application in malpractice cases has been rejected by our Courts",[217] the doctrine was not applicable to the facts of the case.

> It cannot be said, as a matter of common experience, that a ureter is not damaged in the course of the surgical removal of an ovary, Fallopian tube and connecting endometrial tissue and the placing of a mattress suture to control the bleeding, unless the surgeon fails to use reasonable care.[218]

Moreover, expert evidence adduced by the plaintiff was such that there was no other reasonable conclusion than that the defendant had acted reasonably in performing the surgical procedure. The court emphasized that the effect of *res ipsa loquitur* is to give rise to a permissible inference, rather than a presumption, of negligence.[219]

(b) *Products Liability*

On the question of the application of *res ipsa loquitur* in the products liability context, *MacLachlan & Mitchell Homes Ltd. v. Frank's Rentals & Sales Ltd.*[220] is noteworthy. In this case the plaintiff's residential apartment was damaged substantially by a fire. At trial, the fire was found to have originated in a television set manufactured by the co-defendant corporation. However, the set itself had been so damaged by the fire that it could yield no evidence.

The plaintiffs argued *res ipsa loquitur*, with the proposed effect of imposing strict liability on the defendant manufacturer. Rejecting such a claim, Clement J.A. for the Alberta Court of Appeal held that "[t]o impose strict liability here on [the defendant] would be tantamount to making it an insurer which is not to be countenanced."[221]

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[217] *Supra* note 215, at 583, 74 D.L.R. (3d) at 416, citing Nesbitt v. Holt, [1953] 2 S.C.R. 143, [1953] 1 D.L.R. 671 and *Crits*, *supra* note 135.

[218] *Id.* at 584, 74 D.L.R. (3d) at 418.

[219] To similar effect, *see also Holmes*, *supra* note 116; *cf. McLean*, *supra* note 145, at 614, 3 C.C.L.T. at 94, where Gould J. considered the effect of *res ipsa loquitur* to be "that the onus was on the defendant to provide a reasonable explanation of a way in which the accident may have happened without negligence on his part, it not being necessary for the defendant to prove the accident did in fact happen in the way suggested . . . ".

[220] 10 C.C.L.T. 306, 106 D.L.R. (3d) 245 (Alta. C.A. 1979).

[221] *Id.* at 330, 106 D.L.R. (3d) at 262.

C. *Duty*[222]

1. *A Restatement*

The decision of the House of Lords in *Anns v. London Borough of Merton*[223] merits attention for its clear restatement of the proper approach to the issue of duty. In that case Lord Wilberforce stated that following *Donoghue v. Stevenson*,[224] *Hedley Byrne & Co. v. Heller & Partners Ltd.*[225] and *Home Office v. Dorset Yacht Co.*,[226]

> the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise. . . .[227]

This statement emphasizes the gradual shift in focus in the issue of duty from the positive to the negative: liability is subject to policy considerations that can "reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which it may give rise . . ."[228]

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[222] Undiscussed reported cases in which the concept of duty was a primary issue include: Voyageur Prov. Inc. v. Guidolin, [1977] 2 S.C.R. 112, 14 N.R. 495 (duty of bus driver to keep proper lookout); Surrey v. Church, 76 D.L.R. (3d) 721 (B.C.S.C. 1977), *aff'd* [1979] 6 W.W.R. 289, 101 D.L.R. (3d) 218 (B.C.C.A.), *leave to appeal to S.C.C. granted*, 10 C.C.L.T. 226n. (1979) (duty of engineer engaged by architect to site owner); Toews v. MacKenzie, [1977] 6 W.W.R. 725, 81 D.L.R. (3d) 302, *aff'd* [1980] 4 W.W.R. 108, 12 C.C.L.T. 263 (B.C.C.A.) (duty of warden to third party in respect of damages caused by inmate temporarily released on his authorization); Attorney-General for Ontario v. Keller, 19 O.R. 695, 86 D.L.R. (3d) 426 (H.C. 1978) (duty of fleeing driver to police officer injured in giving chase); Mason v. Morrow's Moving & Storage Ltd., 5 C.C.L.T. 59, 87 D.L.R. (3d) 234 (B.C.C.A. 1978) (duty of warehouseman to warn of absence of fire insurance); Thomas v. Whitehouse, 24 N.B.R. (2d) 485, 48 A.P.R. 485, 95 D.L.R. (3d) 762 (C.A. 1979) (duty of builders of house to ultimate purchasers); O'Reilly v. Clinch, [1979] 3 W.W.R. 124, 8 C.C.L.T. 188, 99 D.L.R. (3d) 45 (Man. C.A.) (duty of defendant enabling car theft to policeman injured in chase); Reese v. Coleman (No. 1), 3 Sask. R. 38, [1979] 4 W.W.R. 58 (C.A.) (duty of operators of snowmobile club sponsoring race to spectator injured at event); Regina v. Buchinksy, [1981] 1 W.W.R. 88, 13 C.C.L.T. 298 (Man. C.A. 1980) (duty to third parties indirectly injured).

[223] [1977] 2 All E.R. 492, [1977] 2 W.L.R. 1024 (H.L.).

[224] [1932] A.C. 562, 48 T.L.R. 494 (H.L.).

[225] *Supra* note 100.

[226] [1970] A.C. 1004, [1970] 2 All E.R. 294 (H.L.).

[227] *Supra* note 223, at 498, [1977] 2 W.L.R. at 1032.

[228] Dias, *Comment*, [1980] CAMB. L.J. 45, at 48

2. *Crown Liability*

As has been noted elsewhere,[229] the Alberta Court of Appeal decision in *Kwong v. The Queen*[230] is an "exceptionally important" statement on Crown liability.

The case came before the court under The Fatal Accidents Act[231] in respect of a man who had died of carbon monoxide poisoning from a defective central heating system. The furnace had been converted from oil to gas some years earlier, at which time the conversion had been approved by a gas inspector pursuant to regulations under The Gas Protection Act.[232] The plaintiffs argued that the Crown, which maintained an agency designated as the Gas Protection Branch, was liable on two grounds: (1) for the negligence of the inspector in his inspection; and (2) for breach of the Branch's duty to warn of the danger of operating a furnace of the type in question.

At trial, it was held that the inspector had not been negligent in his inspection but that the Crown was liable for the failure of the Branch to warn consumers. By a majority,[233] the Court of Appeal reversed the latter holding of the trial judgment, rejecting Crown liability in this case. Having made a thorough review of the Canadian and English[234] authorities, McGillivray C.J.A. pointed out that "while there is a public duty, and assuming a breach of it, it is not a breach which is actionable at the insistence of any member of the public."[235] Cases in which liability had been imposed[236] were distinguished as having

> all been cases of negligence amounting to a breach of duty at the operating level, constituting misfeasance — in short, individuals were actively negligent in undertaking duties imposed upon them, which duties brought them into direct relationship with the persons who came to be injured or damaged.[237]

Apparently McGillivray C.J.A. was attempting to draw the well recognized distinction between "the legislative or quasi-judicial level"[238] and "the operating level".[239] According to McGillivray C.J.A. the Crown fell within the former category, and thus was immune.

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[229] *Annotation*, 8 C.C.L.T. 5, at 5 (1979).

[230] [1979] 2 W.W.R. 1, 96 D.L.R. (3d) 214 (Alta. C.A. 1978).

[231] R.S.A. 1980, c. F-5.

[232] R.S.A. 1980, c. G-2.

[233] McGillivray C.J.A., Moir, Haddad and Lieberman JJ.A. in the majority; Prowse J.A. dissenting.

[234] Notably Anns v. London Borough of Merton, *supra* note 223.

[235] *Supra* note 230, at 18, 96 D.L.R. (3d) at 230.

[236] Grossman v. The Queen, [1952] 1 S.C.R. 571, [1952] 2 D.L.R. 241; Ostash v. Sonnenberg, 63 W.W.R. 257, 67 D.L.R. (2d) 311 (Alta. C.A. 1968); Dutton v. Bognor Regis Urban Dist. Council, [1972] 1 Q.B. 373, [1972] 1 All E.R. 462 (C.A.); O'Rourke v. Schact, [1976] 1 S.C.R. 53, 55 D.L.R. (3d) 96.

[237] *Supra* note 230, at 18, 96 D.L.R. (3d) at 231.

[238] Welbridge Holdings Ltd. v. Metro Winnipeg, [1971] S.C.R. 957, at 968, [1972] 3 W.W.R. 433, at 441 (1971) (Laskin C.J.C.).

[239] *Id.*

On first impression, however, this aspect of the judgment is confusing. When McGillivray C.J.A. speaks of a breach of a public duty, not actionable at the instance of any member of the public, it sounds very much more like the concept of breach of statutory duty[240] than what the Chief Justice appears actually to have had in mind.

Another aspect of the judgment should be noted. McGillivray C.J.A. was of the opinion that "there is a very great deal to be said"[241] in favour of the criticism by Robertson J.A. of the British Columbia Court of Appeal in *McCrea v. White Rock*[242] of the approach suggested in *Dutton v. Bognor Regis Urban District Council*.[243] Nevertheless, McGillivray C.J.A. did concede that, having regard to recent authority in Canada[244] and England,[245] *Dutton* did apply wherever an inspector entrusted to perform inspections committed active negligence.

The Court of Appeal decision was affirmed by the Supreme Court of Canada.[246]

3. *Municipalities*

Barrat v. North Vancouver[247] is a decision of considerable interest to municipal authorities. The plaintiff cyclist was injured when he rode into a pothole in the street. The pothole was found to be a hazard and the defendant municipality, through its employees, was held to have been aware of its existence.

The defendant municipality argued on the basis of a number of British Columbia cases[248] that it was exempt from liability in such circumstances. Rejecting this contention, Aikins J. for the British Columbia Supreme Court stated:

> The important point . . . is that none of the British Columbia cases is authority for the proposition that the exemption from liability for non-feasance where there is no statutory duty to repair extends to exempt municipalities from the general duty to use reasonable care to protect the public from known dangers in the streets.[249]

With respect to this decision,[250] Professor Klar has noted that Atkin J.'s

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[240] *Cf.* A. LINDEN, CANADIAN TORT LAW 285-99 (1977).
[241] *Supra* note 230, at 19, 96 D.L.R. (3d) at 231.
[242] [1975] 2 W.W.R. 593, 56 D.L.R. (3d) 525 (B.C.C.A. 1974).
[243] *Supra* note 236.
[244] *O'Rourke*, *supra* note 236.
[245] *Anns*, *supra* note 223.
[246] [1979] 2 S.C.R. 1010, [1979] 6 W.W.R. 573, 105 D.L.R. (3d) 576.
[247] 2 C.C.L.T. 157, 79 D.L.R. (3d) 31 (B.C.S.C. 1977) (Aikins J.)
[248] *Cited id.* at 167-68, 79 D.L.R. (3d) at 39-40.
[249] *Id.* at 169, 79 D.L.R. (3d) at 41.
[250] *Cf.* Mitchell v. Vancouver, 15 B.C.L.R. 54, 10 C.C.L.T. 139 (S.C. 1979) (Taylor J.) (no obligation on city to discover hazardous conditions created by others).

> concession that th[e] duty [owed by the municipalities] still does not mean that [they] must repair the streets but only that they must take reasonable steps to prevent the injury from arising will be little comfort to [them]. In most cases the only reasonable and practical step will be to either repair or remove the danger.[251]

Although the trial decision was followed elsewhere,[252] it was reversed on appeal.[253] Robertson J.A., for the Court of Appeal, noted that liability could only arise if the municipality should have known of the dangerous pothole's existence, but the municipality could have known of its existence only if it had made more frequent inspections of the road than it did. As Robertson J.A. pointed out, the frequency of inspection is a matter of policy to be decided by the municipality. Thus for the Court of Appeal, the circumstances negatived the duty which *prima facie* the municipality owed to the plaintiff as a user of the highway.

4. *New Duties*

In *Stermer v. Lawson*,[254] the defendant teenager loaned his 650cc. motorcycle to his friend, the plaintiff. The defendant was aware that the plaintiff was unaccustomed to operating motorcycles of this size but offered no special instruction. The plaintiff took the motorcycle out, lost control and crashed. The issue was whether the defendant, in giving over the motorcycle to the plaintiff as he did, was in breach of a duty of care to the plaintiff.

Fulton J. for the British Columbia Supreme Court imposed liability. Although there was no direct precedent, Fulton J. in his finding drew on analogy with decisions where persons had loaned their automobiles to intoxicated or inexperienced persons.[255]

The defence of *volenti non fit injuria* was rejected. Fulton J. found that since the plaintiff had not been told of the specific dangers involved in operating the motorcycle,

> it was not possible for [him] to appreciate the risk he was undertaking; that being the case, it cannot be said either that he voluntarily assumed that risk or expressly or impliedly agreed to absolve the defendant from the legal consequences thereof.[256]

However, the plaintiff was found fifty percent contributorily negligent. The finding was based on evidence that the plaintiff had admitted that

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[251] *Annotation*, 2 C.C.L.T. 157, at 158 (1977).

[252] Jones v. Vancouver, [1979] 2 W.W.R. 138 (B.C.S.C.).

[253] 5 C.C.L.T. 303, 89 D.L.R. (3d) 473 (B.C.C.A. 1978).

[254] [1977] 5 W.W.R. 628, 3 C.C.L.T. 57, 79 D.L.R. (3d) 366 (B.C.S.C.) (Fulton J.).

[255] Hempler v. Todd, 74 W.W.R. 758, 14 D.L.R. (3d) 637 (Man. Q.B. 1970) (Hall J.); Ontario Hosp. Servs. Comm'n. v. Borsoski, 7 O.R. (2d) 83, 54 D.L.R. (3d) 339 (H.C. 1973) (Lerner J.).

[256] *Supra* note 254, at 639, 3 C.C.L.T. at 70, 79 D.L.R. (3d) at 376.

"he did not consider himself competent or experienced with respect to the control of a smaller 125cc. motorcycle",[257] that he knew that the motorcycle was much more powerful than any he had previously driven and that he had not requested any instruction on its handling or control, inquiring only as to the operation of the transmission.

While the Court of Appeal[258] upheld the finding of liability, it increased the finding of contributory negligence to ninety percent. According to the court, it was apparent that the plaintiff "knew far better than did the [defendant] the extent of his proficiency in riding motorcycles"[259] and that he was aware that the particular motorcycle was beyond his ability.[260]

On the facts and the court's interpretations, it is hard to see why there should be any liability whatsoever. Since the plaintiff received the vehicle with full knowledge of the fact that it was a dangerous machine and that he was not competent to operate it, it would seem that the defence of *volenti non fit injuria* should have succeeded. The plaintiff's ignorance of the specific dangers should not have affected the issue.

The decision is of concern because of its implication that liability may be imposed without real fault in an ordinary social situation.[261] Imposing strict legal obligations with respect to common acts of generosity and friendship seems an unwarranted extension of the law and contrary to the public interest.[262]

Good-Wear Treaders Ltd. v. D. & B. Holdings Ltd.[263] was another decision in which an unprecedented duty was imposed. In that case the defendant supplied tires which were used on a heavy overloaded truck, with the result that the tires failed, causing a fatal collision. The supplier had warned the owner of the truck through its employee that overloading would be dangerous but supplied the tires in the knowledge that they would be used in such a manner.

The Nova Scotia Supreme Court, Appeal Division, imposed liability on the defendant supplier. Distinguishing cases in which suppliers had been held not liable to persons injured by dangerous products where they

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[257] *Id.* at 639, 3 C.C.L.T. at 71, 79 D.L.R. (3d) at 376

[258] [1980] 3 W.W.R. 92, 11 C.C.L.T. 76, 107 D.L.R. (3d) 36 (B.C.C.A. 1979)

[259] *Id.* at 95, 11 C.C.L.T. at 81, 107 D.L.R. (3d) at 39.

[260] *Id.* at 96, 11 C.C.L.T. at 81-82, 107 D.L.R. (3d) at 40.

[261] In the United States there has been a continuing trend of imposing liability on hosts who serve alcoholic beverages at parties where their guests become intoxicated and do damage to themselves or others. For commentary, *see Note*, 56 NEB. L. REV. 951, at 961-62 (1977); *Note*, 8 RUTGERS-CAMDEN L.J. 719 (1977). Liability on commercial purveyors is being extended there with notable enthusiasm. *See, e.g.*, Grasser v. Fleming, 74 Mich. App. 338, 253 N.W. 2d 757 (Ct. Apps. 1977), *noted* in 54 N. DAK. L. REV. 301 (1977); Campbell v. Carpenter, 279 Ore. 237, 566 P. 2d 893 (Sup. Ct. 1977), *noted* in 14 WILLAMETTE L.J. 327 (1978) and 57 ORE. L. REV. 357 (1978). *But see* Griffin v. Sebek, 245 N.W. 2d 481 (S.D. Sup. Ct. 1976), *noted* in 23 S. DAK. L. REV. 227 (1978).

[262] *Cf.* Klar, *Annotation*, 3 C.C.L.T. 59 (1977).

[263] 31 N.S.R. (2d) 380, 52 A.P.R. 380, 8 C.C.L.T. 87, 98 D.L.R. (3d) 59 (C.A. 1978).

had given adequate warning to intermediaries,[264] the court held that the case at bar was

> merely an application of established negligence law to an unusual and rare fact situation — rarely would a seller know that a prospective buyer firmly intended to use a normal and safe product in an unsafe way dangerous to persons other than the buyer, persons who cannot be warned or otherwise protected, such as other users of the highway.[265]

The court found the plaintiff truckers eighty percent contributorily negligent. Nevertheless, the finding of liability, however small, went well beyond any precedent by imposing liability on a supplier where the consumer was presumably a sane adult.[266]

D. *Causation*[267]

1. *Cause-in-Fact*

During the survey period a rather radical English approach to the concept of cause-in-fact found its way into Canada.

In the 1972 case of *McGhee v. National Coal Board*,[268] the House of Lords was concerned with the appeal of a plaintiff who had contracted dermatitis while employed by the defendants to clean out brick kilns. Although the defendants admitted that their failure to supply adequate washing facilities was in breach of their duty and that the disease was attributable to the work performed by the plaintiff, they insisted that it had not been proven that their failure to supply washing facilities had caused the onset of the disease. In a novel, well-received decision,[269] the

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[264] Holmes v. Ashford, [1950] 2 All E.R. 76, 94 Sol. J. 337 (C.A.); Lambert v. Lastoplex Chems. Co., [1972] S.C.R. 569, 25 D.L.R. (3d) 121; Albert v. Breau, 19 N.B.R. (2d) 476, 30 A.P.R. 476 (Q.B. 1977); Thomas v. Arvon Products Co., 227 A. 2d 897 (Penn. S.C. 1967).

[265] *Supra* note 263, at 389, 52 A.P.R. at 389, 8 C.C.L.T. at 97, 98 D.L.R. (3d) at 68.

[266] *See* Klar, *Annotation*, 8 C.C.L.T. 88, at 89-90 (1979).

[267] Undiscussed reported cases in which causation was a primary issue include: MacMillan Bloedel Ltd. v. Foundation Co. of Canada Ltd., [1977] 2 W.W.R. 717, 74 D.L.R. (3d) 294 (B.C.S.C.); Alberta Caterers Ltd. v. R. Vollan (Alta.) Ltd., 10 A.R. 501, 81 D.L.R. (3d) 672 (S.C. 1978), *as varied in* 11 A.R. 181 (C.A. 1977); *Banks*, *supra* note 62; Cruise v. Niessen, [1978] 1 W.W.R. 688, 82 D.L.R. (3d) 190 (Man. C.A.); Yepremian v. Scarborough Gen. Hosp., 20 O.R. (2d) 510, 6 C.C.L.T. 81, 88 D.L.R. (3d) 161 (H.C. 1978), *aff'd* 28 O.R. (2d) 494, 13 C.C.L.T. 105, 110 D.L.R. (3d) 513 (C.A. 1980); Bond v. Loutit, [1979] 2 W.W.R. 154 (Man. Q.B. 1978); *Kwong*, *supra* note 230; *O'Reilly*, *supra* note 222; Holian v. United Grain Growers, [1980] 3 W.W.R. 632, 11 C.C.L.T. 184 (Man. Q.B.), *aff'd* [1980] 5 W.W.R. 501, 13 C.C.L.T. 269 (Man. C.A.) (allegation that plaintiff's doctor was negligent and that *novus actus interveniens* should apply rejected on the facts); Labrecque v. Saskatchewan Wheat Pool, [1980] 3 W.W.R. 558, 110 D.L.R. (3d) 686 (Sask. C.A.); *Strehlke*, *supra* note 194.

[268] [1972] 3 All E.R. 1008, [1973] 1 W.L.R. 1 (H.L.).

[269] *See, e.g.*, Weinrib, *A Step Forward in Factual Causation*, 38 MODERN L. REV. 518 (1975).

court unanimously allowed the appeal. Lord Reid held that there was no difference between a finding that the defendant's breach of duty had materially increased the risk of injury to the plaintiff and a finding that the breach had materially contributed to the injury. By way of explanation, Lord Reid stated that in order to succeed, a pursuer need only show that the fault of the defender

> caused or materially contributed to his injury. There may have been two separate causes but it is enough if one of the causes arose from the fault of the defender. The pursuer does not have to prove that this cause would of itself have been enough to cause him injury.
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> . . . .
>
> [I]t has often been said that the legal concept of causation is not based on logic or philosophy. It is based on the practical way in which the ordinary man's mind works in every-day affairs of life.[270]

The *McGhee* approach now has been introduced into Canada by the Manitoba Court of Appeal in *Powell v. Guttman*.[271] This was a medical malpractice case in which one doctor was held liable for a fracture that had occurred during an operation by another doctor. Although this operation was necessary, the first doctor had failed to appreciate that fact. Relying on *McGhee*, O'Sullivan J.A. held that

> the law in Canada is that, where a tortfeasor creates or materially contributes to a significant risk of injury occurring and injury does occur which is squarely within the risk thus created or materially increased, then unless the risk is spent the tortfeasor is liable for injury which follows from the risk, even though there are often subsequent causes which also cause or materially contribute to that injury.[272]

However dangerous such an approach may seem, *Powell* has at least established a viable alternative to the long-standing, conservative approach taken in *Reed v. Ellis*.[273] In that case, Meredith C.J.C.P., on similar facts and against the jury verdict, had refused to see such a causal link.

Concerning evidence of future loss or damage that an injured plaintiff will suffer as a result of his injury, the courts have been more lax in the degree of proof required. In *Schrump v. Koot*,[274] Lacourcière J.A. stated:

> In this area of law relating to the assessment of damages for physical injury, one must appreciate that though it may be necessary for a plaintiff to prove, on the balance of probabilities, that the tortious act or omission was the effective cause of the harm suffered, it is not necessary for him to prove, on the balance of probabilities, that future loss or damage *will* occur, but only that there is a reasonable chance of such loss or damage occurring.[275]

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[270] *Supra* note 268, at 1010-11, [1973] 1 W.L.R. at 4-5.
[271] *Supra* note 116.
[272] *Id.* at 241, 6 C.C.L.T. at 197, 89 D.L.R. (3d) at 192.
[273] 38 O.L.R. 123, 32 D.L.R. 592 (C.A. 1916).
[274] 18 O.R. (2d) 337 (C.A. 1977).
[275] *Id.* at 339-40.

In *Keough v. Henderson Highway Branch No. 215, Royal Canadian Legion*,[276] the Manitoba Queen's Bench had no difficulty in dismissing the defendant's distorted argument concerning cause-in-fact. There the defendant participant in an organized snowmobile race had caused an accident by his admittedly negligent driving. However, it was his contention that a certain other participant in the race should have been held liable with himself on the ground that he too was a participant. Nitikman J. answered that such mere participation was inadequate to attract liability, finding that even if that participant had been negligent in his driving, he would not be held liable unless such negligence were a cause of the plaintiff's injury. The result was affirmed on appeal.[277]

The action in *Dunsmore v. Deshield*[278] was resolved by the straightforward application of basic causal principles. In that case, the plaintiff, who sustained an eye injury during a game of touch football, established that if the contact lenses supplied by the defendant optometrist had been the damage-resistant type, as had been ordered, the injury would not have occurred. Liability was accordingly imposed.

2. *Multiple Causes*

In *Giffels Associates v. Eastern Construction Co.*,[279] the Supreme Court of Canada held that for joint tortfeasors to recover contribution and indemnity from one another, both must be liable for the loss. The tortfeasor found to be liable will have no action against his fellow tortfeasor who has escaped liability.

It remains unclear whether an action for contribution under section 2(1) of the Negligence Act[280] lies in a contractual setting. The better view would seem to be that expressed by Pigeon J. in his dissent in *Smith v. McInnis*,[281] where he construed the section so as to permit one tortfeasor to recover from another even though the obligation of that other person arose out of a contract. In so doing, His Lordship relied on the theory that a violation of a contract can also constitute "fault or negligence".

In *Ward v. Palmarchule*,[282] the Alberta Supreme Court took a seemingly inappropriate technical approach to a problem of multiple

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[276] 80 D.L.R. (3d) 326 (Man. Q.B. 1977). *See also* Philbin v. Rutley, 4 B.C.L.R. 325 (S.C. 1977) (defendant not liable to plaintiff pedestrian for negligent driving as real cause of accident was plaintiff's failure to walk on proper side of road in poor weather conditions).

[277] [1978] 6 W.W.R. 335, 91 D.L.R. (3d) 507 (Man. C.A.).

[278] 80 D.L.R. (3d) 386 (Sask. Q.B. 1977).

[279] [1978] 2 S.C.R. 1346, 4 C.C.L.T. 143.

[280] R.S.O. 1980, c. 315.

[281] [1978] 2 S.C.R. 1357, 4 C.C.L.T. 154. *See also* Truman v. Sparling Real Estate, 3 C.C.L.T. 205 (B.C.C.A. 1977). *See generally* D. CHEIFETZ, APPORTIONMENT OF DAMAGES UNDER THE ONTARIO NEGLIGENCE ACT (1980).

[282] [1977] 6 W.W.R. 193 (Alta. S.C.). *Cf.* Piluk v. Pearen, 82 D.L.R. (3d) 605 (Sask. Q.B. 1977) (applying principle in Baker v. Willoughby, [1969] 3 All E.R. 1528, [1970] 2 W.L.R. 50 (H.L. 1969) regarding successive injuries).

causation and damages. In that case, the vehicle in which the plaintiff was a passenger was negligently struck by the first defendant's automobile. The impact of this collision brought the first vehicle into the path of the second defendant, resulting in a second collision. Although the second defendant was also negligent in his driving, having failed to have his lights on high beam as called for in the circumstances, the evidence disclosed that he could only have caused "but a small portion, if any, of the injuries"[283] sustained by the plaintiff. The court imposed full liability on the first defendant on the basis that the second collision was a foreseeable consequence of his initial negligent act. However, in the plaintiff's action against the second defendant, the court held that "the question of how much of the total damages must be borne by [the second defendant] is a matter between [the two defendants]."[284] Steer J. considered that "[i]n this area of dispute, the onus . . . lies on [the first defendant] to quantify the amount of damage caused by [the second defendant]."[285] Since he had not done so, it was held that the plaintiff's action against the second defendant had to fail.

The dismissal of the plaintiff's action against the second defendant, who was found by the court to have negligently caused the plaintiff at least some damage, while technically logical, is difficult to accept as applied to these circumstances. The problem of dividing liability between the defendants should not have resulted in the defendant whose negligence caused injury to the plaintiff escaping all civil responsibility.[286]

Penner v. Mitchell[287] covered related ground but with a more satisfying result. There the plaintiff missed three months work as a result of an injury caused by the defendant. However, the court found that the plaintiff would have missed that period of work regardless of the accident because of a heart problem. On this ground the Alberta Court of Appeal denied recovery. In so doing, the court distinguished a leading authority, the House of Lords decision in *Baker v. Willoughby*.[288] In that case, the court held that the circumstances actually gave rise to the injury, whereas in *Penner* they did not.

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[283] *Id.* at 202-03.
[284] *Id.* at 205.
[285] *Id.*
[286] *Cf.* H. HART & A. HONORE, CAUSATION IN THE LAW 209 (1959).
[287] [1978] 5 W.W.R. 328, 6 C.C.L.T. 132 (Alta. C.A.).
[288] *Supra* note 282.

E. *Remoteness and Proximate Cause*[289]

1. *Type of Damage/Possibility of Damage*

In *Workers Compensation Board v. Schmidt*,[290] an employee was held liable in negligence for a tragic chain of events set off by the lighting of a cigarette. The defendant employee and a co-worker were responsible for cleaning a machine. To perform this task they used rags moistened with an inflammable cleaning solution. The defendant, while conversing with the co-worker, lit a cigarette which ignited a rag he held. He dropped the flaming rag and tried to extinguish it with some nearby dry rags, but these also caught fire. The co-worker then tried stamping out the flames, but while he was doing so his trousers caught fire. This second conflagration was put out by both workers. Finally, the co-worker took an armful of rags, which were saturated with the cleaning solution, and tried to smother the original blaze. These ignited and again his trousers caught fire. In a panic, the co-worker doused himself with the contents of a nearby pail. Unfortunately the pail contained the cleaning solution and the man was burned to death.

Imposing liability on the defendant, Morse J. of the Manitoba Queen's Bench found that his original action of lighting the cigarette was clearly negligent and that "the subsequent chain of events followed directly from this negligence . . . and [they] were or should have been reasonably foreseeable by him."[291] The injuries suffered were "of a class or character foreseeable as a possible result of his negligence"[292] and the principle in *Hughes v. Lord Advocate*[293] was held applicable.

Concerning the deceased's contributory negligence, Morse J. stated:

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[289] Undiscussed reported cases in which foreseeability was a primary issue include: Attorney-General for Ontario v. Crompton, 14 O.R. (2d) 659, 74 D.L.R. (3d) 345 (H.C. 1976) (negligent driving causing highway accident and fire); Goldhawke v. Harder, 74 D.L.R. (3d) 721 (B.C.S.C. 1976) (plaintiff refracturing legs injured by defendant); *Williams*, *supra* note 116 (medication prescribed for husband dispensed by pharmacist to wife); Workmen's Compensation Bd. v. Government of Canada, 15 N.R. 181 (F.C. App. D. 1977); *Keough*, *supra* notes 276-77; *Dunsmore*, *supra* note 278; *Alberta Caterers Ltd.*, *supra* note 267; Carmichael v. Mayo Lumber Co., 85 D.L.R. (3d) 538 (B.C.S.C. 1978); Cameron v. Marcaccini, 87 D.L.R. (3d) 442 (B.C.S.C. 1978) (nervous shock from car accident); *Yepremian*, *supra* note 267; *Powell*, *supra* note 116 (surgeon's delay in treating); Falkenham v. Zwicker, 32 N.S.R. (2d) 199, 54 A.P.R. 199, 93 D.L.R. (3d) 289 (S.C. 1978) (kind of damage); Heeney v. Best, 20 O.R. (2d) 71, 11 C.C.L.T. 66, 94 D.L.R. (3d) 451 (C.A. 1979) (knocked down hydro lines cutting power, cutting off oxygen supply to plaintiff's barn, killing chicks); Comstock v. Edmonton Flying Club, [1979] 6 W.W.R. 633 (Alta. C.A.); *Swami*, *supra* note 184; Toy v. Argenti, [1980] 3 W.W.R. 276 (B.C.S.C.).

[290] 80 D.L.R. (3d) 696 (Man. Q.B. 1977) (Morse J.).

[291] *Id.* at 698.

[292] *Id.*, quoting McKenzie v. Hyde, 61 W.W.R. 1, at 15, 64 D.L.R. (2d) 362, at 376 (Man. Q.B. 1967) (Dickson J.).

[293] [1963] A.C. 837, [1963] 1 All E.R. 705 (H.L.).

> [While the deceased was] negligent in using damp rags, which he should have known had been soaked in cleaning fluid, in an attempt to smother the fire, . . . I think that he was acting in a hurry, doing what he thought was best in the circumstances. The further action of [the deceased] in pouring cleaning fluid over his body was, in my opinion, an action taken in an emergency situation, and I think he was not negligent in acting as he did. I do not consider that he could possibly have realized that there was cleaning fluid in the pail, and I conclude that he acted in a panic, without thinking.[294]

However, because it was "not practicable"[295] for the court to determine the respective degrees of responsibility between the defendant and the deceased, the two were held equally responsible.

Considering that the court had held the deceased's act of throwing a pail of cleaning solution over himself not to constitute contributory negligence, and bearing in mind the defendant's relative inaction after his initial act of negligence, this finding of fifty percent contributory negligence seems excessive.

In *Edmonton Flying Club v. Northward Aviation Ltd.*[296] the *Hughes v. Lord Advocate* principle was applied in imposing liability on the installers of defective heating equipment when fire resulted from the incorrect operation of a furnace by unqualified persons. In that case the defendant company installed a furnace on the premises occupied by the plaintiff. The furnace was defective in that when set to a particular position, called the "hand" position, the fan would stop and the furnace would overheat. The defendant company was aware of a possible defect but did not verify its existence. Twenty-seven years after the installation, employees of a company that had rented the premises and had agreed to arrange to service the furnace set it on the "hand" position. The furnace overheated, caused a fire and damaged the plaintiff's property.

Although Moore J. of the Alberta Supreme Court found the tenant company liable, he went on to hold that the behaviour of its employees was "not such a conscious act of volition as would relieve the [defendant installation company] of liability for their negligence".[297]

Applying *Hughes v. Lord Advocate*, Moore J. explained:

> One does not have to foresee the exact means by which damage might occur. . . . [T]he [defendant installation company] should have been able to anticipate that some kind of damage might occur since they suspected a wiring defect. It does not follow that liability is escaped because they could not foresee the exact events that occurred in this case.[298]

As for the fact that twenty-seven years had passed, the court held that "[i]t makes no difference . . . whether it was 1 year or 27 years, if the defect is not easily discernible. The passage of time should not create a protective umbrella."[299]

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[294] *Supra* note 290, at 699.
[295] *Id.*
[296] [1978] 4 W.W.R. 421 (Alta. S.C.).
[297] *Id.* at 448.
[298] *Id.* at 448-49.
[299] *Id.* at 449.

A perverse interpretation of the foresight test was given in the Supreme Court of Canada's decision in *Wade v. C.N.R.*[300] In that case a mentally retarded eight-year-old boy who was playing in some sand near an unfenced railway line lost his leg when he tried to steal a ride on a passing train.

At trial,[301] the railway having admitted its awareness that children played in the area, a jury found the company negligent in its failure to warn, to erect a fence and to remove the sandpiles which were attractive to children. The boy was held incapable of contributory negligence by reason of his retardation.

The Nova Scotia Court of Appeal[302] affirmed this finding of negligence but held the boy fifty percent contributorily negligent.

In the Supreme Court of Canada, the action was dismissed by the majority[303] on the ground that no duty was owed to the boy. Speaking to this issue, one of several in the case, it was de Grandpré J.'s conclusion "that no reasonable occupier could have reasonably foreseen that a child playing on a pile of sand some fifty feet from the track when the engine went by, would leave his place of safety, run towards the track and attempt to jump on the ladder of a box car".[304] To require that an accident be foreseen in such detail before it will be considered foreseeable is harsh and clearly contrary to the modern trend.

The Court of Appeal, in *Wade*, like the courts in *Schmidt* and *Edmonton Flying Club* as well as the Ontario Court of Appeal in *Price v. Milawski*,[305] had relied on the test set down in *McKennzie v. Hyde*,[306] in which the Manitoba Court of Queen's Bench had looked to whether or not "[t]he injury complained of was of a class or character foreseeable as a *possible* result of the negligence."[307]

Rutlan J. of the British Columbia Supreme Court relied on this same statement of the law, which he took in conjunction with *The Wagon Mound (No. 2)*,[308] to decide the case of *Malat v. Bjornson*.[309] In so doing

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[300] *Supra* note 197.

[301] Unreported judgment of Dubinski J. of the Nova Scotia Supreme Court.

[302] 14 N.S.R. (2d) 541 (C.A. 1976).

[303] 6-3.

[304] *Supra* note 197, at 1087, 3 C.C.L.T. at 191, 80 D.L.R. (3d) at 231.

[305] 18 O.R. (2d) 113, 82 D.L.R. (3d) 130 (C.A. 1977), where Arnup J.A. stated:

> [A] person doing a negligent act may, in circumstances lending themselves to that conclusion, be held liable for future damages arising in part from the subsequent negligent act of another, and in part from his own negligence, where such subsequent negligence and consequent damage were reasonably foreseeable as a *possible* result of his own negligence.

Id. at 124, 82 D.L.R. (3d) at 141 (emphasis added).

[306] *Supra* note 292.

[307] *Id.* at 15-16, 61 W.W.R. at 376 (emphasis added).

[308] Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty. Ltd., [1967] 1 A.C. 617, [1966] 2 All E.R. 709 (P.C.) (Aust. 1966).

[309] 6 C.C.L.T. 142 (B.C.S.C. 1978). For a similar decision in British Columbia, *see Leonard*, *supra* note 116, in which a rare medical reaction was held "possible" and not "far-fetched".

he found the provincial government liable for negligent highway construction in building a median only eighteen inches, instead of thirty inches, high and thus not preventing accidents. In a decision that could have easily been written for *Wade*, Rutlan J. concluded that "here there was a real risk, however remote, and it was very simple to remove the risk with no great expense or inconvenience."[310]

A different Commonwealth example of the influence of *The Wagon Mound (No. 2)* is the case of *Shirt v. Wyong Shire Council*,[311] in which it was concluded that

> [i]t could not be said that the kind of injury the plaintiff suffered is remote according to the accepted tests. There was evidence to the accepted tests There was evidence which could have entitled the jury to hold that, if a skier is induced by negligent conduct to ski in waters the depth of which varies from 3 feet 6 inches and 4 feet, there is a foreseeable possibility that if he is thrown off his skis and precipitated head first into the water, he may receive injuries of the kind which occurred.[312]

Whatever the test of foreseeability, applied by the courts, it can offer no magic solutions. In 1973, Professor Linden wrote the following:

> On occasion, courts have been bewitched by the word foresight and, as a result, have arrived at unsatisfactory decisions. They must resist the allure of foreseeability, because its power is largely an illusion. It can be as broad or as narrow as the beholder wishes to make it. It can disguise value choices as much as causation did. If we must use the term foreseeability, we must not allow it to blind us. Foresight does not excuse courts from the onerous responsibility of making difficult decisions.
>
> Simply stated, the remoteness problem is concerned with whether the defendant, whose conduct has fallen below the accepted standard of the community, should be relieved from paying for damage that his conduct helped to bring about. By formulating the question in this way, we spotlight the value choices that are present in the case. We should not disguise the fact that some intuition and feeling are and should be involved in this determination.[313]

In the survey period, this sentiment surfaced in the case of *Duwyn v. Kaprielian*,[314] in which Morden J.A., after an analysis of the case law and academic comment concerning the difficulty of the foresight test, concluded that "there is a significant element of experience and value judgment in the ultimate application of the foresight requirement."[315]

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[310] *Id.* at 152.

[311] [1978] 1 N.S.W.L.R. 631 (C.A.).

[312] *Id.* at 644.

[313] Linden, *Foreseeability in Negligence Law*, in 1973 SPECIAL LECTURES L.S.U.C. 55.

[314] 7 C.C.L.T. 121, 94 D.L.R. (3d) 424 (Ont. C.A. 1978)

[315] *Id.* at 136, 94 D.L.R. (3d) at 437.

2. *The Thin-Skull Problem*[316]

Bishop v. Arts & Letters Club of Toronto[317] was described by Keith J. of the Ontario High Court as "a textbook case of the tortfeasor being forced to accept his victim as he finds him".[318] The plaintiff was injured as a result of the defendant's negligence. His recovery was delayed because he suffered from hemophilia. Recovery to the full extent of his injuries was allowed.

In *Duwyn v. Kaprielian*,[319] the Ontario Court of Appeal applied the principle of the thin-skulled plaintiff, where the defendant had negligently backed his car into a parked car, breaking that other car's windshield and scattering glass throughout the interior. Inside the parked car was a four-month-old infant who, though not physically injured, was badly frightened and began to scream. The infant's mother, upon coming onto the scene, became hysterical, and was thus unable to comfort the infant properly, who continued to cry for several hours. Afterwards, the mother's guilt feelings about the accident, to which she was predisposed by reason of an earlier, similarly guilt-ridden traumatic experience, led her to treat the infant in such a way as to cause the child to undergo additional mental suffering, and, ultimately, an actual personality change.

Explaining how he saw the foresight test as having been satisfied in this case, Morden J.A. stated that

> while it may be true that Mrs. Duwyn's inability to cope effectively with Brent's condition was a result of her own earlier traumatic experience and the guilt feeling flowing from it, and as such would not, of course, be a foreseeable response, what turned out to be the ineffective response of two (for the evidence refers also to the father) conscientious, sensitive and loving parents to Brent's condition cannot realistically be considered to be outside the bounds of reasonable foreseeability.[320]

Morden J.A. went on to liken such ineffective parental care to improper medical treatment, which had been held "within the limits of foreseeability" in the 1941 case of *Mercer v. Gray*.[321]

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[316] For recent criticism of the "thin skull" rule, *see* Rowe, *The Demise of the Thin Skull Rule*, 40 MODERN L. REV. 377 (1977).

[317] 18 O.R. (2d) 471, 83 D.L.R. (3d) 107 (H.C. 1978).

[318] *Id.* at 479, 83 D.L.R. (3d) at 115.

[319] *Supra* note 314.

[320] *Id.* at 140, 94 D.L.R. (3d) at 441.

[321] [1941] O.R. 127, [1941] 3 D.L.R. 564 (C.A.).

3. *Intervening Negligent Medical Treatment*

The fact that the burden of proof rests on the defendant where he alleges intervening negligent medical treatment[322] was recently articulated in *Papp v. Leclerc*.[323] There Lacourcière J.A. stated:

> Every tortfeasor causing injury to a person placing him in the position of seeking medical or hospital help, must assume the inherent risks of complications, *bona fide* medical error or misadventure, and they are reasonably foreseeable and not too remote. . . . It is for the defendant to prove that some new act rendering another person liable has broken the chain of causation.[324]

The question of whether a negligent doctor should reasonably foresee that another doctor also might act negligently was considered by the Ontario Court of Appeal in *Price v. Milawski*.[325] In that case, the first defendant, while on emergency duty at the hospital, examined the plaintiff who had broken his ankle. The first defendant referred the plaintiff to a radiologist for an x-ray, but failed to identify the location of the injury correctly. Lacking precise direction, the radiologist failed to detect the break. Later, with his ankle still broken, the plaintiff consulted the second defendant, an orthopaedic surgeon. The second defendant relied on the information obtained from the hospital regarding the break, although he had the facilities to x-ray the injury himself. The surgeon wrongly diagnosed the plaintiff's injury as a strained ligament.

While the first defendant did not dispute his own negligence, he argued that he should not also be liable for the negligence of the second. He claimed that it was not foreseeable that subsequent doctors would rely on the x-rays taken at the hospital instead of taking their own.

This argument was rejected by the court. Having reviewed the leading Canadian and English authorities, Arnup J.A. stated:

> Applying these principles to a case in which there are negligent acts by two persons in succession, I would hold that a person doing a negligent act may, in circumstances lending themselves to that conclusion, be held liable for future damages arising in part from the subsequent negligence of another, and in part from his own negligence, where such subsequent negligence and consequent damage was reasonably foreseeable as a possible result of his own negligence.[326]

The court found that it was reasonably foreseeable that once the misinformation resulting from the first defendant's negligence was entered in the hospital records, doctors subsequently treating the plaintiff

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[322] *See, e.g., Holian, supra* note 267; *Cf.* David v. Toronto Transit Comm'n, 16 O.R. (2d) 248, 77 D.L.R. (3d) 717 (H.C 1976) (Parker J.) (negligent motorist held not liable for aggravation of plaintiff's injuries by doctor's negligent treatment)

[323] 16 O.R. (2d) 158, 77 D.L.R. (3d) 536 (C.A. 1977) (nothing to show that subsequent injury was the result of intervening medical treatment)

[324] *Id.* at 161, 77 D.L.R. (3d) at 539.

[325] *Supra* note 305.

[326] *Id.* at 124, 82 D.L.R. (3d) at 141.

might rely on that information without validating it themselves, notwithstanding that such a failure could constitute negligence on their part. Referring to *The Wagon Mound (No. 2)*,[327] the court held that this possibility was

> not a risk which a reasonable man [in the position of the first defendant] would brush aside as farfetched. . . . The later negligence of [the second defendant] compounded the effects of the earlier negligence of [the first defendant]. It did not put a halt to the consequences of the first act and attract liability for all damage from that point forward.[328]

4. *Rescuers*[329]

In *C.N.R. v. Batky*[330] the defendant negligently drove his automobile into the plaintiff's train, severely injuring himself. The train's conductor went to the defendant's aid, maintaining a stooped position for fifteen minutes to support the defendant's injured back until an ambulance arrived. As a result, the conductor suffered a back injury for which he received workmen's compensation. The railway company, being subrogated to his rights, brought an action against the defendant.

The defendant contended that his "original negligence had been spent at the time of the rescue".[331] This argument, which succeeded in the Saskatchewan Court of Appeal in *Corothers v. Slobodian*[332] but failed on appeal to the Supreme Court of Canada,[333] was rejected by the court here.[334] Leach J. noted that the conductor had acted "in an unselfish, responsible way to help another human being who was in serious difficulty"[335] and that his rescue attempt was reasonably foreseeable.

The court in this case did not address itself to the issue of whether the specific injuries sustained by the conductor were foreseeable. Perhaps it was thought to be too obvious.[336]

In *Hachey v. Commercial Equipment Ltd.*,[337] the "rescuer's doctrine" was unsuccessfully invoked by a plaintiff who had fallen down

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[327] *Supra* note 308, at 643, [1966] 2 All E.R. at 718 (Lord Reid).

[328] *Supra* note 305, at 124, 82 D.L.R. (3d) at 142.

[329] For recent English criticism of the generally restrictive attitude of the law towards rescuers, *see* Blake, *The Plight of the Rescuer*, 128 NEW L.J. 476 (1978). For an analysis of the present judicial and legislative position in the United States, *see* Wortley, *Comment: First Aid to Passengers: Good Samaritan Statutes and Contractual Releases from Liability*, 31 S.W.L.J. 695 (1977). On certain more specific aspects, *see* Scanlon, *Comment: The Malpractice Aspects of Emergency Care by Nonphysicians*, 12 GONZAGA L. REV. 676 (1977).

[330] 18 O.R. (2d) 481 (Cty. Ct. 1977).

[331] *Id.* at 484.

[332] 36 D.L.R. (3d) 597 (Sask. C.A. 1973).

[333] [1975] 2 S.C.R. 633, 51 D.L.R. (3d) 1 (1974).

[334] *Supra* note 330, at 485.

[335] *Id.*

[336] *Cf.* Britt v. Magnum, 261 N.C. 250, 134 S.E. 2d 23 (1964).

[337] 19 N.B.R. (2d) 224 (Q.B. 1977).

a steep slope on his neighbour's property while trying to protect the neighbour's intoxicated mother from such a fall. The plaintiff, however, had just ordered her out of his own house. Richard J. for the New Brunswick Court of Queen's Bench considered that the proper time for assisting the mother was when she was still in the plaintiff's house rather than after he had evicted her. Furthermore, the slope on the property was held not to constitute a hazard.

5. *Escaped Convicts*

In *O'Reilly v. Clinch*,[338] one of the defendants was a juvenile delinquent with a history of auto theft and escape from custody. While at a review board meeting, he was allowed to go to the bathroom unhandcuffed. He escaped and managed to steal a car from a used car dealer who had left the keys in the car. Before the delinquent had travelled very far, the car broke down and he had to have it serviced. To pay for the work the delinquent used a stolen credit card, which was recognized as such. When he left, the service station attendant notified the police. There followed a high speed chase through a residential district. However, when the officers giving chase where told back-up units were on the way, they fell back. Nevertheless, the delinquent continued to speed and collided with the plaintiffs, injuring the plaintiffs and killing a passenger.

Included as defendants in the plaintiffs' action were the supervisor of the detention centre, the government of Manitoba, the used car dealer, the police officer who gave chase and the City of Winnipeg.

The Manitoba Court of Queen's Bench absolved the police officers and the City because, at the time of the accident, the officers were driving with due care. The dealer too was absolved from responsibility on the basis that the plaintiffs' injuries were too remote. Solomon J. held that

> before . . . [the dealer] could be held liable, plaintiffs would have to establish that [the dealer] owed a duty to plaintiffs as members of the general public in respect of how it secured [its] property against theft. I know of no law which would impose on [the dealer] such responsibility. Since [the dealer] owed no duty to plaintiffs as members of the public, it is hard to see how [the dealer] could be negligent in performing a duty [he] did not have.[339]

Solomon J. did not make any reference to judicial authority, or to the increasing academic support in the United States for imposing just

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[338] [1978] 3 W.W.R. 145 (Man. Q.B.).

[339] *Id.* at 154.

such a duty.[340] Nevertheless, his approach seems to be the prevailing one in Canada.[341]

As for the supervisor of the detention centre and the government of Manitoba, the court specifically noted the fact that the accident had arisen out of the delinquent's deliberate act of deception,[342] but in general expressed its reservations about "upholding a proposition that custodial services adequate in dealing with average inmates but inadequate in dealing with [this particular delinquent] can be regarded as acts of negligence".[343] This position seems to ignore the fact that the law of negligence has long recognized that a greater risk imposes a greater duty.[344] Nevertheless, the Court of Appeal affirmed the judgment.[345]

V. DEFENCES TO NEGLIGENCE

A. *Contributory Negligence*

At one time contributory negligence was a potent defence, because the slightest negligence on the part of the plaintiff precluded him from succeeding in his action. This unsatisfactory situation was ameliorated by the introduction of apportionment of fault legislation which allows the courts to apportion liability between the parties.

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[340] In the United States, the owner or bailee of an automobile who leaves keys in the ignition can be liable for injuries resulting from its negligent operation by a thief. *See Annotation*, 45 A.L.R. 3d 787 (1972). Commentary generally has been in favour of extending the scope of liability in such circumstances. *See* Peck, *An Exercise Based Upon Empirical Data: Liability for Harm Caused by Stolen Automobiles*, [1969] WISC. L. REV. 909; Von Wald, *Comment: Failure to Remove Ignition Key — The Key to Liability*, 14 S. DAK. L. REV. 115 (1969).

[341] *See* Hollett v. Coca-Cola Ltd., 11 C.C.L.T. 281 (N.S.S.C. 1980) (not foreseeable that thief of van with keys left in ignition would drive negligently so as to injure plaintiff).

[342] *Supra* note 338, at 156.

[343] *Id.* at 155.

[344] Paris v. Stepney Borough Council, [1951] A.C. 367, [1951] 1 All E.R. 42 (H.L. 1950).

[345] *Supra* note 222.

One remaining issue of contention[346] in this area is that of contributory negligence in a plaintiff's omission to wear a seat belt.[347] Huband J.A. of the Manitoba Court of Appeal recently canvassed the divergent law on this point in *Genik v. Ewanylo*.[348] The plaintiff passenger was injured in a car accident caused by the gross negligence of the defendant,[349] in which the plaintiff was not wearing her seat belt; there was evidence that her injuries would have been greatly reduced if she had been wearing it. The Court of Appeal upheld the trial judge's decision not to reduce the plaintiff's award on account of contributory negligence. Huband J.A. stated that while most Canadian courts believe

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[346] One issue that formerly evoked a great deal of judicial ingenuity was that of the last clear chance doctrine. Its use has definitely been curtailed but it is apparently not yet dead as was evidenced during the survey period in *Keough*, *supra* note 277. In that case one defendant argued that the rationale for the doctrine had disappeared since the introduction of apportionment of fault legislation and that it should now be treated as being no longer in existence. The majority of the court rejected this reasoning because no binding case had declared the doctrine dead. Freeman C.M.J. stated: "I therefore do not feel justified in declaring the 'last chance' doctrine to be non-existent. Such a conclusion would have to come, if at all, from the Legislature or the Supreme Court of Canada." *Id* at 344, 91 D.L.R. (3d) at 516. Monnin J.A. differed on this point, finding that the doctrine was irrelevant since the enactment of the Tortfeasors and Contributory Negligence Act, R.S.M. 1970, c. T90.

For cases dealing with contributory negligence in general, *see Wade*, *supra* note 197; *Laurent*, *supra* note 116; Schanuel v. Hoglund, 20 A.R. 539, [1980] 3 W.W.R. 544 (C.A.); *Labrecque*, *supra* note 267; District of Surrey v. Carroll-Hatch & Assocs. Ltd., 10 C.C.L.T. 226, 101 D.L.R. (3d) 218 (B.C.C.A. 1979); Attorney-General for Ontario v. Keller, 23 O.R. (2d) 143, 94 D.L.R. (3d) 647 (C.A. 1978); Jasin v. People's Co-Operative Ltd., 92 D.L.R. (3d) 340 (Man. C.A. 1978); *Gray*, *supra* note 54; Bennett v. Ed. Dyck Ltd., 100 D.L.R. (3d) 507 (B.C.S.C. 1979); Graham v. The Queen, [1978] 6 W.W.R. 48, 90 D.L.R. (3d) 223 (Sask. Q.B.); *Heeney*, *supra* note 289; Henuset Bros. Ltd. v. Pan Canadian Petroleum Ltd., [1977] 5 W.W.R. 681, 82 D.L.R. (3d) 345 (Alta. S.C.); *Stermer*, *supra* note 258; Wilson v. Garibaldi Lifts Ltd., 79 D.L.R. (3d) 495 (B.C.S.C. 1977); *Crossman*, *supra* note 177; *Walker*, *supra* note 195; Gougeon v. Township of Foley, 16 O.R. (2d) 625, 78 D.L.R. (3d) 733 (H.C. 1977); Hillcrest Gen. Leasing Ltd. v. Robinhood Taxi Ltd., 20 O.R. (2d) 749, 88 D.L.R. (3d) 747 (Cty Ct 1978).

See also Klar, *Contributory Negligence and Contribution Between Tortfeasors*, in STUDIES IN CANADIAN TORT LAW, *supra* note 31, at 145; Cheifetz, *Vicarious Liability and the Contributorily Negligent Plaintiff: Is the Common Law Defence Still Applicable?*, 1 ADV. Q. 418 (1977-78).

[347] For commentary on the seat belt defence, *see* Slatter, *Seat Belts and Contributory Negligence*, 4 DALHOUSIE L.J. 96 (1977-78). Slatter contends that the defence of contributory negligence in relation to the non-use of seat belts involves the proof of four factors: (1) the plaintiff was exposed to an unreasonable risk against which a reasonable person would have taken precautions; (2) the belt is generally effective in reducing that risk; (3) the device was available to the plaintiff but the plaintiff did not use it; (4) the device, if used, would actually have prevented some of the resulting damage. In *Genik*, *supra* note 213, the defendant failed to prove the first point.

[348] *Id.*

[349] Monnin J.A. dissented on this point, contending that since there was no obvious cause of the accident and it was probable that the defendant, an elderly gentleman, merely fell asleep at the wheel, only a finding of ordinary negligence was warranted.

it to be contributorily negligent not to wear a seat belt, it certainly is not a settled matter in law that this always should be so. Failure to wear a seat belt might be entirely excusable and not a disregard for one's safety. In this case there was no impending risk:

> It was a fine day for driving. The road was straight and in good condition for driving. Traffic was not heavy. The driver was cautious to ensure that he did not exceed the speed limit on his journey through the countryside. While the trip was a fairly lengthy one, the defendant says that he was feeling fine and was not fatigued. He had consumed no alcohol. No suggestion had been made by the driver to the passenger that she should use the seat belt. Accordingly, I would conclude that the plaintiff has been guilty of no departure from the standard by which a reasonable and prudent person will govern himself in relationship to his own safety.[350]

In other words, no risk is incurred merely by going out on the roads. Another factor which supported this conclusion, the court found, was the fact that there was no legislation in Manitoba making the use of seat belts mandatory and therefore

> [i]n the absence of legislation, a finding of contributory negligence against a passenger would be the *exception*, rather than the rule. . . . I would be reluctant to allow a defendant to invoke contributory negligence legislation to cut down the magnitude of a claim to which a plaintiff would be entitled under common law, except under the clearest circumstances. The circumstances are far from clear when the Legislature itself has declined to intervene.[351]

Monnin J.A. reasoned, in *obiter*, that since the legislature had decided not to make the use of seat belts compulsory, the courts should not legislate to the opposite effect.

The issue of whether the non-use of seat belts amounts to contributory negligence has been the subject of many cases and two distinct schools of thought have emerged, both of which were considered by Huband J.A. in this case.[352] *Yum v. Torstad*[353] represents the line of authority that holds that a failure to use a seat belt amounts to contributory negligence *per se*; damages will be reduced provided that the failure to use the belt contributed to the injuries. Using seat belts has generally been proven to be effective in reducing injuries and plaintiffs should take some responsibility for disregarding their own safety.[354] The opposite view was espoused in *MacDonnell v. Kaiser*[355] by Dubinsky J., who held that failure to wear a seat belt did not amount to contributory negligence. He was unconvinced of the general effectiveness of wearing seat belts and cautious of the problems that could arise in proving whether the belt would in fact have reduced the injuries. Since 1974,

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[350] *Supra* note 213, at 175-76, 12 C.C.L.T. at 146.

[351] *Id.* (emphasis added).

[352] For a discussion on the debate, *see* Osborne, *Annotation*, 12 C.C.L.T. 122 (1980).

[353] 62 W.W.R. 645, 66 D.L.R. (2d) 295 (B.C.S.C. 1967).

[354] *Supra* note 352, at 123.

[355] 68 D.L.R. (2d) 104 (N.S.S.C. 1968).

however, most of the cases have tended to follow the *Yum* decision.[356] A likely explanation for this occurrence is a growing acceptance of the fact that seat belts effectively reduce injury. The fact that the legislatures of British Columbia, Nova Scotia, Ontario, Quebec and Saskatchewan have made the wearing of seat belts mandatory[357] also explains this swing in judicial attitude.

Huband J.A.'s decision could be criticized on the basis that driving is an inherently dangerous activity; the requirement of abnormal circumstances before a seat belt is required could lead to confusion. In addition, the Manitoba legislature has not condoned the non-use of seat belts; rather, it has merely declined to make it a punishable offence. This should have no bearing on a civil action. On the other hand, the decision can be commended for the fact that it rejected the proposition from *Yum* that failure to wear a seat belt was negligence *per se*. The failure to use a seat belt *may* be contributory negligence, but that depends on the circumstances.

Another case during the survey period which rejected the seat belt defence was *Anderson v. Davis*.[358] Although the plaintiff was wearing a seat belt, she wore it incorrectly for comfort's sake. The trial judge concluded that the unorthodox wearing of the seat belt did not amount to contributory negligence; this was affirmed on appeal. According to McEachern C.J.S.C. there was never any discussion between the plaintiff and the defendant about the correct way to wear a seat belt. He stated: "It is significant that this accident occurred in 1975 when knowledge about the use of seat belts was not nearly as widespread as it is today."[359] Keeping that in mind, the plaintiff did not act unreasonably in all the circumstances. In conclusion, the judge stated:

> In reaching this conclusion I am aware that future plaintiffs might attempt to escape a finding of contributory negligence, when they fail to wear their seat belts properly, by concocting a story about seat belt irritation. I am satisfied in this case that the plaintiff has not concocted a story because the defendant . . . gave basically the same evidence as the plaintiff on this issue. All motorists should wear their seat belts in a proper way. Where they fail to wear their seat belts in the proper way they will, in most cases, be found guilty of contributory negligence. . . . The Court will view all explanations for departures from this standard of conduct with considerable suspicion, and will scrutinize with great care the evidence of any person who attempts to justify his failure to wear a seat belt properly.[360]

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[356] *See* Haley v. Richardson, 10 N.B.R. (2d) 653, 60 D.L.R. (3d) 480 (C.A. 1975); Ohlheiser v. Cummings, 4 Sask. R. 402, [1979] 6 W.W.R. 282 (Q.B.); Gagnon v. Beaulieu, [1977] 1 W.W.R. 702 (B.C.S.C.); Cleveland v. Marini, 4 C.C.L.T. 102 (B.C.S.C. 1977).

[357] *See, e.g.*, The Highway Traffic Amendment Act, S.O. 1975 (2d sess.), c. 14, s. 1; *now* R.S.O. 1980, c. 198, s. 90.

[358] 10 C.C.L.T. 120 (B.C.S.C. 1979), *aff'd* 15 C.C.L.T. 192 (B.C.C.A. 1980).

[359] *Id.* at 127.

[360] *Id.* at 129.

With respect, even in 1975 the average person probably realized the benefit of wearing a seat belt. One could also question the acceptance of the proposition that the plaintiff was being reasonable in wearing the seat belt as she did merely because it was more comfortable. Why would this excuse a departure from the reasonable standard of care?

The seat belt defence also failed in *Lucas v. Antoniak*[361] where the defendants were claiming that the non-use of the seat belt by the plaintiff was a failure to use reasonable care and to take precautions for his own safety. Callahan J. of the British Columbia Supreme Court summarized the law on point as stated in *Gagnon v. Beaulieu*:[362] (1) failure to wear a seat belt is failure to take reasonable steps for one's safety; (2) if injuries are suffered and they could have been lessened by the seat belt, there is contributory negligence; (3) the defendant must satisfy the court that the plaintiff was not wearing a seat belt and, as a consequence, his injuries were more severe. The defendant here failed to prove a causal connection between the seat belt and the injuries; the specialist could not rule out the possibility of severe injuries even if the belt had been worn.

The reader should not suppose that the seat belt defence always fails.[363] However, the defendant has a heavy onus in proving that a seat belt would have reduced the risk.[364] With the advent of legislation making the use of seat belts obligatory, this burden may be lessened.

B. *Volenti Non Fit Injuria*

Voluntary assumption of risk is one of the most problematic defences to negligence and, since the introduction of apportionment legislation for contributory negligence, has fallen into disuse. In the past, a plaintiff who was negligent often stood in a better position than one who was not; for instance, a drunk passenger frequently succeeded in a negligence action where a sober one did not. This has led the courts to impose stricter requirements on the defence of *volenti*; at one extreme are judges who require the existence of a "bargain", express or implied, between the parties where one agrees to forego any legal action against the other in return, for instance, for a ride. At the other end of the spectrum are judges who merely require the recognition by the plaintiff of the risk and a willingness to assume that risk — a unilateral decision. Both approaches were evidenced during the survey period. *Crossan v.*

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[361] 7 C.C.L.T. 209 (B.C.S.C. 1978). For a discussion of the other issues in the case, *see* Klar, *Annotation*, 7 C.C.L.T. 210 (1978).

[362] *Supra* note 356.

[363] For cases during the survey period where the defence succeeded, *see* Quinlin v. Steffens, 12 C.C.L.T. 162 (Ont. H.C. 1980); *Ohlheiser*, *supra* note 356.

[364] Normally the defendant must call in a number of experts merely to show that seat belts are generally effective in reducing injuries. Hopefully the benefit of seat belts will become a settled question of law so that the expense of these experts can be avoided.

Gillis[365] illustrates the restrictive approach being taken by some courts. In this case the two plaintiffs, one sober and one intoxicated, were injured while they were being driven by the defendant, who was also intoxicated. The trial judge found the defendant to be grossly negligent. The defence of *volenti* did not succeed against the plaintiff who had been drunk because in his state he could not be expected to have appreciated the risk, but the claim of M., the sober plaintiff, was dismissed on the ground of *volenti*: he appreciated and voluntarily assumed the risk of being a passenger in a car being driven by an intoxicated person. This approach of Hallett J. has been criticized for the following reason:

> It might be argued that in view of the fact that the authorities require a "bilateral relation" which means that both plaintiff and defendant must reach an agreement as to the terms of the undertaking, the drunkenness of the defendant prevented even the sober plaintiff from reaching an agreement with him. In other words, if it is reasoned that the drunk plaintiff was in no position to accept terms, why can it not equally be argued that the drunk defendant was in no position to set terms? This being the case, and there having been no requirement on the part of the defendant that the plaintiff waive his legal rights, how can it be said that the plaintiff agreed to waive his legal rights?[366]

Although the defence of *volenti* did not succeed against G., the passenger who had been drunk, he was found to have been contributorily negligent.

Both the defendant and M. appealed, the former disputing the decision as to the lack of *volenti* by G., the latter the finding of *volenti* on his part, claiming rather that there was merely contributory negligence. The defendant's appeal was dismissed but M.'s was allowed. MacKeigan C.J.N.S., Price J.A. concurring, held that for the defence of *volenti* to succeed there must be proof of a bilateral agreement — expressly or by implication — with the onus on the defendant to prove its existence. The bargain is not just to assume the risk but must also be one whereby the plaintiff gives up his right of action, and it must be an actual bargain inferred from the acts or words of the parties. The court refused to follow the Supreme Court of Canada decision in *Miller v. Decker*.[367] That case

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[365] 7 C.C.L.T. 269, 96 D.L.R. (3d) 611 (N.S.C.A. 1979), *rev'g* in part 4 C.C.L.T. 184 (S.C. 1977). For an informative discussion of the trial judgment, *see*, Klar, *Annotation*, 4 C.C.L.T. 185 (1977). In addition to the cases discussed in the text, the following cases dealing with the doctrine of *volenti non fit injuria* were also decided during the survey period: *Stermer*, *supra* note 258; Klyne v. Town of Indian Head, [1980] 2 W.W.R. 474, 107 D.L.R. (3d) 692 (Sask. C.A. 1979), *rev'g sub nom* Klyne v. Bellegarde, [1978] 6 W.W.R. 743, 92 D.L.R. (3d) 747 (Sask. Q.B.); Dolby v. McWhirter, 24 O.R. (2d) 71, 99 D.L.R. (3d) 727 (H.C. 1979); Henderson v. Pearson Forest Products Ltd., 10 C.C.L.T. 209 (Ont. H.C. 1979); Epp v. Ridgetop Builders Ltd., 7 C.C.L.T. 291, 94 D.L.R. (3d) 505 (Alta. S.C. 1978); *Bond*, *supra* note 267

See also Hertz, *Volenti Non Fit Injuria — A Guide*, in STUDIES IN CANADIAN TORT LAW, *supra* note 31, at 101.

[366] Klar, *id.* at 186-87.

[367] [1957] S.C.R. 624, 9 D.L.R. (2d) 1. The Court relied on the approach taken in Lehnert v. Stein, [1963] S.C.R. 38, 36 D.L.R. (2d) 159.

also involved a drinking spree during which a serious accident occurred. Rand J. for the majority held that there could be a unilateral voluntary assumption of risk; being aware of the consequences of drinking and driving was enough to find *volenti*. MacKeigan C.J.N.S., after discussing this and similar cases, reasoned as follows:

> I suggest that a basic error in the approach I have been criticizing is that it overlooks that in Canada we are concerned not with waiver of liability for ordinary negligence but for gross negligence, *i.e.*, supposed exoneration of a driver for his wilful, reckless and wanton misconduct. What driver, drunk or sober, ever expects or intends to be grossly negligent or would even think of extracting from his passenger an advance waiver of liability for such misconduct? What passenger would volunteer to give such a waiver in advance? We should bear in mind that the onus is on the driver to obtain the waiver, and, if he seeks to show the passenger *volens*, the onus is on him to prove that the waiver must have been given.[368]

The defence of *volenti non fit injuria* has virtually been excluded in automobile cases except where the driver has procured an express waiver.

Cooper J.A. agreed with the approach taken by MacKeigan C.J.N.S. and went on to add that the defence of *volenti* has lost much of its validity since the enactment of contributory negligence legislation[369] which allows for a just distribution of fault.

A more recent case from the Manitoba Court of Appeal has also apparently followed this line of reasoning with its requirement of a bargain between the parties before the defence of *volenti* will succeed, but it produced a different and equally contradictory result. In *Cherrey v. Steinke*[370] the defendant, who was intoxicated (as was the plaintiff), drove through a stop sign. A high speed police chase ensued when the plaintiff counselled the driver to outrun the police. This resulted in an accident and injury to the plaintiff, who brought an action for damages for negligence. At trial the action was dismissed, the court holding that the defence of *volenti* succeeded.[371]

On appeal Matas J.A., quoting Cartwright J. in *Lehnert v. Stein*,[372] found that there had to be an express or implied bargain between the parties whereby the plaintiff gave up his right of action for negligence. The court held that the plaintiff's wish to outrun the police together with his encouragement to the driver impliedly constituted an agreement by the plaintiff that he would exempt the defendant from liability. This seems to be an instance of the court merely paying lip-service to the new requirement of *volenti* as enunciated in *Lehnert*; there is still an air of

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[368] *Supra* note 365, at 284, 96 D.L.R. (3d) at 622.

[369] He was referring in particular to the Contributory Negligence Act, R.S.N.S. 1967, c. 54.

[370] [1980] 6 W.W.R. 298, 13 C.C.L.T. 50 (Man. C.A.).

[371] 9 C.C.L.T 276 (Man. Q.B. 1979).

[372] *Supra* note 367. Cartwright J. himself relied on and adopted the discussion of *volenti* in G. WILLIAMS, JOINT TORTS AND CONTRIBUTORY NEGLIGENCE 308 (1951).

unreality in implying an agreement where one apparently did not exist. However, in cases where the conduct of the plaintiff is "extreme", the courts have often been willing to find a voluntary assumption of risk;[373] this seems to be an exception to the requirement of a bargain.

O'Sullivan J.A. delivered a unique dissenting judgment when he applied the law of contract to the "bargain" between the parties. He stated:

> It may be useful to note that the liability of the defendant driver is not based on contract but on tort. It is the defendant who must prove an agreement to release him from the consequences of his gross negligence. I see no reason why the ordinary rules for implying agreements should not be applied in considering whether what was said or done . . . gives rise to an inference that there was an agreement containing a term exonerating the defendant driver.[374]

Applying contract law, the judge concluded that a term will only be read into a contract if it is necessary in order to make the contract work — a test of necessity. In his opinion, there was nothing in the facts that required a term exonerating the defendant driver in order to give effect to the agreement between the parties.

A case providing a twist on the normal automobile passenger cases was that of *Ferris v. Stubbs*[375] from the New Brunswick Court of Appeal. The plaintiff was the administratrix of the estate of her deceased son who died when his own car, driven by the defendant, overturned. The deceased, who had become intoxicated at a party, asked the defendant, who was apparently sober, to drive. At one point the deceased urged the defendant to speed up and pass the car which was ahead of them. The defendant complied with this request on a curve, causing the car to go out of control and causing an accident. At trial the defendant's plea of *volenti non fit injuria* succeeded but that finding was overturned on appeal. After discussing many of the cases on *volenti*, including *Miller v. Decker*,[376] the Court of Appeal could find none similar to the present case, where the driver was sober and the passenger made an imprudent suggestion. Since the encouragement was not planned and it was not certain that the deceased was aware of the danger because he was intoxicated, the court concluded that there was no evidence that the deceased impliedly consented to the lack of reasonable care on the part of the defendant.[377]

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[373] *See, e.g.*, Allen v. Lucas, [1972] 2 W.W.R. 241, 25 D.L.R. (3d) 18 (Sask. C.A.).

[374] *Supra* note 370, at 304, 13 C.C.L.T. at 63-64.

[375] 22 N.B.R. (2d) 570, 89 D.L.R. (3d) 364 (C.A. 1978).

[376] *Supra* note 367.

[377] There was a finding, however, of contributory negligence with liability apportioned equally.

C. *Inevitable Accident*

Although it was once common to see a party affirmatively pleading the "defence" of inevitable or unavoidable accident, it seems to have become practically obsolete. It is nothing more than a denial of negligence; there is no shifting of the burden of proof to the defendant. The theory behind the defence is that the defendant can escape liability for negligence if he can show that both the cause of the accident and the result of that cause were unavoidable. Even though it has been suggested that the defence of inevitable accident be eliminated in order to prevent the financial ruin of the innocent victim,[378] to date the legislatures have remained silent.

During the survey period there were two cases on point, one dealing with an automobile accident arising out of the mechanical failure of the car and the other with the physical condition of the driver. In the first case, *Vanderkolk v. Craig*,[379] the plaintiff's car was hit from behind by the defendant's car when the latter's brakes failed. Two months earlier the defendant had had his brakes tested and they were found by the mechanic to be good for another 4,000 miles. In an action by the plaintiff for damages for negligence the defendant pleaded inevitable accident. Moore J. of the Alberta Supreme Court, quoting from Cartwright J.'s judgment in *Rintoul v. X-Ray & Radium Industries Ltd.*,[380] found that two essential points had to be proven before the defence would succeed: (1) that the alleged failure of the brakes could not have been prevented by the exercise of reasonable care; and (2) that the defendant could not, by the exercise of reasonable care, have avoided the collision. In this instance the defence succeeded because the defendant had done everything that could be expected of a reasonable man in the circumstances: he had had the brakes inspected earlier and had also handled himself well during the accident; in the circumstances he could not have been expected to remember to apply the emergency brake.

In the second case, involving a loss of consciousness by the defendant, the defence of unavoidable accident failed. In *Telfer v. Wright*[381] the defendant's car suddenly crossed into the plaintiff's lane, causing an accident, due to the driver's loss of consciousness. At trial medical evidence was introduced showing that there was no explainable cause for the sudden blackout. The defendant had had dizzy spells on previous occasions, one of these only minutes before the accident, causing the defendant to stop by the side of the road to let it pass. The defence of unavoidable accident succeeded, the trial judge holding that the defendant could not have anticipated a dizzy spell.

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[378] *See, e.g.*, LEGISLATIVE ASSEMBLY OF ONTARIO, SELECT COMMITTEE ON AUTOMOBILE INSURANCE, TRIAL REPORT 84-86 (1963).

[379] [1978] 5 W.W.R. 180 (Alta. S.C.).

[380] [1956] S.C.R. 674.

[381] 23 O.R. (2d) 117, 95 D.L.R. (3d) 188 (C.A. 1978).

On appeal Lacourcière J.A. used Prosser's[382] definition of unavoidable accident: an occurrence that was not intended and which could not have been foreseen or prevented by the exercise of reasonable care. His Lordship then continued:

> While an unconscious person obviously cannot be guilty of negligence it is also clear that his unconsciousness will not be a defence if he had reasonable grounds to anticipate that it would occur. Where the driver of a car has previously suffered symptoms of dizziness similar to that which afflicted him before the accident, his liability will depend on whether he had reason to anticipate a recurrence of dizziness. In circumstances such as the present, it is up to the defendant to rebut the inference of breach of duty and lack of reasonable care, and in most cases this is done by showing that there was no evidence of knowledge of prior disability or foresight of probable harm. A motorist has the duty of making sure that he is in a proper state of health to operate a motor vehicle. He must not expose other persons to the risk or the possibility that he may suffer an attack of a kind that would impair his ability to control his motor vehicle as he proceeds on the highway. A motorist who is aware he suffers from a disability is under a very heavy duty to take the necessary precautions to avoid the possibility of this disability implicating him as the cause of an accident.[383]

The question was not whether the defendant foresaw the chance of a blackout, but whether a reasonable man might have done so. The court held that a reasonable man here would have foreseen the possibility of a blackout because of the fact that such incidents had occurred on previous occasions, one immediately preceding the accident. Judgment was entered for the plaintiff.

D. *Illegality*

Usually the mere fact that the plaintiff was participating in an illegal activity at the time of his injury is no reason to disallow his claim. The defendant may succeed with this defence but normally only when the plaintiff's offence involves turpitude.[384] As Professor Gibson has said: "There is no justification, either in policy or in law, for introducing the *ex turpi causa* defence to the law of tort."[385] Due to the reluctance of courts to deny the plaintiff's claim because of his illegal act, the defence of *ex turpi causa non oritur actio* was only pleaded in one case during the survey period. In *Bond v. Loutit*[386] the plaintiff and defendant took the defendant's mother's car without permission. The defendant, driving at an excessive speed, veered off the road, causing serious brain injury to the sleeping plaintiff. In the resulting negligence action the defendant

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[382] W. PROSSER, HANDBOOK OF THE LAW OF TORTS 140 (4th ed. 1971).

[383] *Supra* note 381, at 119, 95 D.L.R. (3d) at 190-91.

[384] J. FLEMING, THE LAW OF TORTS 272 (5th ed. 1977).

[385] Gibson, *Illegality of Plaintiff's Conduct as a Defence*, 47 CAN. B. REV. 89, at 96 (1969).

[386] *Supra* note 265.

pleaded both *volenti non fit injuria*[387] and *ex turpi causa*. On the issue of illegality, Hamilton J. of the Manitoba Queen's Bench adopted the reasoning from *Godbolt v. Fittock*,[388] a decision from New South Wales:

> [I]n principle . . . the plaintiff cannot be precluded from suing simply because the wrongful act is committed after the illegal agreement is made and during the period involved in its execution. The act must, I should have supposed, at least be a step in the execution of the common illegal purpose.[389]

He then went on to say that the use of the defence is still one of public policy: "Its application . . . is still limited in its scope and it is applied rarely."[390] He concluded that there must be a causal connection between the illegal act and the negligence complained of. If the negligence is completely unconnected with the crime, the defence cannot succeed. In this case there was no causal connection between the taking of the vehicle and the negligent way in which it was driven, and therefore the defence failed.[391]

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[387] This defence failed because there was no bargain to give up any right of action.

[388] 63 N.S.W. St. R. 617, 80 W.N. (N.S.W.) 1110 (S.C. 1963).

[389] *Supra* note 267, at 166.

[390] *Id.*

[391] It follows from this reasoning that if the injury had occurred while the car was being taken, the defence would have succeeded.