

# RECENT DEVELOPMENTS IN CANADIAN LAW: TORT LAW

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## I. INTRODUCTION

The law of torts continues to play an important role in the protection of personal and property rights in society. As one might expect with this dynamic area of law, the past few years have witnessed exciting and interesting developments. Two particularly difficult areas of tort law, the effect of statutory breach on civil rights of action and the liability of public officials, have been carefully looked at by the Supreme Court of Canada. The extension of negligence law to recovery for pure, economic losses has also received considerable judicial attention, although more thought must still be given to this area. Damage assessments continue to provide lower courts with their most frustrating tasks. In the area of non-pecuniary losses, the Supreme Court of Canada's earlier "trilogy"<sup>1</sup> has created a very unsatisfactory situation. The impact of *Reibl v. Hughes*<sup>2</sup> has begun to be felt with the courts being flooded with "failure to inform" cases. Other professionals are increasingly becoming targets of tort law claims. The contract/tort debate is still bothersome, although a consensus is forming to resolve this issue. There have been noteworthy advances made to the area of products liability, occupier's liability, nuisance, limitation periods, economic torts and negligent statements. This survey will review all of these recent developments while concentrating on the more significant ones.

A very positive and encouraging development has been the emergence of useful academic works in the area of tort law. We have recently seen the publication of the following works: two books on the law of damages,<sup>3</sup> books on economic loss recovery,<sup>4</sup> negligence,<sup>5</sup> municipal liability,<sup>6</sup> medical law,<sup>7</sup> privacy,<sup>8</sup> criminal injury compensation,<sup>9</sup> worker's compensation,<sup>10</sup> occupier's liability,<sup>11</sup> products liability,<sup>12</sup> apportionment of fault,<sup>13</sup> a new edition of Linden,<sup>14</sup> a new studies book,<sup>15</sup> a new

<sup>1</sup> *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452; *Thornton v. Board of School Trustees*, [1978] 2 S.C.R. 267, 83 D.L.R. (3d) 480; *Arnold v. Teno*, [1978] 2 S.C.R. 287, 83 D.L.R. (3d) 609.

<sup>2</sup> [1980] 2 S.C.R. 880, 114 D.L.R. (3d) 1.

<sup>3</sup> S. WADDAMS, THE LAW OF DAMAGES (1983); K. COOPER-STEVENS & I. SAUNDERS, PERSONAL INJURY DAMAGES IN CANADA (1981).

<sup>4</sup> B. FELDTHUSEN, ECONOMIC NEGLIGENCE (1984).

<sup>5</sup> J. SMITH, LIABILITY IN NEGLIGENCE (1984).

<sup>6</sup> S. MAKUCH, CANADIAN MUNICIPAL AND PLANNING LAW (1983).

<sup>7</sup> E. PICARD, LEGAL LIABILITY OF DOCTORS AND HOSPITALS IN CANADA (2d ed. 1984).

<sup>8</sup> ASPECTS OF PRIVACY LAW (D. Gibson ed. 1980).

<sup>9</sup> P. BURNS, CRIMINAL INJURIES COMPENSATION (1980).

<sup>10</sup> T. ISON, WORKERS' COMPENSATION IN CANADA (1983).

<sup>11</sup> J. DI CASTRI, OCCUPIERS' LIABILITY (1981).

<sup>12</sup> S. WADDAMS, PRODUCTS LIABILITY (2d ed. 1980).

<sup>13</sup> D. CHEIFETZ, APPORTIONMENT OF FAULT IN TORT (1981).

<sup>14</sup> A. LINDEN, CANADIAN TORT LAW (3d ed. 1982).

<sup>15</sup> ISSUES IN TORT LAW (F. Steel & S. Rodgers-Magnet eds. 1983).

casebook,<sup>16</sup> a new edition of Wright, Linden & Klar<sup>17</sup> and numerous articles, notes and case comments.<sup>18</sup> The pattern of the seventies, in terms of academic contribution to the study of tort law, has changed. No longer do we have only a few academics interested in writing on the substance of tort law, with many more writing on its abolition. Even if academics have not changed their opinions about the value of tort law, there is the realization that the law of torts is an important part of our existing legal system and that serious efforts have to be made to make it more progressive and comprehensible.

## II. DIRECT INTERFERENCES WITH PERSONS, CHATTELS AND LAND

Although very little seems to change the few nominate torts which trace their roots to the thirteenth century,<sup>19</sup> in many respects the so-called "intentional torts"<sup>20</sup> personify the values and virtues inherent in a vibrant civil justice system. Even New Zealand, committed as it was to the abolition of the private right of action for victims of personal injuries, discovered that it could not remove the civil action from those who wished to pursue *deliberate* wrong-doers in court.<sup>21</sup> The civilized message of justice embodied in the intentional torts far outweighs the torts' numerical significance in terms of reported cases.

### A. Assault, Battery and False Imprisonment

The primary torts which protect a person's physical or mental integrity are assault, battery and false imprisonment. The issues involved in the actions for battery, assault and false imprisonment generally relate not to whether the tortious interferences have taken place but rather to whether they can be justified by the defendants. The two most common defences are legal authority and consent. These defences have been in issue in several recent cases and will be examined in turn. I will

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<sup>16</sup> R. SOLOMON, B. FELDTHUSEN & S. MILLS, CASES AND MATERIALS ON THE LAW OF TORTS (1982).

<sup>17</sup> C. WRIGHT, A. LINDEN & L. KLAR, CANADIAN TORT LAW: CASES, NOTES & MATERIALS (8th ed. 1985).

<sup>18</sup> Much credit must go to Professor Irvine, the editor of the CANADIAN CASES ON THE LAW OF TORTS.

<sup>19</sup> J. FLEMING, THE LAW OF TORTS 15 (6th ed. 1983).

<sup>20</sup> In Canada, both assault and battery can be committed either intentionally or negligently. Query whether you can have a *negligent* false imprisonment.

<sup>21</sup> The Court of Appeal in Donselaar v. Donselaar, [1982] 1 N.Z.L.R. 97, decided that actions for exemplary damages resulting from an intentional tort can still be brought, notwithstanding the statutory bar to all civil proceedings for damages arising directly or indirectly from personal injuries that are caused accidentally.

then discuss another recently controversial issue: the effect of provocation on these actions.

### 1. *The Defence of Legal Authority*

Many of the assault, battery and false imprisonment actions are brought against police officers, prison guards or others who are in positions of legal authority. This is of course not surprising: these activities by their nature involve physical violence or the detainment of persons. This is tortious conduct which can only be justified in special circumstances.

The right of those who are in legal authority to engage in conduct which would otherwise be tortious stems from both common and statute law. Recent cases, however, demonstrate an unfortunate tendency on the part of courts to fail to adequately distinguish between these two sources. Courts have uncritically accepted legal authority based on federal or provincial statutes as a defence to intentional torts. There are numerous statutes which contain provisions allowing persons to act in ways which would normally be considered tortious, that is, as infringing upon a person's bodily security or liberty. In recent cases, for example, the following statutes were raised: the *Criminal Code*,<sup>22</sup> the *Identification of Criminals Act*,<sup>23</sup> the *Mental Health Act*,<sup>24</sup> the *Liquor Control Act*<sup>25</sup> and the *Intoxicated Persons Detention Act*.<sup>26</sup> The *Criminal Code* is a federally enacted statute which makes no express reference to its effect on civil liability. The *Identifications of Criminals Act* is also federally enacted, however, it specifically provides that there is no civil liability for any act done pursuant to the statute. The other statutes are provincially enacted and contain immunity provisions. It is submitted that there are several questions that a court must consider before applying any statutory provision as a defence to a civil action for assault, battery or false imprisonment. First, does the provision expressly provide an immunity from civil liability? Second, if the statute does not expressly provide an immunity, ought the court to accept the statutory provision as a defence to the civil action? If so, how should the provision be interpreted? Should the court distinguish between the statute's effect on civil, as opposed to criminal, liability? Third, if the statute is federally enacted and purports to immunize a defendant from civil liability, is this constitutionally necessary and valid?

There are two conflicting policy considerations involved in these questions. One might argue that although statutory defences ought to

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<sup>22</sup> R.S.C. 1970, c. C-34.

<sup>23</sup> R.S.C. 1970, c. I-1.

<sup>24</sup> R.S.A. 1980, c. M-13.

<sup>25</sup> R.S.A. 1979, c. 211 (*replaced by* R.S.A. 1980, c. L-17).

<sup>26</sup> R.S.N.B. 1973, c. I-14.

be available in criminal prosecutions, they should not necessarily apply in civil proceedings. The interests sought to be protected in these two types of proceedings are different. While one might wish to give police officers or other law enforcement persons a wide latitude in carrying out their functions without fear of criminal sanction, a smaller margin of error might be desirable in civil proceedings where the compensation rights of innocent persons are involved. If, for example, a police officer wrongly arrests an innocent person because the police officer had reasonable and probable grounds to believe that he had committed an indictable offence, it might be a desirable policy goal to shield the police officer from criminal prosecution, while not removing the innocent person's right to receive compensation for the interference with his liberty. On the other hand, it might be suggested that even the threat of civil proceedings will unduly deter police officers from carrying out their duties for the public's protection. If this view is accepted, then the statutory defence might have to be accepted for both criminal and civil proceedings.

A recent case which clearly raised (though did not discuss) the problem of overlapping federal and provincial jurisdictions with respect to criminal law and property and civil rights was *B. v. Baugh*.<sup>27</sup> A juvenile who was charged with a delinquency had his fingerprints taken by force against his will. The plaintiff sued for an assault (more correctly, a battery). The defence was based on the *Identification of Criminals Act*,<sup>28</sup> a federal statute which allows force to be used to obtain the fingerprints of a person charged with an indictable offence. The statute specifically provides that there is no civil liability for anything lawfully done under the Act.<sup>29</sup> The plaintiff's argument was that he had not been charged with an indictable offence but with a delinquency under the *Juvenile Delinquents Act*.<sup>30</sup> Although the trial judge<sup>31</sup> accepted the plaintiff's argument, this decision was reversed by both the Court of Appeal<sup>32</sup> and the Supreme Court.<sup>33</sup> The Supreme Court held that a person charged with a delinquency which related to an indictable offence was, for the purposes of the statute, a person who was charged with an indictable offence. The constitutional validity of the immunity provision was not questioned in this case. One can only assume that the parties considered the constitutionality of the section to be unimpeachable as it was necessarily incidental to the federal government's criminal law powers.

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<sup>27</sup> 53 N.R. 41, [1984] 3 W.W.R. 577 (S.C.C.).

<sup>28</sup> R.S.C. 1970, c. I-1.

<sup>29</sup> S. 3.

<sup>30</sup> R.S.C. 1970, c. J-3 (replaced by the *Young Offenders Act*, S.C. 1980-81-82-83, c. 110).

<sup>31</sup> *P.B. v. Baugh*, 32 B.C.L.R. 55, 64 C.C.C. (2d) 155 (S.C. 1982).

<sup>32</sup> *B. v. Baugh*, 88 B.C.L.R. 1, 70 C.C.C. (2d) 71 (C.A. 1982).

<sup>33</sup> *Supra* note 27.

Provincial legislation containing immunity provisions also raise problems of interpretation. In *Rumsey v. The Queen*<sup>34</sup> the plaintiff was arrested and detained pursuant to the *Liquor Control Act*.<sup>35</sup> While in custody, the plaintiff was grabbed by the defendant and put in a "full nelson" hold because of a previous commotion which he had caused. The force of the hold broke the plaintiff's neck. The defendant raised both the *Criminal Code* and the *Liquor Control Act* in his defence. The trial judge rejected the application of subsection 25(1) of the *Criminal Code* because it had not been expressly adopted for the purpose of enforcing provincial laws. In addition, the defendant was not enforcing the *Criminal Code* or any other federal law at the time of the commission of the tort. The trial judge, however, applied subsection 84(4) of the *Liquor Control Act* which stated:

No action lies against a police officer or constable or other person for anything done in good faith with respect to the apprehension, custody or release of a person pursuant to this section.

The trial judge stated that this provision required a reasonable standard of conduct towards the detainee, similar to that required by the common law and that, in the circumstances of this case, it had not been met. Although the result of this case is satisfactory, the trial judge's application of the immunity provision seems questionable. Section 84 of the *Liquor Control Act* permits a police officer or constable to engage in activities which would otherwise be considered tortious; namely, it allows an apparently intoxicated person to be taken into custody and kept there for a certain period of time. Subsection 84(4) immunizes a defendant from civil liability for anything done in good faith with respect to these activities, namely, the apprehension, custody or release of a person. The section does not contemplate acts of violence committed towards the detainee while in custody and arguably, the immunity provision ought not to have applied to the violent act in this case. One can contrast this case with another recent decision, *Lang v. Burch*,<sup>36</sup> a judgment of the Saskatchewan Court of Appeal. In that case a police officer took a person into custody and detained him under the authority of section 5 of *The Summary Offences Procedure Act*.<sup>37</sup> As with the *Liquor Control Act*, the right to take a person into custody under this provision depends upon the police officer being of the opinion that the person was intoxicated in a public place. The trial judge<sup>38</sup> found that the plaintiff had not in fact been intoxicated when he was apprehended. He further found that the defendant did not have a reasonable suspicion that the plaintiff was intoxicated and that, therefore, the apprehension was unlawful. The trial

<sup>34</sup> [1984] 5 W.W.R. 585, 32 Alta. L.R. (2d) 364 (F.C. Trial D.).

<sup>35</sup> R.S.A. 1970, c. 211 (*replaced by* R.S.A. 1980, c. L-17).

<sup>36</sup> 18 Sask. R. 99, 140 D.L.R. (3d) 325 (C.A. 1982).

<sup>37</sup> R.S.S. 1978, c. S-63.

<sup>38</sup> 8 Sask. R. 96 (Q.B. 1981).

judge upheld the plaintiff's action for false imprisonment. The Court of Appeal held that the trial judge erred in his interpretation of section 7 of *The Summary Offences Procedure Act*. This immunity provision is worded like subsection 84(4) of the *Liquor Control Act*:

No action lies against a peace officer or other person for anything done in good faith with respect to the apprehension, custody or release of a person pursuant to section 5.

The Court of Appeal held that section 7 applies to immunize defendants from liability, even where they acted unlawfully. That is, even where the defendants had no reasonable grounds for apprehending and detaining someone, section 7 would apply if they had a *bona fide* belief in facts which, if true, would have made their conduct lawful. For example, even if a defendant, on an objective test, did not have a reasonable suspicion that a person was intoxicated, he would be relieved from liability if, on a subjective basis, he actually believed that the facts justified his conduct. The Court of Appeal found that the trial judge had erred in law in not having made this distinction between an objective reasonable suspicion and subjective good faith. However, the Court decided that this made no difference to the outcome of this case as the evidence did not establish that the defendant met the subjective test of having acted in good faith. The action for false imprisonment was accordingly upheld.

The defence of legal authority seems to have been removed from the purview of the common law and been given over to a series of provincial and federal statutes, some expressly providing immunities, others being interpreted as such. It has been unquestionably assumed that immunity from civil liability is necessarily incidental to police functions. These are regrettable developments. The interests involved in protecting the public welfare and in compensating victims who have been deprived of fundamental rights are both important and must be more equally balanced.

## 2. *The Defence of Consent*

A second area which occasionally involves claims for battery is physical contact sport. As with actions against those in legal authority, battery actions against sportsmen revolve around not whether a battery has taken place but whether there is an available defence. In the case of sport, the defence is that of consent.

There are two defences of consent which often are not adequately distinguished: the defence of consent to an intentional tort and the defence of *volenti non fit injuria* to a claim for negligently caused injury. In the intentional tort of battery, any direct, offensive physical contact is a battery, without proof of damage. If this contact was either desired or substantially certain to result from the defendant's conduct, it is intentional and the defendant is liable for all the direct damages which

result,<sup>39</sup> unless there is an available defence. The defence of consent to the intentional tort of battery involves the assertion that the plaintiff knew about the physical contact involved with the sport and agreed to it. Injuries in sport also occur, however, as a result of unintended, but arguably negligent or unreasonable conduct. Players and spectators may get injured from conduct which, although not intended, can be said to entail risks higher than those normally tolerated in non-sport activities. In this case, it might be argued that a victim voluntarily assumed these higher-than-normal risks of injury by agreeing to participate in the sport. This is the defence of *volenti*.

In *Matheson v. Governors of Dalhousie University*<sup>40</sup> the plaintiff was injured when he was grabbed by the ankle and tackled during a game of borden ball. The participants had agreed that the game was to be non-contact, without tackling, although the evidence indicated that even so, contact was not unexpected. The plaintiff's injury was serious but was not intended by the defendant. Although the judgment was vague, the cause of action in this case ought to have been battery and the defence that of consent. The physical contact was neither accidental nor negligent, it was intended. Did the plaintiff consent to it? According to the trial judge he did. The trial judge stated that the incident was not "unexpected, unusual, infrequent or out of the ordinary".<sup>41</sup> The trial judge also stated that the plaintiff's unfortunate injury did not result from negligence on the part of the defendants.<sup>42</sup> This clouds the issue and fails to distinguish between the two causes of action.

In *King v. Redlich*<sup>43</sup> the plaintiff was injured when he was hit in the head by a puck shot by the defendant. The defendant shot the puck at the net as the plaintiff skated by. The puck hit the goal post and ricocheted into the plaintiff. The defendant had obviously not intended to hit the plaintiff and could only have been sued for negligent or unreasonable conduct. The trial judge dismissed the plaintiff's action because he found that the defendant had not been negligent. The basis for this finding and the effect of the defence of *volenti* are unclear. The trial judge, citing *Hagerman v. City of Niagara Falls*,<sup>44</sup> stated that the question of *volenti* never arose because there was no negligence. Is this so, however? The defence of *volenti* applies whenever conduct which would otherwise be negligent and actionable is excused because it can be said that the plaintiff knew and accepted the risk inherent in that conduct. The defendant's conduct in this case, shooting the puck at the net while the plaintiff skated by, must be tested in this way. If it was only "not negligent" because the plaintiff could be said to

<sup>39</sup> See *Bettel v. Yim*, 20 O.R. (2d) 617, 88 D.L.R. (3d) 543 (Cty. Ct. 1978).

<sup>40</sup> 57 N.S.R. (2d) 56, 25 C.C.L.T. 91 (S.C. 1983).

<sup>41</sup> *Id.* at 65, 25 C.C.L.T. at 104.

<sup>42</sup> *Id.*

<sup>43</sup> 30 C.C.L.T. 247, [1984] 6 W.W.R. 705 (B.C.S.C.).

<sup>44</sup> 29 O.R. (2d) 609, 114 D.L.R. (3d) 184 (H.C. 1980).

have assumed the risks of injury, then rather than the defence not arising, as suggested by the trial judge, it is the defence itself which has led to this conclusion. If the defendant had, for example, thrown his stick at the net where it struck the plaintiff, this would be considered negligent as such an act is not one of the accepted risks of the game. It is the knowledge and acceptance of the risk, that is *volenti*, which accounts for this distinction.

### 3. *The Effect of Provocation*

What is the effect of provocation on these intentional torts? This question was raised in two recent cases. In *Holt v. Verbruggen*<sup>45</sup> the plaintiff's arm was broken in a hockey game as a result of the defendant having intentionally hit him with his stick. This was apparently the final blow in a series of physical exchanges between the two players. The trial judge rejected both the defences of consent and self-defence and assessed the plaintiff's damages. The trial judge decided that punitive damages were not called for and that the plaintiff's own conduct, which constituted provocation, operated so as to reduce his compensatory damages by one-third.

In *Long v. Gardner*<sup>46</sup> the defendant stabbed the plaintiff with a knife. This blow was also the last act in a series of unpleasant and childish exchanges between the two parties. The defence argued not provocation but contributory negligence under the Ontario *Negligence Act*.<sup>47</sup> After discussing some of the potential problems that might arise if the plaintiff's negligence could be raised by a defendant sued for an intentional tort, the trial judge dismissed the contributory negligence defence on the facts of the case. The trial judge did concede, however, that the word "fault" in the *Negligence Act* encompassed more than merely negligence and that, in the appropriate case, a court could apportion damages "for assault alleged to have been caused in part by the negligence of the plaintiff".<sup>48</sup>

Two questions arise from these judgments. First, was there any difference between the defendant's plea of provocation in *Holt* and the defence of contributory negligence in *Long*? Second, what is the effect of either of these defences on an intentional tort action?

It seems clear that the essence of both defences in the above cases was the same. Contributory negligence can be defined as any unreasonable conduct on the part of a plaintiff which contributes to his injury. Provocation can be viewed as a specific type of contributorily negligent

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<sup>45</sup> 20 C.C.L.T. 29 (B.C.S.C. 1981).

<sup>46</sup> 144 D.L.R. (3d) 73 (Ont. H.C. 1983).

<sup>47</sup> R.S.O. 1980, c. 315, s. 4.

<sup>48</sup> *Supra* note 46, at 77.

behaviour. In both cases the defendants were essentially arguing that the plaintiff's provocative conduct was unreasonable and contributed to his own injury.

Should the fact that a plaintiff has acted unreasonably by provoking a defendant reduce the damages awarded against a defendant who has committed an intentional battery? This is a matter of policy that has been viewed differently by Canadian courts. One approach has been to hold a defendant entirely responsible for the consequences of his wrongdoing, even where the wrongdoing has been provoked by the victim. Provocation can, under this approach, be considered only when deciding whether punitive damages should be awarded in the case. The second approach has been to treat provocation in the same way as contributory negligence and allow it to reduce the plaintiff's award of compensatory damages. The cases and policy interests have been well presented in an annotation by Professor Osborne<sup>49</sup> and need not be reiterated here. Suffice it to say that the British Columbia courts have adopted the second approach,<sup>50</sup> hence the decision in *Holt*. The Ontario Court of Appeal has accepted the first position.<sup>51</sup> This may explain why counsel in *Long* did not argue provocation but couched the issue in terms of contributory negligence. This strategy did not escape the trial judge's notice. He stated:

Under the guise of contributory negligence, the court in effect would be recognizing provocation as warranting a reduction of liability. It seems that the law of Ontario ere long will recognize that provocation (more loosely defined than in criminal law) ought to justify a court in reducing the quantum of damages of whatever description.<sup>52</sup>

The trial judge may have been correct in predicting that Ontario courts will return to the position that provocation ought to be considered in relation to all of the plaintiff's damages and not merely to the issue of punitive damages. This is the course which I prefer. With apportionment legislation, there is no reason to disregard the plaintiff's own conduct, even in intentional torts. If the defendant's conduct is substantially more serious than was warranted by the plaintiff's provocation, this will be represented in the court's apportionment of the damages. However, until that position is accepted, surely it is inappropriate to deny that provocation should reduce compensatory

<sup>49</sup> Osborne, Annot., 20 C.C.L.T. 29 (1981).

<sup>50</sup> *Rouleau v. Rex Drive-in Theatre* (1972) Ltd., 16 C.C.L.T. 218 (B.C. Cty. Ct. 1981). This approach has also been accepted in *Mason v. Sears*, 31 N.S.R. (2d) 521, 52 A.P.R. 521 (Cty. Ct. 1979); *Murphy v. Culhane*, [1976] 3 All E.R. 533 (C.A.).

<sup>51</sup> *Shaw v. Gorter*, 16 O.R. (2d) 19, 77 D.L.R. (3d) 50 (C.A. 1977). See also *Landry v. Patterson*, 22 O.R. (2d) 335, 93 D.L.R. (3d) 345 (C.A. 1978); *Check v. Andrews Hotel Co.*, [1975] 4 W.W.R. 370, 56 D.L.R. (3d) 364 (Man. C.A. 1974); *Lane v. Holloway*, [1968] 1 Q.B. 379 (C.A. 1967).

<sup>52</sup> *Supra* note 46, at 77.

damages, while permitting apportionment under the guise of contributory negligence.

### B. *Intentional Infliction of Mental Suffering*

A recent case of note is *Rahemtulla v. Vanfed Credit Union*.<sup>53</sup> The plaintiff was dismissed from her job as a teller at the defendant credit union, after being accused of theft. She sued for wrongful dismissal and sought damages for the emotional distress that she claimed to have suffered as a result of the manner in which she was fired. The plaintiff's claim for damages for emotional distress on the basis of contract law failed. However, the tort of intentional infliction of mental distress, based on *Wilkinson v. Downton*,<sup>54</sup> was applied and damages were awarded. McLachlin J. reviewed the elements of this tort and found that they were present in this case. The defendant's conduct was "flagrant and extreme", "plainly calculated to produce some effect of the kind which was produced" and it did produce actual harm, a "visible and provable illness".<sup>55</sup> The plaintiff was awarded \$5,000.00 for her mental distress. It is interesting to see new life being breathed into this old and rarely used tort. This case, in conjunction with two other recent cases,<sup>56</sup> indicates the common law's growing interest in protecting not only a person's bodily security but also their "peace of mind".

### C. *Trespass, Detinue and Conversion*

There are several tort actions available to protect a person's property rights in chattels. The primary ones are trespass, detinue and conversion, although there are also replevin and the special action on the case for permanent injury to reversionary interest. However, it is difficult to distinguish these torts in order to select the most appropriate cause of action for a given set of circumstances. This problem was at the heart of two recently decided cases.

In *Steiman v. Steiman*<sup>57</sup> the plaintiff sued the defendants for the conversion of jewellery which she claimed was hers. This was a dispute between family members. The defendants had taken the jewellery from the plaintiff's house after her husband died and were refusing to return it to her. The jewellery had risen in value significantly from the date of the conversion to the date of trial. The plaintiff succeeded in

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<sup>53</sup> 29 C.C.L.T. 78, [1984] 3 W.W.R. 296 (B.C.S.C.).

<sup>54</sup> [1897] 2 Q.B. 57.

<sup>55</sup> *Supra* note 53, at 94-95, [1984] 3 W.W.R. at 312-13.

<sup>56</sup> *Motherwell v. Motherwell*, 1 A.R. 47, 73 D.L.R. (3d) 62 (C.A. 1976) (nuisance); *Saccone v. Orr*, 34 O.R. (2d) 317, 19 C.C.L.T. 37 (Cty. Ct. 1981) (invasion of privacy).

<sup>57</sup> 18 Man. R. (2d) 203, 143 D.L.R. (3d) 396 (C.A. 1982).

establishing that the jewellery was hers. Thus, the Court's difficult task (made even more difficult because the defendants were refusing to allow the jewellery to be appraised) was to assess her damages. Were the damages to be assessed as at the date of the conversion, the date of the judgment or at some other time? In conversion, can the court award "consequential" damages for converted goods which rise in value after the conversion?

At trial,<sup>58</sup> the plaintiff was awarded the value of the jewellery at the time of judgment. The decision was explained as follows:

[S]urely it is reasonable and just to fix the date of the evaluation as of the time of judgment as opposed to conversion. The rationale is simply that had the goods not been converted from the plaintiff but left in her possession, or returned to her, then she would have had the benefit not only of the use of the jewelry but also of any increase in the value to date.<sup>59</sup>

This approach has been supported by several authorities, including Salmond.<sup>60</sup> Citing Salmond, the Court justified the award of the increased value of the converted object as being a "special damage resulting from the conversion, in addition to the original value of the property converted . . .".<sup>61</sup> If the plaintiff had sued in detinue under the same circumstances and had been awarded damages, the goods would also have been assessed as of the date of judgment. The trial Court's approach, therefore, had the effect of awarding the plaintiff the same damages whether the action was based in detinue or conversion.

The Court of Appeal,<sup>62</sup> *per* O'Sullivan J.A., upheld the plaintiff's action in conversion but varied her award of damages. The Court assessed the damages not as of the date of judgment but as of the time of the conversion and refused to award consequential damages for the increase in the jewellery's value. This decision was supported by the following argument:

A person who finds his goods taken may continue to regard the goods as his own and sue in detinue for their return but if he elects to claim damages for conversion his damages must be based on the supposition that he has replaced the missing goods at market prices.

The victim who replaces converted goods will not lose any appreciation in value by reason of a rising market. If the victim were permitted to recover damages as of the date of trial for goods which he has in fact replaced by purchase, he would gain twice from appreciation — once on the goods converted and once on the goods purchased.<sup>63</sup>

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<sup>58</sup> 11 Man. R. (2d) 376, 18 C.C.L.T. 133 (Q.B. 1979).

<sup>59</sup> *Id.* at 380, 18 C.C.L.T. at 138.

<sup>60</sup> SALMOND ON THE LAW OF TORTS (17th ed. R. Heuston 1977).

<sup>61</sup> *Supra* note 58, at 382, 18 C.C.L.T. at 140.

<sup>62</sup> *Supra* note 57.

<sup>63</sup> *Id.* at 207, 143 D.L.R. (3d) at 407.

The Manitoba Court of Appeal applied the *Steiman* approach to a subsequent case which came before it, *Dominion Securities v. Glazerman*.<sup>64</sup> In this case the conversion of shares was in issue. The shares fluctuated in price between the date of their conversion and the time of trial and the defendant, who owned the shares, was seeking their highest value during this period of time. O'Sullivan J.A. followed his earlier decision and decided that the shares' value should be assessed at the date the defendant became aware of the conversion and could have replaced them.

The *Steiman* decision is on appeal to the Supreme Court.<sup>65</sup> There are two questions which presumably will be resolved soon. Ought the plaintiff's damages be determined according to the characterization of the action as either detinue or conversion? As pointed out above, it has generally been considered that damages in conversion are assessed at the time of the conversion and damages in detinue at the time of judgment. This is because while a conversion occurs at a specific point of time, a detinue continues as long as the defendant refuses to return the goods. If goods are rising in value, then detinue would be the wiser cause of action. Conversely, if goods are falling in value, conversion provides the better cause of action. As there is no policy reason which would justify this difference in assessment, where the facts of a case will support both actions, courts have tended to equalize the awards by awarding "consequential" damages in conversion where goods have risen in value and similar damages in detinue where goods have dropped in value. The Manitoba Court of Appeal's decision restored the importance of the plaintiff choosing his action carefully.

The second question relates to the reasons behind the Court of Appeal's decision. As indicated in the extract quoted above, O'Sullivan J.A. stated that on a conversion being discovered, a plaintiff ought to replace the converted goods by purchasing new ones. If the goods then rise in value, the plaintiff stands to benefit from the appreciation. By allowing the plaintiff to recover the appreciation on the converted goods as well, he is then entitled to benefit twice. There are problems with this reasoning. The plaintiff might not be able to replace the goods because of impecuniosity. How ought this to affect O'Sullivan J.A.'s solution?<sup>66</sup> Also, the goods might be irreplaceable or have unique or sentimental values. Further, replacement of the goods involves a certain risk to the plaintiff. Should the plaintiff's conversion action fail, or the judgment be unsatisfied, the plaintiff will have been forced to "speculate" with his own money. Should the goods be returned, the plaintiff might find himself with twice the desired "investment". Ultimately the issue is this: should an innocent person or the wrongdoer suffer (or benefit)

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<sup>64</sup> 29 C.C.L.T. 194 (Man. C.A. 1984).

<sup>65</sup> *Leave to appeal granted* 52 N.R. 236 (S.C.C. 1983).

<sup>66</sup> This question is discussed in Irvine, *Annot.*, 29 C.C.L.T. 195 (1984).

from the vagaries of the marketplace? I am inclined to prefer the judgment of the lower Court. When a wrongdoer converts or detains another's goods, the risk that these goods will either rise or drop in value ought to be borne by the wrongdoer and not by the innocent plaintiff.

### III. NEGLIGENCE

Negligence law, already the dominant area of tort law, continues to grow in importance. Several significant developments in recent years have served to expand its reach. Not only have courts been more willing to ignore contractual relationships and find concurrent liability in tort but even other areas of tort law, such as the business torts, have seen their rules and limitations eroded by the extension of negligence law principles. In addition, as the barriers to claims for pure economic losses, nervous shock, negligent statements and against public bodies have gradually fallen, negligence law has become even more highly utilized. Are the basic principles of negligence law, formulated before this increased interest in compensation, suited to these new problems? This question is now being seriously examined.<sup>67</sup> Meanwhile, the expansion continues unchecked. This section will examine some of the important recent developments.

#### A. Standard of Care

##### 1. Medical Malpractice

The previous tort law survey<sup>68</sup> noted that the only significant development in the area of "medical malpractice" had occurred in relation to the issue of informed consent. Two cases decided in that period (1977-1981), *Reibl v. Hughes*<sup>69</sup> and *Hopp v. Lepp*,<sup>70</sup> seemed to have given patients important new rights in the control of their medical treatment. In the five years since these judgments, the excitement has waned. The doctor's "duty to warn", even where it has been breached, has not resulted in many successful tort claims. Professor Robertson, writing in mid-1983, stated:

The post-*Reibl* cases are, however, tending to confirm the view that "the

<sup>67</sup> See, e.g., B. FELDTHUSEN, *supra* note 4; J. SMITH, *supra* note 5; Henderson, *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467 (1976).

<sup>68</sup> Edwards, Hopkins & White, *Annual Survey of Canadian Law — Torts: Part I*, 14 OTTAWA L. REV. 152, at 173 (1982).

<sup>69</sup> *Supra* note 2.

<sup>70</sup> [1980] 2 S.C.R. 192, 112 D.L.R. (3d) 67.

patient seems to come out the loser from the changes in the law effected by the Supreme Court of Canada in *Reibl v. Hughes*.<sup>71</sup>

Recent cases continue to provide evidence that although there has been a significant increase in "failure to inform" claims, these are still difficult cases to win.

Why is this? As noted in Professor Robertson's article, the "hurdle" which must be overcome is causation. Prior to *Reibl*, when "failure to inform" claims could be based on battery, the plaintiff did not have to prove that he had suffered damage as a result of the professional's breach. According to *Reibl* and the negligence approach, a breach of duty to inform a patient of a material risk is actionable only if the plaintiff can establish that he, as a reasonable patient, would have declined the treatment had he been informed of the risk. Not only does this place the onus of proof on the plaintiff<sup>72</sup> but it is a difficult burden to discharge. If a trial judge has decided that the doctor's treatment of the plaintiff was reasonable and that the decision to operate, despite the risks, was a skillful and competent one, is it likely that this same trial judge would then decide that a reasonable patient, informed of the benefits and risks, would have *declined* the treatment? It is more likely that a trial judge would assume that the competent doctor's decision to treat, especially where there are risks, is made only after careful consideration of the costs and benefits and of any effective and safer alternatives. Given such consideration, the trial judge would have difficulty in finding for the plaintiff on the issue of causation.

As Professor Robertson has correctly pointed out, the analysis presented above is valid only if one assumes that in a given case there is only one reasonable decision, to treat or not to treat.<sup>73</sup> Where there is a reasonable alternative, the court may find that even though the doctor's decision to treat was reasonable, so was the patient's refusal. In *Bucknam v. Kostiuk*,<sup>74</sup> for example, the Court found that there were "two conflicting, but respectable and reasonable, schools of thought"<sup>75</sup> concerning the surgery proposed by the doctor. One school would have elected for the procedure, the other would have opted for an alternate, safer procedure. In this type of case, therefore, the plaintiff might have been able to overcome the causation hurdle even where the defendant's

<sup>71</sup> Robertson, *Overcoming the Causation Hurdle in Informed Consent Cases: The Principle in McGhee v. N.C.B.*, 22 U.W.O.L. REV. 75 (1984). Professor Robertson was citing Picard, *Consent to Medical Treatment in Canada*, 19 OSGOODE HALL L.J. 140 (1981). As to the actual effect which *Reibl v. Hughes* has had on the practice of medicine, see Robertson, *Informed Consent in Canada: An Empirical Study*, 22 OSGOODE HALL L.J. 139 (1984). The House of Lords has recently expressly rejected *Reibl v. Hughes* in *Sidaway v. Bethlehem Royal Hospital*, [1985] 1 All E.R. 643, [1985] 2 W.L.R. 480.

<sup>72</sup> See contra Robertson, *Overcoming the Causation Hurdle*, *supra* note 71, at 81.

<sup>73</sup> *Id.*

<sup>74</sup> 44 O.R. (2d) 102, 3 D.L.R. (4th) 99 (H.C. 1983).

<sup>75</sup> *Id.* at 113, 3 D.L.R. (4th) at 110.

treatment was reasonable. In *Bucknam*, however, the plaintiff's claim failed. Mr. Justice Krever found that the reasonable person *in the plaintiff's position* would have accepted her doctor's advice. She had developed complete confidence in him and had confirmed his opinion by consulting another independent specialist.

Two recent cases illustrate this link between the doctor's duty to skillfully and competently treat his patients and the causation element in a failure to inform claim. In *Reynard v. Carr*<sup>76</sup> and *Graham v. Persyko*<sup>77</sup> doctors prescribed the drug prednisone for their respective patients. This drug had serious side-effects which adversely affected these patients. In *Reynard* Mr. Justice Bouck found that the defendant doctors who had prescribed the drug were negligent in their decision to do so. They had demonstrated either indifference to, or ignorance of, the side-effects. The trial judge found that the continuation of the drug treatment after a certain point in time presented "unacceptable hazards". He also found that the failure to inform the patient of these adverse effects was negligent. According to the trial judge, when the failure to inform of risks is due to negligent ignorance of these risks, as in this case, the plaintiff need not prove causation. The plaintiff, in other words, did not have to establish that had he been informed of the risks, the reasonable decision would have been to decline treatment. In view of the Court's finding regarding the safety of the drug, however, the causation issue would obviously have posed no difficulty.

Although it is clear that the failure to inform aspect of the plaintiff's claim in *Reynard* was superfluous in view of the Court's other findings, the application of Mr. Justice Bouck's causation rule to cases where the doctor's treatment was not negligent is questionable. If the treatment is reasonable, despite the doctor's negligent ignorance of the risk, and is treatment that the reasonable patient would not have declined if informed of the risks, it does not seem appropriate to allow a plaintiff to succeed in the absence of causation. There is no "negligence in the air", a principle which is ignored by Mr. Justice Bouck's proposition.

In *Graham* Mr. Justice Holland found that the doctor's prescription of prednisone "was wrong and in making the decision to prescribe prednisone he fell below the degree of care and skill that could reasonably be expected".<sup>78</sup> The Court also found that the failure to inform was actionable and that the plaintiff would not have consented to the drug's use had he been informed. Again, this finding is hardly surprising in view of the Court's decision that it was negligently wrong to prescribe the drug in the first instance.

Two other recent medical malpractice cases are worth noting. *Bergen*

<sup>76</sup> 50 B.C.L.R. 166, 30 C.C.L.T. 42 (S.C. 1983).

<sup>77</sup> 30 C.C.L.T. 85 (Ont. H.C. 1984).

<sup>78</sup> *Id.* at 96.

v. *Sturgeon General Hospital*<sup>79</sup> is a true "horror story" of medical negligence. The patient was admitted to the hospital complaining of stomach pains. The admitting physician suspected appendicitis and called in other doctors to examine the patient in order to confirm his suspicions. Three other doctors became involved — a surgeon, a gynaecologist and a general practitioner. They suspected another problem and failed to conduct a routine test for appendicitis. After four and one-half days in hospital the patient's appendix ruptured and, despite an operation, she died. At trial, six separate defendants were held liable for the patient's death — the three doctors who failed to diagnose the plaintiff's condition, two nurses who failed to take appropriate steps once the patient's appendix burst and the hospital itself for the destruction of medical records by its nurses. There were some interesting legal issues in these facts which were not dealt with by the Court. This case was a classic example of a chain of individual negligent acts ultimately leading to tragedy. Should a court hold each person who was negligent liable or should they insulate the earlier negligent actors from liability if the tragedy could have been prevented by one of the later negligent people? In this case, the Court found that the patient probably would have survived, despite the negligent acts of the doctors, if the nurses had obtained a doctor as soon as the patient's appendix ruptured.<sup>80</sup> Nevertheless, all of the parties were found liable. This approach is consistent with some authorities,<sup>81</sup> although inconsistent with others.<sup>82</sup> The problem was never really addressed in the judgment. Another curious finding was that the hospital's destruction of records was negligent and actionable. There was no suggestion that these records were in any way relevant to the patient's death.

*Layden v. Cope*<sup>83</sup> is a similar failure-to-diagnose case. Two doctors misdiagnosed a patient's problem which ultimately led to the amputation of the patient's leg. The trial judge made some interesting references to the "locality rule". He accepted the proposition that standards in a small community may differ from those in larger urban centres. However, he held that on the facts of this case, the standard of care expected from a small town general practitioner was not "markedly different" from the standard expected from a general practitioner in a larger city<sup>84</sup> and found the defendants negligent. This judgment confirms Professor Picard's statement that "the locality rule refuses to die",<sup>85</sup> although it is not clear that it is having any real effect on medical malpractice judgments.

<sup>79</sup> 28 C.C.L.T. 155 (Alta. Q.B. 1984).

<sup>80</sup> *Id.* at 182.

<sup>81</sup> *E.g.*, *Price v. Milawski*, 18 O.R. (2d) 113, 82 D.L.R. (3d) 130 (C.A. 1977).

<sup>82</sup> *E.g.*, *Yepremian v. Scarborough Gen. Hosp.*, 28 O.R. (2d) 494, 110 D.L.R. (3d) 513 (C.A. 1980).

<sup>83</sup> 52 A.R. 70, 28 C.C.L.T. 140 (Q.B. 1984).

<sup>84</sup> *Id.* at 75, 28 C.C.L.T. at 148.

<sup>85</sup> *Supra* note 7, at 177.

## 2. Legal Malpractice

Although there have been numerous law suits against lawyers in the past few years,<sup>86</sup> most do not raise issues of great legal significance. The most problematic area for lawyers in terms of potential liability seems to involve real estate transactions. Lawyers have frequently been faulted for acting on both sides of the same transaction or for ignoring various legal requirements bound up with the transaction. Cases involving missed limitation periods also continue to arise.

The question of the basis of the lawyer's liability, contract or tort, remains unsettled. As discussed by Professor Rafferty,<sup>87</sup> some judgments have favoured imposing tort liability on solicitors, in addition to breach of contract, while others have not. The question generally arises in relation to the appropriate limitation period. In *Central Trust Co. v. Rafuse*<sup>88</sup> Mr. Justice Jones of the Nova Scotia Court of Appeal conceded that the "question still remains a contentious issue"<sup>89</sup> and declined to resolve it. Instead, he found that in both tort and contract the limitation period runs from the time the breach occurred.<sup>90</sup> This case is now on appeal to the Supreme Court of Canada and the issue, therefore, may soon be resolved. It would frankly be quite surprising, in view of the growing support for a concurrent liability approach,<sup>91</sup> if the Supreme Court were to decide that the existence of a contractual relationship precludes liability in tort when the law of tort recognizes a legal obligation apart from contract.

Another point of legal interest involves the solicitor's fiduciary

<sup>86</sup> *Ruzicka v. Costigan*, 54 A.R. 385, [1984] 6 W.W.R. 1 (C.A.); *Bank of Nova Scotia v. Terry*, 46 O.R. (2d) 180, 9 D.L.R. (4th) 101 (C.A. 1984); *Pound v. Nakonechny*, 27 C.C.L.T. 146, 5 D.L.R. (4th) 427 (Sask. C.A. 1983); *Central Trust Co. v. Rafuse*, 57 N.S.R. (2d) 125, 147 D.L.R. (3d) 260 (C.A. 1983); *Malicki v. Yankovich*, 41 O.R. (2d) 160, 145 D.L.R. (3d) 767 (C.A. 1983); *Jacks v. Davis*, 39 B.C.L.R. 353, 141 D.L.R. (3d) 355 (C.A. 1982); *Stronghold Inv. Ltd. v. Renekema*, [1984] 3 W.W.R. 51, 7 D.L.R. (4th) 427 (B.C.S.C.); *Ferris v. Rusnak*, 50 A.R. 297, 9 D.L.R. (4th) 183 (Q.B. 1983); *Ingwersen v. Dykstra*, 50 B.C.L.R. 88, 4 D.L.R. (4th) 355 (S.C. 1983); *Foster v. Barry*, [1983] 5 W.W.R. 315 (B.C.S.C.); *Bjorninen v. Mercredi*, 21 Man. R. (2d) 229, [1983] 4 W.W.R. 633 (Q.B.); *Meadwell Enterprises Ltd. v. Clay & Co.*, 44 B.C.L.R. 188, [1983] 3 W.W.R. 742 (S.C.); *Soursos v. C.I.B.C.*, 44 B.C.L.R. 66, [1983] 3 W.W.R. 716 (S.C.); *Panko v. Simmonds*, 42 B.C.L.R. 50, [1983] 3 W.W.R. 158 (S.C. 1982); *Brumer v. Gunn*, 18 Man. R. (2d) 155, [1983] 1 W.W.R. 424 (Q.B. 1982). There are numerous other cases reported in 1981 and 1982.

<sup>87</sup> Rafferty, *The Tortious Liability of Professionals to Their Contractual Clients*, in *ISSUES IN TORT LAW*, *supra* note 15, at 243.

<sup>88</sup> *Supra* note 86.

<sup>89</sup> *Id.* at 137, 147 D.L.R. (3d) at 274.

<sup>90</sup> Professor Irvine was strongly critical of this aspect of the decision, claiming that the approach was "very unorthodox": *Irvine, Annot.*, 25 C.C.L.T. 228 (1983).

<sup>91</sup> See, e.g., *Rempel v. Parks*, 53 B.C.L.R. 167, 10 D.L.R. (4th) 52 (C.A. 1984); *Ferris v. Rusnak*, *supra* note 86; *Nielson v. Watson*, 33 O.R. (2d) 515, 125 D.L.R. (3d) 326 (H.C. 1981).

relationship with his client and the implications of such a relationship. Although this issue has not been adequately discussed in any of the recent judgments, it has been raised.<sup>92</sup> Professor Irvine has, however, elaborated on the significance of this issue.<sup>93</sup>

### 3. Other Professionals

Actions have recently been brought against architects,<sup>94</sup> accountants and auditors,<sup>95</sup> bankers,<sup>96</sup> builders,<sup>97</sup> engineers,<sup>98</sup> insurers<sup>99</sup> and real estate appraisers.<sup>100</sup>

Actions against architects, builders and engineers frequently raise the concurrent liability issue, either for the purposes of limitation periods or with respect to the applicability of apportionment legislation. The recent judgments demonstrate the increasing acceptance of the concurrent liability approach, or a modified, concurrent liability approach, restricted to certain professionals. This has led to a decline of the "mutual exclusivity" thesis.<sup>101</sup> In *Attorney-General of Nova Scotia v. Aza Avramovitch Assocs.*<sup>102</sup> an architect was held concurrently liable in tort and contract for the purposes of apportionment legislation, although ultimately the architect's claim for contribution from the third party failed. In *John Maryon International Ltd. v. New Brunswick Telephone Co.*<sup>103</sup> and *Ward v. Dobson Construction Ltd.*<sup>104</sup> actions against

<sup>92</sup> See *Jacks v. Davis*, *supra* note 86; *MacCulloch v. Corbett*, 49 N.S.R. (2d) 663, 133 D.L.R. (3d) 43 (C.A. 1982).

<sup>93</sup> *Irvine*, *Annot.*, 12 C.C.L.T. 299 (1980).

<sup>94</sup> *A.-G.N.S. v. Aza Avramovitch Assocs.*, 63 N.S.R. (2d) 181, 11 D.L.R. (4th) 588 (C.A. 1984).

<sup>95</sup> *Ranjoy Sales & Leasing Ltd. v. Deloitte, Haskins & Sells*, 27 Man. R. (2d) 311, [1984] 4 W.W.R. 706 (Q.B.); *Revelstoke Credit Union v. Miller*, 28 C.C.L.T. 17, [1984] 2 W.W.R. 297 (B.C.S.C.); *H.E. Kane Agencies v. Coopers & Lybrand*, 44 N.B.R. (2d) 374, 23 C.C.L.T. 233 (Q.B. 1983).

<sup>96</sup> *Hayward v. Bank of Nova Scotia*, 27 C.C.L.T. 298, 7 D.L.R. (4th) 135 (Ont. H.C. 1984).

<sup>97</sup> *Hansen v. Twin City Constr. Co.*, 37 A.R. 433, [1982] 4 W.W.R. 261 (Q.B.); *Ward v. Dobson Constr. Ltd.*, 44 N.B.R. (2d) 632, 24 C.C.L.T. 205 (Q.B. 1983), *aff'd* 50 N.B.R. (2d) 1, 131 A.P.R. 1 (C.A. 1983).

<sup>98</sup> *John Maryon Int'l Ltd. v. New Brunswick Tel. Co.*, 43 N.B.R. (2d) 469, 141 D.L.R. (3d) 193 (C.A. 1982).

<sup>99</sup> *G.K.N. Keller Canada Ltd. v. Hartford Fire Ins. Co.*, 27 C.C.L.T. 61 (Ont. H.C. 1983).

<sup>100</sup> *Cantwell v. Petersen*, 25 R.P.R. 290, 139 D.L.R. (3d) 466 (B.C.S.C. 1982); *Semkuley v. Clay*, 39 A.R. 526, 140 D.L.R. (3d) 489 (Q.B. 1982).

<sup>101</sup> This term is used by Irvine in *Case Comment: John Maryon International Ltd. v. New Brunswick Telephone Co. & Ward v. Dobson Construction Ltd.*, 24 C.C.L.T. 213, where a good discussion of these issues is presented.

<sup>102</sup> *Supra* note 94.

<sup>103</sup> *Supra* note 98.

<sup>104</sup> *Supra* note 97.

an engineer and a builder respectively were held to be based either in tort or contract for the purpose of limitation periods.

*G.K.N. Keller Canada Ltd. v. Hartford Fire Insurance Co.*<sup>105</sup> has broadened the potential liability of insurers. The plaintiff, a foundation contractor, sought comprehensive liability insurance for its operations. It approached the defendant insurance broker who obtained a policy from the co-defendant insurance company. When the plaintiff was sued by a client for damages resulting from a breach of contract, the defendant insurer declined coverage due to an exclusion in the policy for "liability assumed by the Insured under any contract or agreement". The plaintiff settled his liability claim and sued both the insurance broker and the insurance company. The Court concluded that the policy did in fact exclude coverage for the plaintiff's liability claim but held both the broker and the insurer liable in negligence. Mr. Justice Rutherford found that both defendants had been aware of the plaintiff's needs, were experienced in the insurance field and were equally at fault for their failure to provide the insurance coverage which they knew the plaintiff required.

*Revelstoke Credit Union v. Miller*<sup>106</sup> provided an excellent review of the principles and authorities relating to the auditor's standard of care. An interesting side issue in the case was the finding that, despite the auditor's negligence and breach of its duty, the plaintiff was contributorily negligent, resulting in a fifteen percent reduction in damages. This decision raises the question of whether contributory negligence can be used as a defence to a claim of breach of contract, a matter which is by no means settled in Canadian law. Recent cases have expressed approval of utilizing apportionment in breach of contract actions.<sup>107</sup> The point was not fully discussed in *Revelstoke Credit Union* in view of Mr. Justice McEachern's finding that an earlier British Columbia case, *West Coast Finance Ltd. v. Gunderson, Stokes, Walton & Co.*,<sup>108</sup> obliged him to hold that the *Contributory Negligence Act*<sup>109</sup> applied to negligent auditors. It seems likely, however, that where a defendant has been sued for failure to take reasonable care, resulting in a breach of contract, courts will not be reluctant to apportion liability if the plaintiff's negligence also contributed to his loss.<sup>110</sup>

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<sup>105</sup> *Supra* note 99.

<sup>106</sup> *Supra* note 95.

<sup>107</sup> *Cosyns v. Smith*, 41 O.R. (2d) 488, 146 D.L.R. (3d) 622 (C.A. 1983); *H.E. Kane Agencies Ltd. v. Coopers & Lybrand*, *supra* note 95; *Ribic v. Weinstein*, 26 R.P.R. 247, 140 D.L.R. (3d) 258 (Ont. H.C. 1982); *Tompkins Hardware Ltd. v. North W. Flying Servs. Ltd.*, 22 C.C.L.T. 1, 139 D.L.R. (3d) 329 (Ont. H.C. 1982).

<sup>108</sup> [1974] 2 W.W.R. 428, 44 D.L.R. (3d) 232 (B.C.S.C.), modified [1975] 4 W.W.R. 501, 56 D.L.R. (3d) 460 (B.C.C.A.).

<sup>109</sup> R.S.B.C. 1960, c. 74 (replaced by the *Negligence Act*, R.S.B.C. 1979, c. 298).

<sup>110</sup> See Klar, *Developments in Tort Law: The 1979-80 Term*, 2 SUP. CT. L. REV. 325, at 342 (1981).

#### 4. Limitation Periods

The question of the applicable limitation period in tort cases has frequently been before the courts in recent years. Two problems have been raised. First, what is the usual starting date for the running of the limitation period? Second, is there a different rule for an action in which damage has occurred that was not reasonably discoverable until some later time?

As noted above, despite the traditional rule that in tort the cause of action arises at the date of damage, several cases have recently held that in tort, as in contract, limitation periods begin at the time of the breach of the duty.<sup>111</sup> Professor Irvine has been critical of this "heresy";<sup>112</sup> these cases will not be discussed here. The more significant development in relation to limitation periods in tort occurred in *City of Kamloops v. Nielsen*.<sup>113</sup> In this judgment, the Supreme Court of Canada, *per* Madame Justice Wilson, rejected the House of Lords decision in *Pirelli General Cable Works Ltd. v. Oscar Faber & Partners*<sup>114</sup> and held that it is not the date that damages manifest themselves but rather the date that they are reasonably discoverable that initiates the tort limitation period. In so deciding, the Supreme Court was accepting the earlier English Court of Appeal decision in *Sparham-Souter v. Town & Country Developments (Essex) Ltd.*<sup>115</sup> and several Canadian judgments which had followed it.<sup>116</sup> It obviously ended the notion that the tort and contract limitation periods start running on the same date.<sup>117</sup> The *Sparham-Souter* principle, now part of Canadian law, must be carefully considered by future courts and perhaps by legislatures as well. Is it advisable to allow a cause of action to arise many years after the occurrence of the breach or damage, as might possibly happen in view of the "reasonable discoverability" rule? How discoverable must the damage have been? Will this principle apply to all claims in tort, for personal injury as well as property damages?<sup>118</sup> These questions merit further consideration.

<sup>111</sup> *Power v. Halley*, 17 C.C.L.T. 182, 124 D.L.R. (3d) 350 (Nfld. C.A. 1981); *Page v. Dick*, 12 C.C.L.T. 43 (Ont. H.C. 1980). In *Robert Simpson Co. v. Foundation Co.*, 20 C.C.L.T. 197 (Ont. C.A. 1982), this approach was restricted to tort cases involving persons exercising a "skilled calling".

<sup>112</sup> *Irvine*, Annot., 17 C.C.L.T. 182, at 184 (1981).

<sup>113</sup> *City of Kamloops v. Nielsen*, 29 C.C.L.T. 97, 10 D.L.R. (4th) 641 (S.C.C. 1984).

<sup>114</sup> [1983] 1 All E.R. 65 (H.L. 1982).

<sup>115</sup> [1976] Q.B. 858 (C.A.).

<sup>116</sup> *Robert Simpson Co. v. Foundation Co.*, *supra* note 111; *supra* note 98.

<sup>117</sup> That is, at least for the purposes of duties not involving "skilled callings".

*See note 111 supra.*

<sup>118</sup> In *Robert Simpson Co. v. Foundation Co.*, *supra* note 111, the Court distinguished the start of the limitation period for personal injury cases from the start of the limitation period for property damage cases. It held that the date for personal injury actions was the time of the damage, not the time of discoverability and applied *Cartledge v. E. Jopling & Sons Ltd.*, [1963] A.C. 758. The commencement date for

## B. Proof

### 1. *Res Ipsa Loquitur*

The doctrine of *res ipsa loquitur* has very little importance in most tort law cases. It is occasionally raised by plaintiffs; more often than not it is either rejected by the courts or applied in cases where it adds nothing to the court's ultimate finding.

*Res ipsa loquitur* was raised but rejected in two medical malpractice cases. In *Ferguson v. Hamilton Civic Hospitals*<sup>119</sup> a plaintiff became paralyzed after undergoing an angiogram test. There was no clear cause for the plaintiff's injury; it could have occurred in several ways. Mr. Justice Krever, referring to his earlier discussion of the doctrine in *Hobson v. Munkley*,<sup>120</sup> held that "common experience" did not indicate that the plaintiff's injury could not have occurred without negligence; that is, the occurrence did not "speak of negligence". Even if applicable, Mr. Justice Krever noted that the doctrine did not shift the onus of proof to the defendant but merely raised an inference of negligence. This inference would be discharged by the defendant providing an explanation equally consistent with no negligence as with negligence.<sup>121</sup> In *Savoie v. Bouchard*<sup>122</sup> a surgeon contracted "hepatitis B" when he pricked his hand on a contaminated needle during an operation. The surgeon sued both the scrub nurse, whose duty it was to keep the operating area clean and her employers, the hospital trustees. The doctrine of *res ipsa loquitur* was raised but rejected by the Court. The trial judge<sup>123</sup> held that one of its elements was absent — the syringe needle was not "in the sole management or control of the defendant".<sup>124</sup> The application of the doctrine was even more questionable on another ground. Its purpose is to assist plaintiffs when the cause of an accident is unknown and

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property damage which had been "covered up" was reasonable discoverability, based on *Sparham-Souter*. Has this distinction survived *Kamloops*? Since Wilson J. stated that there was "no clear basis of distinction" between the two cases, can one imply that the *Kamloops* principle now applies to both types of claims?

<sup>119</sup> 40 O.R. (2d) 577, 144 D.L.R. (3d) 214 (H.C. 1983). This judgment is more interesting for its discussion of the problem of informed consent.

<sup>120</sup> 14 O.R. (2d) 575, 74 D.L.R. (3d) 408 (H.C. 1976). This case was discussed in the last tort law survey, *supra* note 68.

<sup>121</sup> This approach tends to become circular. The doctrine is not applied where common experience indicates that there are reasons other than negligence for the accident's occurrence. However, when the doctrine is applied, a defendant can clear herself by providing evidence that there were other causes not attributable to her negligence which equally explain the occurrence.

<sup>122</sup> 49 N.B.R. (2d) 424, 26 C.C.L.T. 173 (C.A. 1983).

<sup>123</sup> 43 N.B.R. (2d) 271, 23 C.C.L.T. 83 (Q.B. 1982).

<sup>124</sup> *Id.* at 289, 23 C.C.L.T. at 101.

only circumstantial evidence is available. In this case, the cause of the accident was clearly known. The only real issue was whether the nurse's conduct or the doctor's conduct was negligent, not a matter for *res ipsa loquitur*. In the end, fault was ascribed to both parties and the liability was apportioned equally.

*Chabot v. Ford Motor Co.*<sup>125</sup> is a product liability case which shows that even where the doctrine is applied, it might add nothing to the case. The plaintiff's Ford truck was destroyed by a fire which started somewhere under its hood. There were several theories advanced regarding the fire's cause. The trial judge accepted the plaintiff's theory. He held that "the most convincing and most probable explanation of the fire" was that the drain plug on the oil pan had been improperly torqued, had worked itself loose and that oil had then leaked out and ignited.<sup>126</sup> Both parties agreed that the drain plug was the manufacturer's responsibility, although Ford disputed the plaintiff's theory. After a careful review of the leading authorities, the trial judge applied *res ipsa loquitur*. In view of the trial judge's findings, however, was *res ipsa* necessary? From conflicting theories, the Court had accepted one which indicated the fire's cause and attributed it to the defendant's negligence.

### C. Duty

#### 1. The Effect of Statutory Duties on the Common Law Action

One of the more important tort law judgments in recent years is *R. v. Saskatchewan Wheat Pool*.<sup>127</sup> The case concerned an issue which has long vexed tort law: what is the effect of the breach of statutory duty on an action in tort? The degree to which the courts will allow statutes to either create new common law rights or define the scope of existing duties will determine the extent to which the common law will control the development of tort law.

The plaintiff, the Canadian Wheat Board, sued the defendant, the Saskatchewan Wheat Pool, for the economic losses which it suffered as a result of the Pool's breach of a provision of the *Canada Grain Act*.<sup>128</sup> The Pool, which is responsible for the storage and delivery of grain, had delivered infested grain from a terminal elevator, contrary to the Act. A penalty was provided for in the legislation but the Act was silent with respect to the question of civil liability. The Wheat Board's damages consisted of the expenses that it incurred in bringing the infested

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<sup>125</sup> 39 O.R. (2d) 162, 138 D.L.R. (3d) 417 (H.C. 1982).

<sup>126</sup> *Id.* at 171, 138 D.L.R. (3d) at 428.

<sup>127</sup> 23 C.C.L.T. 121, 143 D.L.R. (3d) 9 (S.C.C. 1983). This case is discussed in Klar, *Developments in Tort Law: The 1982-83 Term*, 6 SUP. CT. L. REV. 309, at 310 (1984).

<sup>128</sup> S.C. 1970-71-72, c. 7.

grain back to shore, unloading it from the ship and fumigating and reloading it. As the plaintiff made no allegations of negligence but based its case solely on the defendant's statutory breach, the effect of such a breach was to be determinative of the liability issue in this case.

In a very thorough judgment, Mr. Justice Dickson, as he then was, reviewed the various positions which have been taken in American and English cases on the issue of statutory breach. In a judgment which emphasized the important differences between statutes passed for penal purposes and common law tort claims, the following principles were adopted:

- (1) There is no tort of breach of statutory duty in Canada. A statute's silence regarding the civil effect of a breach of statutory provisions will be taken as indicating that no private right of action was created.
- (2) The civil consequences of a breach of statute will be subsumed in the law of negligence. In no circumstances, however, will an unexcused breach be treated as constituting negligence *per se*, giving rise to absolute liability.
- (3) Proof of statutory breach, causative of damages, may be evidence of negligence. It may afford a specific and useful standard of reasonable conduct. This decision is within the discretion of the trier of fact. The breach will not create a rebuttable presumption of negligence, shifting an onus of disproof of negligence onto the defendant.<sup>129</sup>

Applied to the facts of *Saskatchewan Wheat Pool*, these principles resulted in the dismissal of the plaintiff's action. The defendant's conduct, even if it could be said that a duty was owed, was not negligent.

This judgment will have a significant effect on Canadian tort law. Prior to it, Canadian courts have frequently created new common law duties based on statutory enactments.<sup>130</sup> Although *Saskatchewan Wheat Pool* does not preclude the growth of common law and the adoption of new common law duties, it does remind the courts that the existence of a statutory duty should not necessarily encourage the creation of a concomitant common law duty. Mr. Justice Dickson stated:

One of the main reasons for shifting a loss to a defendant is that he has been at fault, that he has done some act which should be discouraged. There is then good reason for taking money from the defendant as well

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<sup>129</sup> *Saskatchewan Wheat Pool*, *supra* note 127, at 146, 143 D.L.R. (3d) at 25. There is one possible exception to the first principle set out above. Mr. Justice Dickson (as he then was) stated that "industrial penal legislation" requires special consideration and that in such circumstances absolute liability might be imposed.

<sup>130</sup> This is especially true of the cases dealing with a defendant's failure to take affirmative action. Where the courts have been able to find breaches of statutory duties, they have been more inclined to impose civil liability on defendants. *See, e.g.*, *Jordan House Ltd. v. Menow*, [1974] S.C.R. 239, 38 D.L.R. (3d) 105 (1973); *Horsley v. MacLaren*, [1972] S.C.R. 441, 22 D.L.R. (3d) 545; *Ostash v. Sonnenberg*, 63 W.W.R. 257, 67 D.L.R. (2d) 311 (Alta. C.A. 1968).

as a reason for giving it to the plaintiff who has suffered from the fault of the defendant. But there seems little in the way of defensible policy for holding a defendant who breached a statutory duty unwittingly to be negligent and obligated to pay even though not at fault. The legislature has imposed a penalty on a strictly admonitory basis and there seems little justification to add civil liability when such liability would tend to produce liability without fault. The legislature has determined the proper penalty for the defendant's wrong but if tort admonition of liability without fault is to be added, the financial consequences will be measured, not by the amount of the penalty, but by the amount of money which is required to compensate the plaintiff. Minimum fault may subject the defendant to heavy liability. Inconsequential violations should not subject the violator to any civil liability at all but should be left to the criminal courts for enforcement of a fine.<sup>131</sup>

Where a common law duty of care is owed and a statutory breach is raised as evidence of negligence, the same spirit prevails. Unless the court is convinced that the defendant's conduct was blameworthy, justifying an adverse verdict, civil liability should not be affected by the statutory breach.

Another change in the law brought about by *Saskatchewan Wheat Pool* is the apparent rejection of the "presumption of negligence" approach in favour of a much weaker "inference of negligence" view.<sup>132</sup> This view is in accordance with Mr. Justice Dickson's general proposition that the effect of a statutory breach is a matter within the trier of fact's discretion.

The influence of *Saskatchewan Wheat Pool* has been apparent in subsequent judgments. In *Baird v. Canada*<sup>133</sup> the Federal Court of Appeal was faced with a motion to strike out a statement of claim. The plaintiff, an investor, lost his entire investment in a trust company that had been licensed under the *Trust Companies Act*.<sup>134</sup> The plaintiff sued the Crown alleging breach of statutory duty and the Minister of Finance and the Superintendent of Insurance, alleging negligence in the exercise of statutory duties and powers in the licensing, inspection and regulation of the trust company. In discussing this motion, Mr. Justice LeDain stated that since the *Saskatchewan Wheat Pool* decision, the tort liability of the defendant was not to be determined "by conjectures as to legislative intention" [in reference to the *Trust Companies Act*] "but by the application, in a public law context, of the common law principles governing liability for negligence. The liability is not to be regarded as created by the statute, where there is no express provision for it."<sup>135</sup>

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<sup>131</sup> *Saskatchewan Wheat Pool*, *supra* note 127, at 143-44, 143 D.L.R. (3d) at 23.

<sup>132</sup> The reference to this change is, admittedly, ambiguous. It is nevertheless my opinion that this is a justifiable view to take of this judgment: see Klar, *supra* note 127.

<sup>133</sup> 48 N.R. 276, 148 D.L.R. (3d) 1 (F.C. App. D. 1983).

<sup>134</sup> R.S.C. 1970, c. T-16.

<sup>135</sup> *Supra* note 133, at 282-83, 148 D.L.R. (3d) at 9.

This statement contrasts with Mr. Justice LeDain's pre-*Saskatchewan Wheat Pool* approach in *Canadian Pacific Airlines Ltd. v. The Queen*.<sup>136</sup> In that case the question of whether the *Aeronautics Act*<sup>137</sup> imposed a civil law duty on the defendant was decided by considering if there was a "legislative intention" to create a private right of action for breach of the statutory provision. On the merits of the motion, Mr. Justice LeDain held that it was not "plain and obvious" that there could not be a common law duty of care imposed on the defendant and accordingly dismissed the motion. In *Palmer v. Nova Scotia Forest Industries*<sup>138</sup> the Court dismissed a claim arising out of an alleged breach of the *Fisheries Act*,<sup>139</sup> referring to *Saskatchewan Wheat Pool*'s rejection of the nominate tort of breach of statutory duty.

In *B.G. Ranches v. Manitoba Agricultural Lands Protection Board*<sup>140</sup> a statement of claim was struck out and the action dismissed partly because there was no cause of action alleged other than a breach of the *Agricultural Lands Protection Act*.<sup>141</sup> Following the *Saskatchewan Wheat Pool* decision, the Court held that a statutory breach, by itself, does not give rise to a claim for damages.

Although the Supreme Court of Canada has unequivocally rejected the tort of breach of statutory duty, this of course does not mean that those who have been given statutory responsibilities cannot be sued in tort if they negligently discharge their functions.<sup>142</sup> In this instance, however, it is the common law of torts and not the statutory enactment itself that creates and defines the scope of the duty. This common law duty will be discussed, *infra*.

## 2. Duties of Affirmative Action

Although the common law imposes no *general* duty on persons to take affirmative action to protect others, duties to act have been imposed on persons in numerous specific situations. Professor Smith has written that the following sorts of relationships have traditionally been held to give rise to a duty to prevent harm: (1) contractual relationships, (2) "reliance" relationships, (3) fiduciary relationships, (4) special relationships of dependency and (5) relationships between occupiers of adjacent land.<sup>143</sup> The few Canadian cases decided recently in this area support this view.

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<sup>136</sup> [1979] 1 F.C. 39, 87 D.L.R. (3d) 511 (App. D. 1978).

<sup>137</sup> R.S.C. 1970, c. A-3.

<sup>138</sup> 60 N.S.R. (2d) 271, 2 D.L.R. (4th) 397 (S.C. 1983).

<sup>139</sup> R.S.C. 1970, c. F-14.

<sup>140</sup> [1983] 4 W.W.R. 681 (Man. Q.B.).

<sup>141</sup> S.M. 1977, c. 44 (*as amended by S.M. 1978, c. 45*).

<sup>142</sup> This result was the combined effect of *Baird v. Canada*, *supra* note 133 and *Howarth v. The Queen*, 29 C.C.L.T. 157 (F.C. Trial D. 1984).

<sup>143</sup> J. SMITH, *supra* note 5, at 34. Professor Smith argues that there is not, and

In *Crocker v. Sundance Northwest Resorts Ltd.*<sup>144</sup> the defendants were held liable for permitting an intoxicated person to enter into a winter event called "tube racing". The defendants operated a ski complex and were holding a carnival. The plaintiff, who won his first race, became intoxicated prior to competing in a second race. This intoxication was noticed by the defendant company's manager who suggested to the plaintiff that in view of his state he not enter the race. The plaintiff did not heed this advice and was seriously injured during the race. The plaintiff alleged that the defendant was negligent and had breached its duty to him by failing to prevent him from racing. Relying on the Supreme Court of Canada's judgment in *Jordan House Ltd. v. Menow*,<sup>145</sup> Mr. Justice Fitzpatrick held that the contractual relationship between the parties gave rise to a duty on the defendant's part to prevent the plaintiff from racing, even if this meant calling the provincial police to have the plaintiff removed.

Two cases involving innkeepers and intoxicated patrons are *Schmidt v. Sharpe*<sup>146</sup> and *McGeough v. Don Enterprises Ltd.*<sup>147</sup> In the first case a jury found the defendant negligent for having served liquor to the under-aged co-defendant, resulting in a subsequent motor vehicle accident. No reasons were given and no cases cited by the trial judge. In *McGeough* a hotel was found not liable for an attack carried out by one patron on another. The trial judge considered the *Jordan House* decision but held that the attack was not foreseeable nor reasonably preventable by the defendant.

Can a social host be found liable to either an intoxicated guest or a person injured by such a guest? Although there are no Canadian cases on this point, the New Jersey Supreme Court, in *Kelly v. Gwinnell*,<sup>148</sup> has set an important precedent in this regard. The majority held that:

[A] host who serves liquor to an adult social guest, knowing both that the guest is intoxicated and will thereafter be operating a motor vehicle, is liable for injuries inflicted on a third party as a result of the negligent operation of a motor vehicle by the adult guest when such negligence is caused by the intoxication.<sup>149</sup>

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ought not to be, a *prima facie* duty to prevent harm by taking positive action to remove risks. There are, according to Professor Smith, important differences between law and morality and it is his view that "[a] grave injustice will result if a person is forced to pay damages by way of compensation for a failure to act, where there is no proper grounds for a duty to act". *Id.* at 46.

<sup>144</sup> 43 O.R. (2d) 145, 150 D.L.R. (3d) 478 (H.C. 1983). See Osborne, Comment, 25 C.C.L.T. 220 (1983).

<sup>145</sup> *Jordan House*, *supra* note 130.

<sup>146</sup> 27 C.C.L.T. 1 (Ont. H.C. 1983). See Kligman, *Innkeepers' Liability: of the Alcoholic Excesses of Patrons*, 27 C.C.L.T. 49 (1983).

<sup>147</sup> [1984] 1 W.W.R. 256 (Sask Q.B. 1983).

<sup>148</sup> 476 A.2d 1219 (N.J. 1984). For a more detailed examination of the case, see Landenberger, Murphy & Orellana, Case Comment, 60 NOTRE DAME L. REV. 191 (1984).

<sup>149</sup> *Kelly v. Gwinnell*, *supra* note 148, at 1224.

Both majority and dissenting opinions review in considerable detail the policy implications of this decision. Will Canadian courts be prepared to go this far? This is debatable; there is no doubt, however, that Canadian tort law has the judicial foundation to support such a development.

Three other affirmative action cases are worthy of note. In *Hejduk v. The Queen*<sup>150</sup> the notice to fix the date of an appeal from a criminal conviction was mailed by a clerk of the County Court to an incorrect address. The plaintiff never received the notice, did not appear and his appeal was dismissed. As he did not pay the fine for his earlier conviction, believing that his appeal was pending, he was arrested and jailed for thirty days. Ultimately an appeal was heard and the plaintiff was re-tried and acquitted. A tort action against the Crown for the clerk's failure to send the notice to the correct address was dismissed. The trial Court held that the only duty owed to the plaintiff was a duty to post the notice in a conspicuous place in court pursuant to the *Criminal Code*.<sup>151</sup> This had been done. McEachern C.J.S.C. stated that although "a duty of care may arise in an unstructured relationship when one undertakes to discharge a function that he is not obliged to perform", there is not "an additional duty of care by reason of a gratuitous assumption of an additional responsibility outside an established relationship".<sup>152</sup> This decision was upheld on appeal.<sup>153</sup> A somewhat similar case is *Hofstrand Farms Ltd. v. The Queen*.<sup>154</sup> When an attempt by the lands department to assist the plaintiff by expediting the delivery of urgent documents failed (the courier misplaced the envelope), an action brought by the plaintiff against the Crown was equally unsuccessful. The Court of Appeal held that a duty of care was not created by reason of this conduct and even if one was, there had been no negligence. Finally, in the area of special relationships of dependency, an action by a camper against a camp for an assault perpetrated by another camper failed.<sup>155</sup>

### 3. Public Tort Liability

The broadening of the public tort liability area is the most significant development in tort law over the past few years.<sup>156</sup> Governments at all levels are very involved in the daily activities of Canadians and

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<sup>150</sup> [1981] 4 W.W.R. 122 (B.C.S.C.).

<sup>151</sup> R.S.C. 1970, c. C-34, sub. 751(1) (*repealed by S.C. 1974-75- 76, c. 93, s. 89*).

<sup>152</sup> *Supra* note 150, at 125-26.

<sup>153</sup> [1984] 4 W.W.R. 283 (B.C.C.A. 1983).

<sup>154</sup> 33 B.C.L.R. 251, 131 D.L.R. (3d) 464 (C.A. 1982).

<sup>155</sup> *Long v. Gardner*, *supra* note 46.

<sup>156</sup> See M. ARONSON & H. WHITMORE, PUBLIC TORTS AND CONTRACTS (1982); Bridge, *Governmental Liability, the Tort of Negligence and the House of Lords Decision in Anns v. Merton London Borough Council*, 24 MCGILL L.J. 277 (1978); Craig, *Negligence in the Exercise of a Statutory Power*, 94 L.Q.R. 428 (1978).

regulate many aspects of business and personal life. It is a fact that the decisions made and programs implemented by government will affect persons both beneficially and detrimentally. The judicial attitude has traditionally been to remove certain aspects of governmental activity from the private law area, while not completely precluding the possibility of a civil suit in the more serious cases of abuse and injury. What has happened, however, is that the line between permissible and impermissible review has been shifting, with the result that areas of dispute previously "off limits" now seem more open to litigation. We still do not have a clearly fixed boundary; this uncertainty results in unpredictable judicial decision making.

*City of Kamloops v. Nielsen*<sup>157</sup> is the high-water mark for the tort liability of government in Canada. A house was built on foundations that were not in accordance with the approved plans. This defect was discovered by the city's building inspector before the house was completed and resulted in a stop work order being placed on the site. New plans were submitted to remedy the defect and the stop work order was lifted. The builder failed to comply with the new plans and continued to build the house as *per* the original plans. The builder's noncompliance was discovered by the building inspector and a second stop work order was placed on the site. The builder ignored the order and, with the knowledge of the inspector, continued to build. The lot was sold to the builder's father and the house was eventually completed, notwithstanding the continuation of the stop work order. Despite the fact that an occupancy permit was not issued, the new owner moved in. Two years later, the house was sold to the plaintiff who was not aware of these problems. Several months later the defective foundations were discovered. The plaintiff sued both the vendor and the city. The city was found partly liable at trial and this decision was upheld on appeal.<sup>158</sup> A further appeal was then taken to the Supreme Court of Canada.

It is essential in disputes of this nature to understand the applicable legislative provisions which form the bases of the tort action. The *Municipal Act*<sup>159</sup> gave the defendant city the power to regulate the construction of buildings and the power to require that occupancy permits be obtained prior to a building being occupied. The city passed a by-law prohibiting construction without a building permit, providing for a scheme of inspections, prohibiting occupancy without an occupancy permit and imposing a duty on the building inspector to enforce the provisions of the by-law. The building inspector's enforcement powers included the authority to issue stop work orders and to refuse to grant

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<sup>157</sup> *Supra* note 113.

<sup>158</sup> 19 C.C.L.T. 146, 129 D.L.R. (3d) 111 (B.C.C.A. 1981).

<sup>159</sup> R.S.B.C. 1960, c. 255 (*re-enacted* in R.S.B.C. 1979, c. 290).

occupancy permits. The city had greater enforcement authority; it could enforce its by-laws by court proceedings or demolition.

What was the basis of the plaintiff's action against the city? Was it that the building inspector had failed to reasonably perform a duty imposed upon him by the city's by-law for which the city was to be held vicariously liable or did the city's alleged fault lie in something that it had itself failed to do? If it is the latter, what was that fault? In a three to two decision Madame Justice Wilson, writing for the majority, upheld the city's liability. Despite considerable discussion of the building inspector's duties, ultimately the city's liability was based not on any breach of duty by the building inspector but on *its own lack of good faith*. Having done all that he could in issuing a stop work order and refusing to grant an occupancy permit, the building inspector had satisfied his duties. It was then left to the city to decide how to proceed. Should it go to court? Should it demolish the house? Should it do nothing? The city's failure to take any steps or to even consider taking any steps was a "decision" outside the limits of its *bona fide* discretion. As stated by Madame Justice Wilson "inaction for no reason or inaction for an improper reason cannot be a policy decision taken in the bona fide exercise of discretion".<sup>160</sup> The dissenting opinion, written by Mr. Justice McIntyre, approached the plaintiff's complaint in the same way, although his conclusion was that there was no evidence of bad faith on the city's part. The decision not to enforce the by-law was, according to McIntyre J., a "quasi-judicial" decision not qualified by private law concerns. Only when the exercise of that discretion was motivated by corruption, by consideration of extraneous motives or by bad faith could a plaintiff have a private cause of action. In this case, according to the dissent, the "scanty" evidence did not allow for such a conclusion to be drawn.

The *Kamloops* decision is important to the development of Canadian law with respect to public tort liability for several reasons. It has clearly accepted *Anns v. Merton London Borough Council*<sup>161</sup> into Canadian tort law. The decision goes significantly further than the Supreme Court's earlier judgment in *Barratt v. District of North Vancouver*.<sup>162</sup> One should recall that in that case, Mr. Justice Martland distinguished between statutory duties and powers. With regard to the latter he stated:

Its method of exercising its power was a matter of policy to be determined by the Municipality itself. If, in the implementation of its policy its servants acted negligently, causing damage, liability could arise, but the Municipality cannot be held to be negligent because it formulated one policy of operation rather than another.<sup>163</sup>

<sup>160</sup> *Supra* note 113, at 119, 10 D.L.R. (4th) at 673.

<sup>161</sup> [1978] A.C. 728 (H.L. 1977).

<sup>162</sup> [1980] 2 S.C.R. 418, 114 D.L.R. (3d) 577.

<sup>163</sup> *Id.* at 428, 114 D.L.R. (3d) at 584.

The Supreme Court has now added an important proviso to this "immunity". Although an authority cannot be held negligent for formulating one policy as opposed to another, it can be held negligent for failing to conscientiously consider the policy matter. Lord Reid's statement in *Home Office v. Dorset Yacht Co.*<sup>164</sup> is particularly relevant to this approach:

Where Parliament confers a discretion the position is not the same. Then there may, and almost certainly will, be errors of judgment in exercising such a discretion and Parliament cannot have intended that members of the public should be entitled to sue in respect of such errors. *But there must come a stage when the discretion is exercised so carelessly or unreasonably that there has been no real exercise of the discretion which Parliament has conferred. The person purporting to exercise his discretion has acted in abuse or excess of his power.* Parliament cannot be supposed to have granted immunity to persons who do that.<sup>165</sup>

A very important consideration stemming from *Kamloops* is the problem of proving that a policy decision was not conscientiously approached. One can assume that the burden of proof will be the plaintiff's. What will the standard of "conscientiousness" be? Will it approximate the ordinary negligent standard, will it represent a balance of the probability and gravity of injury against the cost of avoidance or will it be a more lenient standard from the defendant's perspective? Will the mere fact that the policy matter was considered, even if considered quickly and without reasonable thought, be sufficient? Courts must tread very carefully here. They do not want to be drawn into the impossible task of reconsidering matters of policy; they must, however, seek to preserve the spirit of *Kamloops*: important matters of policy cannot be avoided by municipal authorities.

It is too early to gauge the effect of *Kamloops* on other cases. If, however, *Pawella v. City of Winnipeg*<sup>166</sup> is an example, the courts have a lot of careful work to do. The plaintiffs in that case purchased a river lot home built by previous owners who had been issued a building permit by the City of St. Vital (later annexed to the City of Winnipeg). The plaintiffs sued the city when the lot began to slip toward the river, resulting in the need for expensive remedial measures. The city had passed a by-law which regulated the construction of homes and provided for inspections. Although the evidence was not clear, it appeared that the municipality had adopted the procedure of issuing building permits without first requiring an inspection of the site. Mr. Justice Hanssen stated that he was not convinced that this procedure was the result of a "conscious policy decision". If it had been, the trial judge would not have subjected the city to potential liability. This approach highlights

<sup>164</sup> [1970] A.C. 1004 (H.L.).

<sup>165</sup> *Id.* at 1031 (emphasis added).

<sup>166</sup> [1984] 6 W.W.R. 133 (Man. Q.B.).

the potential problems inherent in *Kamloops*. Was the trial judge implying that the city had acted in bad faith in its policy implementation? Was there evidence that it had not conscientiously considered the matter, as opposed to a lack of evidence that it had? On whom is the burden of proof? In the end, all of this did not matter as the Court held that the problems were not "readily foreseeable" at the time the permit was issued.

Although the *Kamloops* decision has increased the potential liability of municipal authorities for negligence in the area of policy, it has not removed the need for distinguishing between the "operational" and "policy" activities of government. The former are subject to the ordinary rules of negligence, the latter to the requirement of good faith. The difficulty, as noted by Lord Wilberforce in *Anns v. Merton London Borough Council*,<sup>167</sup> is that the distinction between the policy and operational activities "is probably a distinction of degree; many 'operational' powers or duties have in them some element of 'discretion' ".<sup>168</sup> In *Diversified Holdings Ltd. v. The Queen*<sup>169</sup> the plaintiff sued the provincial Ministry of the Environment, alleging that it had been negligent in the implementation of an elk feeding program. The Ministry, concerned about the size of the elk population, had commenced a feeding program. The program was successful and the elk population grew. When the feeding program was terminated, the elk, who had become accustomed to their enriched diet, invaded the plaintiff's farm, damaging his crops. Were the acts complained of within the operational or policy areas? Was this a case of an unreasonable policy decision or the unreasonable implementation or operation of a policy? The trial judge held that the Ministry could not be faulted for "acts reasonably taken within the limits of a delegated discretion or policy".<sup>170</sup> The plaintiff could neither question the policy decision to increase the elk herds by a feeding program nor provide evidence that any of the acts done to implement the policy were unreasonable. That being the case, the action was dismissed.

In *Aza Avramovitch Assocs.*<sup>171</sup> officers of the provincial Department of Health approved the location and design of a sewage system and issued a permit allowing the installation of a septic tank. The regulations gave the Department the power to require percolation test holes to determine the suitability of the soil before approving the installation. If the test holes indicated that the soil was unsuitable, the regulations directed that the permit was to be refused. In this case, the officers decided not to require test holes as they believed, based on previous tests and other knowledge, that the soil would be suitable. They were

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<sup>167</sup> *Supra* note 161.

<sup>168</sup> *Id.* at 754.

<sup>169</sup> 41 B.C.L.R. 29, 143 D.L.R. (3d) 529 (C.A. 1982).

<sup>170</sup> 35 B.C.L.R. 349, at 361, 133 D.L.R. (3d) 712, at 724 (S.C. 1982).

<sup>171</sup> *Supra* note 94.

wrong. If test holes had been dug, the soil's unsuitability would have been discovered. Was the decision not to require test holes a "non-actionable error in judgment in exercising a discretion" or did it constitute an actionable tort of negligence? Was it "operational" or "policy"? Although the Court conceded that the officers had "wide discretion" as to what test holes should be required and that their "operational" duty to approve the suitability of soil "inherently called for judgment and the exercise of discretion", it was prepared to impose liability on the officers for their lack of reasonable care in not requiring test holes to be dug.<sup>172</sup> Despite the fact that the action against the public officials was dismissed on other grounds, the judgment does support the imposition of an actionable duty on public officials for an exercise of discretion which although unreasonable in the court's opinion could in no way be said to be outside of its area of a discretion *bona fide* exercised.

The case of *Hendrick v. De Marsh*<sup>173</sup> illustrates another attempt by a court to review an operational decision that involved considerable discretion. Regulations passed under the *Ministry of Correctional Services Act*<sup>174</sup> gave the Superintendent the power to grant a paroled or discharged inmate assistance to aid him in his rehabilitation. A probation and parole officer, working in the Ministry of Correctional Services, placed an inmate in the plaintiff's boarding house. The officer informed the plaintiff that the inmate had recently been discharged from prison for a "break and enter". The officer did not tell the plaintiff that the specific inmate had suffered from serious personality disorders that had regularly manifested themselves in a propensity to set fires. The boarder was accepted. One month later, he set fire to the boarding house, killing one person and causing extensive property damage. The plaintiff sued the officer and his employer, the Minister of Correctional Services. The Court conceded that the Minister had the discretion to weigh the interests of the released inmate and the public when deciding where an inmate should be sent and what should be disclosed about him. The officer had weighed these interests and had decided not to disclose further information about the inmate to the plaintiff. This decision was the result of a conscious, policy choice. Was this an abuse of, or outside, a *bona fide* discretion? The trial judge concluded that "the omission to pass on to the plaintiffs the peculiar risk that De Marsh [the boarder] represented was an exercise of discretion without due care. Stated differently, I think that there was no real exercise of discretion at the operational or administrative level."<sup>175</sup> Although the action was dismissed because of the expiration of the limitation period, one can see that as

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<sup>172</sup> *Id.* at 196, 11 D.L.R. (4th) at 606-07.

<sup>173</sup> 45 O.R. (2d) 463, 6 D.L.R. (4th) 713 (H.C. 1984).

<sup>174</sup> R.S.O. 1979, c. 110 (*replaced by* S.O. 1978, c. 37, *re-enacted in* R.S.O. 1980, c. 275).

<sup>175</sup> *Supra* note 173, at 481, 6 D.L.R. (4th) at 731.

in *Aza Avramovitch Assocs.*<sup>176</sup> the trial judge essentially disagreed with a policy decision within a public official's discretion and concluded, therefore, that the decision was *ultra vires*. This conclusion could only be valid, using Lord Reid's approach in *Home Office v. Dorset Yacht Co.*,<sup>177</sup> if the discretion was exercised "so carelessly or unreasonably that there has been no real exercise of the discretion".<sup>178</sup> One can legitimately question, in both cases, whether this threshold had been crossed.

A second, considerably less complicated area of public tort liability involves statutes which impose specific duties on public authorities and provide for civil liability where these duties have been breached. The duty to maintain roads is one such duty and has been the source of frequent litigation. More specifically, the failure to salt or sand icy roads seems to cause particular problems, especially in Ontario. Two recent judgments have been added to the growing list of "failure to salt or sand" cases. In *Rydzik v. Edwards*<sup>179</sup> the trial judge applied the principle established in *R. v. Coté*<sup>180</sup> that the duty to salt or sand an icy highway is confined to a "highly special, dangerous situation".<sup>181</sup> The mere fact that a highway is icy and could be rendered more safe by applying salt or sand, does not provide a sufficient basis for imposing a duty to do so. In *Gould v. County of Perth*<sup>182</sup> Mr. Justice Southey stated that although there is no "general duty" to salt or sand, liability will result "where the situation gives rise to an unreasonable risk of harm to users of the highway, and the authority has failed to take reasonable steps to eliminate or reduce the danger within a reasonable time after it became aware, or ought to have become aware, of its existence".<sup>183</sup> With respect, Mr. Justice Southey's proposition seems to merely restate the normal negligence principle of the duty to act reasonably in order to reduce an unreasonable risk and does not take into account the more limiting formula from *R. v. Coté* of "a *special* and *highly dangerous* condition".<sup>184</sup> This approach revives the debate that had arisen between the Court of Appeal in *Landriaud v. Pinard*<sup>185</sup> and the same Court in *Simms v.*

<sup>176</sup> *Supra* note 94.

<sup>177</sup> *Supra* note 164.

<sup>178</sup> *Id.* at 1031.

<sup>179</sup> 38 O.R. (2d) 486, 138 D.L.R. (3d) 87 (H.C. 1982).

<sup>180</sup> [1976] 1 S.C.R. 595, 51 D.L.R. (3d) 244 (1974).

<sup>181</sup> *Id.* at 603, 51 D.L.R. (3d) at 252.

<sup>182</sup> 42 O.R. (2d) 548, 149 D.L.R. (3d) 443 (H.C. 1983).

<sup>183</sup> *Id.* at 557, 149 D.L.R. (3d) at 451.

<sup>184</sup> It is important to note that in *Gould*, the Court of Appeal, 29 M.V.R. 47, 12 D.L.R. (4th) 763 (1984), had a different interpretation of the trial judge's finding. Mr. Justice Dubin stated that the trial judge found that the defendant had "knowingly permitted the highway to remain in a highly dangerous condition". *Id.* at 49, 12 D.L.R. (4th) at 764.

<sup>185</sup> 1 C.C.L.T. 216 (Ont. C.A. 1976). See Litman, Annot., 1 C.C.L.T. 217 (1976).

*Municipality of Metropolitan Toronto*,<sup>186</sup> a debate which appeared to have been settled. In view of the continuing litigation concerning the duty to salt or sand roads and the uncertain judicial formulation of the relevant test, this might be an appropriate area for legislative intervention.

#### 4. *Immunity from Suit*

Ontario cases have recently confirmed the immunities of Crown prosecutors, Attorneys-General and judges from suits for malicious prosecution, abuse of process or negligence for acts performed within the scope and during the course of their official duties. *Bosada v. Pinos*,<sup>187</sup> *Richman v. McMurtry*<sup>188</sup> and *Unterreiner v. Wilson*<sup>189</sup> have all agreed that an *absolute* immunity, not defeated even by malice, exists for the following reason: "The immunity is granted, not out of a concern with personal immunity, but because such immunity tends to insure zealous and fearless administration of justice. No matter what their motives may be, they cannot be inquired into."<sup>190</sup> It is apparently thought that the fear of suit, even if restricted to acts done with malice, will somehow deter honest officials from freely carrying out their functions.

While not at this point wishing to engage in a debate no doubt replete with historical and political concerns, I must confess my unease with the existing state of the law. Canadian courts have recently rejected similar arguments used to support the barrister's immunity from suit for negligence.<sup>191</sup> There has not been a single reported judgment holding a barrister liable for an alleged error committed during the conduct of proceedings since the removal of this immunity,<sup>192</sup> nor has anyone suggested that barristers are more fearful and less independent due to this change. One wonders why the Crown prosecutor needs an immunity which the defence counsel presently does not have. It would, moreover, be an unfortunate commentary on the integrity of Canadian judges, Attorneys-General and Crown prosecutors if it were true that once stripped of an immunity for acts done with malice, the quality of their work and their independence would suffer. Undoubtedly, if this immunity was removed, it would be exceedingly rare that a suit would in fact

<sup>186</sup> 4 C.C.L.T. 214 (Ont. C.A. 1978). *See also* *McAlpine v. Mahovlich*, 9 C.C.L.T. 241 (Ont. C.A. 1979).

<sup>187</sup> 44 O.R. (2d) 789, 5 D.L.R. (4th) 334 (H.C. 1984).

<sup>188</sup> 41 O.R. (2d) 559, 147 D.L.R. (3d) 748 (H.C. 1983).

<sup>189</sup> 40 O.R. (2d) 197, 142 D.L.R. (3d) 588 (H.C. 1982), *aff'd* 41 O.R. (2d) 472, 146 D.L.R. (3d) 322 (C.A. 1983).

<sup>190</sup> *Supra* note 187, at 792, 5 D.L.R. (4th) at 337.

<sup>191</sup> *DeMarco v. Ungaro*, 21 O.R. (2d) 673, 95 D.L.R. (3d) 385 (H.C. 1979).

<sup>192</sup> *See* Smith, *Liability for the Negligent Conduct of Litigation: The Legacy of Rondel v. Worsley*, 47 SASK. L. REV. 211 (1982), for a good discussion of the issues involved.

succeed. However, the law would have freed itself from the unfortunate position of appearing to place certain public officials<sup>193</sup> "above the law".

### 5. *Liability for Negligent Statements*

The duty to take care when giving information or advice, although now firmly established in the common law, is still being refined by the courts. While there is agreement that Lord Atkin's "neighbour" principle casts too wide a net for the negligent statement cases, the formulation of an equivalent principle for the negligent statement duty is a difficult task.<sup>194</sup>

The few cases decided recently seem to be moving toward expanding liability. In *Sirois v. Federation Des Enseignants Du Nouveau-Brunswick*<sup>195</sup> two members of an association of francophone teachers sued the association for inaccurate information which had been contained in one of the association's news bulletins. The bulletin had advised unemployed teachers to apply for unemployment insurance benefits to commence in September, while in reality benefits were also payable for the months of July and August. The plaintiffs failed to apply for these benefits in time and, as a consequence, were not entitled to them. The Court reviewed *Hedley Byrne & Co. v. Heller*<sup>196</sup> and other negligent statement cases and decided that a special relationship existed between the parties. That relationship gave rise to a duty of care that was breached and resulted in damage. The Court held that the plaintiffs had relied on the bulletin's advice to their detriment. The trial judge also found, however, that the plaintiffs were contributorily negligent in failing to inquire further into the matter, as advised in the bulletin. Accordingly, the plaintiffs' damages were reduced by twenty-five percent.<sup>197</sup>

One of the issues in *Sirois* concerned the present status of *Guay v. Sun Publishing Co.*<sup>198</sup> This pre-*Hedley Byrne* Supreme Court of Canada judgment denied a right of recovery to a woman who had suffered

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<sup>193</sup> Not all officials have this immunity. See *Curry v. Dargie*, 28 C.C.L.T. 93, 41 C.P.C. 102 (N.S.C.A. 1984), where a residential tenancies officer was denied this immunity.

<sup>194</sup> See B. FELDTHUSEN, *supra* note 4 and Smillie, *Negligence and Economic Loss*, 32 U. TORONTO L.J. 231 (1982). The negligent statement question is as much a problem of recovery for pure economic losses as it is a problem of recovery for negligent words, as opposed to deeds.

<sup>195</sup> 28 C.C.L.T. 280, 8 D.L.R. (4th) 279 (N.B.Q.B. 1984).

<sup>196</sup> [1964] A.C. 465 (H.L.).

<sup>197</sup> The courts have accepted the view that plaintiffs can be reasonable in relying on information while at the same time being unreasonable in their attempts to mitigate, or even prevent, their losses. See also *Grand Restaurants Ltd. v. City of Toronto*, 32 O.R. (2d) 757, 123 D.L.R. (3d) 349 (H.C. 1981), *aff'd* 39 O.R. (2d) 753, 140 D.L.R. (3d) 191 (C.A. 1982), on this point.

<sup>198</sup> [1953] 2 S.C.R. 216, [1953] 4 D.L.R. 577.

nervous shock when she read a false report in the defendant's newspaper stating that her husband and three children had been killed in a motor vehicle accident. Although there were several reasons given for dismissing the plaintiff's action,<sup>199</sup> one can safely argue that the portion of the judgment which denied recovery for losses caused by negligent statements, except in the case of fraud, deceit, malice or breach of a fiduciary or contractual relationship, can no longer be regarded as good law. Whether all newspapers which negligently publish false information will be subject to liability under *Hedley Byrne* is still open to question. The trial judge in *Sirois* did emphasize that in this case the defendant's bulletin was specifically directed at members of the association and was not intended for the general public. There are, nevertheless, undoubtedly hundreds of publications which presently would meet these qualifications.

Another, less significant expansion of liability occurred in *392980 Ontario Ltd. v. City of Welland*.<sup>200</sup> The defendant was held liable for accurate but misleading information contained in an unsolicited letter sent by the city's solicitor to land developers. The information concerned zoning matters and the plaintiff relied on his interpretation of the information to his detriment. The test suggested by the Court was the following: did the representor know or ought to have known that the person to whom the statement was made would reasonably and probably give it another meaning or interpretation that was incorrect?<sup>201</sup>

In *Ranjoy Sales and Leasing v. Deloitte, Haskins and Sells*<sup>202</sup> the Court allowed four of 950 investors to bring a class action for losses which each had suffered by relying upon negligently audited financial statements. The judgment is important for its comments on the availability of class actions in Manitoba. It is also potentially important with respect to the scope of *Hedley Byrne* duties. In *Haig v. Bamford*<sup>203</sup> the Supreme Court allowed an investor to recover losses caused by reliance on a negligently prepared financial statement because the accountant had "actual knowledge of the limited class that will use and rely on the statement".<sup>204</sup> The financial statement had been prepared for a specific class of persons in a specific class of transactions. When the merits of *Ranjoy Sales and Leasing* are considered, it will be interesting to see how the courts will deal with this question of class size and definition.

Finally, *Beaver Lumber Co. v. McLenaghan*<sup>205</sup> involved a negligent

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<sup>199</sup> The Court found a lack of foreseeability and applied limits to recovery for nervous shock.

<sup>200</sup> 45 O.R. (2d) 165, 6 D.L.R. (4th) 151 (H.C. 1984).

<sup>201</sup> *Id.* at 176, 6 D.L.R. (4th) at 162.

<sup>202</sup> *Ranjoy Sales and Leasing v. Deloitte, Haskins & Sells*, *supra* note 95.

<sup>203</sup> [1977] 1 S.C.R. 466, 72 D.L.R. (3d) 68 (1976).

<sup>204</sup> *Id.* at 476, 72 D.L.R. (3d) at 75.

<sup>205</sup> 23 C.C.L.T. 212, 143 D.L.R. (3d) 139 (Sask. C.A. 1982).

misrepresentation which induced the plaintiff to enter into a contract, not with the representor, but with a third party. The defendant representor sold the plaintiff a package of components for a prefabricated home and recommended a particular building contractor. The contractor's work was inadequate and the plaintiff's house was deficient. The Court held that *Hedley Byrne* applied to this relationship, that there was a breach and reliance causing damage. The exemption clause in the contract between the parties was held to be irrelevant with respect to this independent tort liability. The measure of damages adopted was based on the "tortious" and not the "contractual" measure. The plaintiff was put back into his original position and not into the anticipated post-contractual position. This holding meant that he was given the difference between the value of the services which he had received and the amount paid for them, plus consequential damages to remedy the deficiencies in his house.

#### D. *Causation*

##### 1. *Cause-in-Fact*

One generally thinks of the "cause-in-fact" aspect of the negligence action as being fairly straight-forward; "but for" the defendant's negligence, would the plaintiff's injury have occurred? Occasionally, however, a case reveals the potential complexity of the causation issue. *Deacon v. Heichert*<sup>206</sup> is such a case.

The plaintiffs operated a cattle yard to the displeasure of the defendants — their neighbours — who objected to the noise. The defendants prevented the unloading of a shipment of seventy-seven calves at the plaintiffs' premises. Their actions resulted in the calves being kept overnight in a stationary cattle truck until they were eventually unloaded. A few days later, an outbreak of "shipping fever" struck the plaintiffs' cattle. The outbreak of disease started with the calves which had been delayed by the defendants, then spread to other cattle. The plaintiffs sued the defendants for the "nuisance" of having unlawfully interfered with the plaintiffs' right to use their property. The main issue in the case concerned causation; did the defendants' tort cause the plaintiffs' damage?

The evidence indicated that stress produced the disease, although the specific stress which caused the disease in this instance could not be determined. The calves had undergone various stressful experiences, including being confined in the truck for longer than necessary. Experts testified that "the more stress the animal is under the more likely [the disease] is to happen and . . . the more severe the condition is likely

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<sup>206</sup> 9 D.L.R. (4th) 680 (B.C.S.C. 1984).

to be".<sup>207</sup> One expert testified that the detention was "an added stresser". Another stated that this was "the initiating cause of this outbreak". The trial judge noted that the experts could not say with absolute certainty which of the stressful experiences caused the disease or even that the disease would not have occurred without the delay. Both experts did agree that the outbreak would not have been as bad. Based on this evidence, had the plaintiffs satisfied the test of causation? The trial judge held that although the evidence did not "pinpoint the cause" of the disease, the stress produced by the delay did contribute to the disease either by causing it or making it more severe. The trial judge correctly stated that that was all the plaintiffs were required to show.

In arriving at his finding, the trial judge had referred to *McGhee v. National Coal Board*,<sup>208</sup> an important, but in view of the affirmative findings by the Court, an arguably unnecessary referral. *McGhee*, at first sight, appears to be very similar to the present case. The plaintiff, an employee at the defendant's brick works, contracted dermatitis. The plaintiff established that the defendant had failed in its duty to provide washing facilities for employees' use but could not establish that this failure was a cause or contributing factor to his having contracted the disease. He did show, however, that the lack of washing facilities materially increased the risk of contracting dermatitis. The House of Lords accepted this evidence as establishing causation, subject to proof by the defendant that the dermatitis was not in fact caused by the breach. In this important decision, the House of Lords decided that where negligence has materially increased the risk of injury and where the injury which has occurred falls within the ambit of this risk, the plaintiff has satisfied the test of causation. One can thus see the major difference between these two cases. In *Deacon* the trial judge found not that the defendants' conduct increased the risk of disease but that it *actually* contributed to either its outbreak or severity. Surprisingly, the trial judge in *Deacon* reduced the plaintiffs' damages by one-half based on the finding that there were other causes, unconnected with the delay, which were "possible causes of shipping fever either singly or in combination".<sup>209</sup> This apportionment was made pursuant to the British Columbia *Negligence Act*.<sup>210</sup> Was it justified?

In my respectful submission, apportionment clearly was not justified. If the finding of the Court was that the defendants' conduct contributed to the plaintiffs' injuries, as I contend it was, there could be only two reasons for reducing the award. First, the Court might have found that despite the defendants' negligence, the plaintiffs' own "fault" was a contributing factor to their injury. Such fault was not found. Other stressful

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<sup>207</sup> *Id.* at 683.

<sup>208</sup> [1972] 3 All E.R. 1008 (H.L.).

<sup>209</sup> *Supra* note 206, at 686.

<sup>210</sup> R.S.B.C. 1979, c. 298.

experiences suffered by the calves that possibly contributed to their disease were unrelated to the plaintiffs', or for that matter anyone else's, negligence. They were "innocent" co-existing causes that ought to have had no effect on this judgment. Second, the Court might have found that the defendants' tort only exacerbated a condition which would have existed without the delay. In other words, the defendants' conduct only caused a portion of the plaintiffs' loss. If there was evidence and a finding by the trial judge that one-half of the plaintiffs' losses would probably have occurred without the delay, then on basic causation principles the defendants ought to have only been liable for the portion of the losses caused by their tortious activities. However, this was not, at least expressly, the Court's finding. The trial judge accepted evidence that the delay caused by the defendants contributed either to the outbreak of the disease itself or to its severity.<sup>211</sup> Applying *McGhee*, if the delay had not necessarily caused the outbreak, yet had materially increased the risk of the outbreak of the disease, the delay would be held to have contributed to its outbreak. The trial judge attempted to distinguish *McGhee* from the present case. He stated that in *McGhee* "[t]here was no cause for his dermatitis which incurred *blame* other than the defendant's failure to provide washing facilities".<sup>212</sup> It was because this failure was the only blameworthy reason for the dermatitis that the plaintiff in *McGhee* recovered damages in full. With respect, unless the trial judge used the word "blame" to mean "fault", there were other possible causes in *McGhee* which could have caused dermatitis even if washing facilities had been provided; that is why the House of Lords had difficulty with the cause-in-fact issue. As in *Deacon*, there were other possible, innocent causes; nevertheless, a negligent cause which contributes to the damages is responsible *in full*.

*Delaney v. Cascade River Holidays Ltd.*<sup>213</sup> also struggled with the cause-in-fact issue. The deceased was a passenger on a white water rafting excursion. The raft overturned and the deceased drowned. The life jacket provided to the deceased was inadequate. If a life jacket of greater buoyancy had been provided, would the deceased have survived? The majority of the Court of Appeal found that the plaintiff, the deceased's widow, failed to show on balance that the deceased would have survived had he worn another life jacket and, accordingly, that cause-in-fact had not been established. *McGhee* was not referred to by the majority. McFarlane J.A. pointed to the lack of evidence establishing an affirmative link between the inadequacy of the life jacket and the death, as well as to the fact that eight of eleven persons who wore

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<sup>211</sup> *Supra* note 206, at 686. •

<sup>212</sup> *Id.* (emphasis added).

<sup>213</sup> 44 B.C.L.R. 24, 24 C.C.L.T. 6 (C.A. 1983). Note that while leave to appeal to the Supreme Court of Canada was granted, the parties arrived at a settlement before the trial date.

similar life jackets survived the experience. Nemetz C.J.B.C., in dissent, applied *McGhee* and found on the evidence that the failure to provide a superior life jacket "contributed substantially" to causing the drowning. He stated that "[i]t would indeed be contrary to ordinary common sense to hold that the negligence . . . which increased the risk of drowning did not materially contribute to causing the death".<sup>214</sup> It is difficult to reconcile the majority and dissenting opinions. One possibility is that the majority, which seemed unhappy with the trial judge's finding that it was negligent not to have provided more adequate life jackets, was not prepared to concede that the inadequate life jacket increased the risk of drowning and that *McGhee* was, therefore, irrelevant to these facts. Another possibility is that the majority simply rejected *McGhee* and was not prepared to equate materially increasing a risk with materially contributing to an injury. It must also be kept in mind that the majority would have dismissed the action in any event; there was a disclaimer clause that it upheld.

## 2. *Multiple Causes*

Disputes between concurrent wrongdoers still give rise to considerable litigation although, gradually, the ambiguous provisions of provincial apportionment statutes are being clarified by judicial interpretation.<sup>215</sup> Courts are generally giving these provisions a liberal interpretation, thereby facilitating apportionment. There have been several recent examples of this trend. In *Hannigan v. City of Edmonton*<sup>216</sup> the plaintiff's vehicle struck a second vehicle to avoid hitting the defendant's bus. The plaintiff settled the damages caused to the second vehicle and brought an action against the defendant for indemnity under the *Tort-Feasor's Act*.<sup>217</sup> The defendant accepted 100 percent liability for the accident but disputed the plaintiff's right to indemnity based on the *Tort-Feasor's Act* because the plaintiff was not a "tort-feasor liable in respect of that damage"<sup>218</sup> (the damage suffered by the second vehicle). Although technically correct, the Court saw the inequity that would result if a literal interpretation was to be given to the wording of the provision and allowed the plaintiff's claim. In *Cristovao v. Doran's Beverages Inc.*<sup>219</sup> the plaintiffs had been sued for damages resulting from a motor vehicle accident. It was too late to issue a third party notice

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<sup>214</sup> *Id.* at 32-33, 24 C.C.L.T. at 14.

<sup>215</sup> An excellent book on this area has been written by D. CHEIFETZ, *supra* note 13.

<sup>216</sup> 47 A.R. 266, 1 D.L.R. (4th) 397 (Q.B. 1983).

<sup>217</sup> R.S.A. 1980, c. T-6.

<sup>218</sup> Sub. 3(1).

<sup>219</sup> 40 O.R. (2d) 737, 143 D.L.R. (3d) 641 (H.C. 1983).

for contribution under Ontario's *Negligence Act*,<sup>220</sup> so the plaintiffs commenced a separate action against the concurrent tortfeasors. The Court allowed an application by the co-tortfeasors to strike out the action but permitted the plaintiffs to commence the separate action once the issue of liability had been determined in the principle action. The Court stated that there were two ways in which a claim for contribution could be made, either by way of third party notice in the principal action or by the commencement of separate proceedings upon completion of the principal action. This decision in effect refused to follow *Cohen v. S. McCord & Co.*,<sup>221</sup> an earlier decision of the Ontario Court of Appeal that had decided that all issues of contribution and indemnity are to be determined in the principal action.<sup>222</sup> Today, the restrictive rule in *Cohen* seems generally to be regarded as questionable, a conclusion reinforced by the present judgment.<sup>223</sup>

Two British Columbia cases have recently dealt with the following interesting issue. Where an injury has been suffered by one party, due partly to his own fault as well as to the fault of two or more other persons, are the defendants jointly liable to the plaintiff for his full damages, reduced by his own degree of negligence or does the plaintiff receive judgment against each defendant for only his respective share of the loss? In a case where the plaintiff is not negligent and is injured by two or more wrongdoers, there is, unquestionably, joint liability. In *Leischner v. West Kootenay Power and Light Co.*<sup>224</sup> and *Cominco Ltd. v. Canadian General Electric Co. (No. 2)*,<sup>225</sup> the Courts decided that under British Columbia's *Negligence Act*<sup>226</sup> there is, in cases of a contributorily negligent plaintiff, only several liability. In *Leischner* this conclusion had very unfortunate results for the plaintiff. He had sued two defendants for injuries he had sustained when the rigging of a sailboat touched a power line. The two defendants took third party proceedings against another party who had not been sued by the plaintiff. The Court found the plaintiff to be ten percent at fault, one of the defendants to be forty-five percent at fault and the third party to be forty-five percent at fault. Rather than being awarded ninety percent of his damages against the liable defendant, the plaintiff only received forty-five percent of his damages from him. The Court stated that the British Columbia *Negligence Act* clearly directed this result and that an earlier British

<sup>220</sup> R.S.O. 1980, c. 315.

<sup>221</sup> [1944] O.R. 568, [1944] 4 D.L.R. 753 (C.A.).

<sup>222</sup> Klar, *supra* note 110, at 354, discussed this case.

<sup>223</sup> See *Slater Steel Indus. Ltd. v. I.C.E. Combustion Sys. Inc.*, 43 C.P.C. 259, 8 D.L.R. (4th) 254 (H.C. 1984), for another recent decision on proceedings for contribution claims.

<sup>224</sup> [1983] 5 W.W.R. 166 (B.C.S.C.).

<sup>225</sup> 4 D.L.R. (4th) 186 (B.C.C.A. 1983). On the limitation period issue, see 45 B.C.L.R. 35, 147 D.L.R. (3d) 279 (C.A. 1983).

<sup>226</sup> R.S.B.C. 1979, c. 298.

Columbia case, *Quinlan v. Nordlund*,<sup>227</sup> that had not adopted this method, was wrong. Mr. Justice Spencer stated that he trusted the matter would be appealed for a definitive choice between the two views. This choice appears to have been made in *Cominco*. The plaintiff suffered damage caused by fire. The plaintiff was held twenty percent liable for the damages and five defendants were held equally liable for the remaining eighty percent. One defendant's liability was dismissed due to the expiration of a limitation period. The Court of Appeal awarded several judgments in favour of the plaintiff against the remaining four defendants for sixteen percent each of the total loss. The plaintiff, therefore, ultimately bore twenty percent of the loss due to his own negligence as well as an additional sixteen percent due to the expiration of the limitation period against one of the otherwise liable parties.

The significance of choosing the several as opposed to the joint judgment method is obvious from these two cases. Where the contributorily negligent plaintiff can execute his several judgments against each of the defendants he will receive the same amount as he would have under the joint judgment method. However, where judgment has not been obtained or cannot be executed against one of the defendants due to the expiration of a limitation period, failure to sue or bankruptcy, the full burden of that defendant's portion will fall on the plaintiff. If the plaintiff had not been contributorily negligent, he would have been spared this unfortunate result. The only issue which faced the British Columbia courts was whether the legislation mandated the several as opposed to the joint judgment method, not whether such apportionment was fair. I would agree with the decisions' interpretation of the legislation. However, on the question of fairness, it does seem unfair that merely because a plaintiff is slightly negligent he must himself bear the burden of insolvent defendants. If the several judgment method is to be adopted, it ought to take this fact into consideration and spread the burden amongst all parties.<sup>228</sup>

#### E. Remoteness

##### 1. The Possibility Test

Mr. Justice Linden's judgment in *Gallant v. Beitz*<sup>229</sup> clearly discussed the "remoteness" problem in negligence actions. The plaintiff's truck was involved in a collision with the defendant's car. As a result of the collision, a heavy iron bar which the manufacturer of the plaintiff's truck had placed behind the driver's seat, pierced the seat and injured

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<sup>227</sup> 27 D.L.R. (2d) 162 (B.C.S.C. 1961).

<sup>228</sup> See G. WILLIAMS, *JOINT TORTS AND CONTRIBUTORY NEGLIGENCE* (1951).

<sup>229</sup> 42 O.R. (2d) 86, 148 D.L.R. (3d) 522 (H.C. 1983).

the plaintiff's back. The defendant issued a third party notice against the manufacturer, claiming that its negligent design of the truck was responsible for the plaintiff's injury. The manufacturer moved to strike out the third party notice on the ground that as the defendant could not be held responsible to the plaintiff for the additional damage caused by the tire iron, he could not claim contribution for this damage from the third party. This argument required Mr. Justice Linden to consider whether a negligent motorist could be held responsible for this type of damage. Mr. Justice Linden treated this issue as one of "remoteness".

According to Mr. Justice Linden, the function of the concept of remoteness is "to draw the appropriate line between the *additional* consequences for which an admittedly negligent defendant will be liable, and those for which he will escape liability".<sup>230</sup> Mr. Justice Linden stated the test of remoteness as follows:

The test for determining remoteness now is foreseeability of the possibility of the type of harm that transpires. If a defendant can reasonably foresee the risk that certain consequences may result, he can be liable for them; if he cannot reasonably foresee the possibility of such matters occurring, then he is exonerated from liability for those items.<sup>231</sup>

After reviewing several types of "remoteness" problems considered in recent cases, Mr. Justice Linden held that it was "an open question" whether a reasonable motorist would reasonably foresee the possibility of injury from a collision being aggravated by the design of a vehicle or by its negligent design and accordingly dismissed the application to strike out the third party notice.

*Williams v. City of Saint John*<sup>232</sup> also involved the remoteness issue. A fire at the defendant city's detention centre killed twenty-one inmates. The fire had been deliberately started by one of the inmates. There were five allegations of negligence made against the city: the use of hazardous material in the cells' construction, inadequate fire protection, inadequate supervision, improper cell design and improper training for fire emergencies. Basing himself on the classic remoteness cases of *Wagon Mound (No. 1)*,<sup>233</sup> *Hughes v. Lord Advocate*<sup>234</sup> and *Wagon Mound (No. 2)*,<sup>235</sup> Mr. Justice Hoyt held that the danger of fire was reasonably foreseeable even if the precise chain of events which led up to it were not. The trial judge also rejected the argument that the inmate's act of deliberately setting the fire constituted a *novus actus interveniens* in

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<sup>230</sup> *Id.* at 91, 148 D.L.R. (3d) at 526.

<sup>231</sup> *Id.* at 91, 148 D.L.R. (3d) at 527.

<sup>232</sup> 27 C.C.L.T. 247, 24 M.P.L.R. 15 (N.B.Q.B. 1983).

<sup>233</sup> [1961] A.C. 388 (P.C.) (Aust.).

<sup>234</sup> [1963] A.C. 837 (H.L.).

<sup>235</sup> [1967] A.C. 617 (P.C. 1966) (Aust.).

view of the fact that it was that very act which the defendant had unreasonably failed to prevent.<sup>236</sup>

## 2. The Thin Skull Rule and Suicide

In *Cotic v. Gray*<sup>237</sup> a person was involved in a motor vehicle accident which claimed two lives. Prior to this accident, this individual had suffered serious emotional problems and was subject to fits of depression. Although he was not responsible for the accident, he felt guilt concerning the deaths and became very disturbed. Sixteen months after the accident, he committed suicide. An action was brought by his dependants under the *Fatal Accidents Act*,<sup>238</sup> claiming that the suicide was legally attributable to the tortfeasor who had caused the original motor vehicle accident.

Is suicide under these conditions too "remote"? This question can be approached by considering the following issues:

- (1) Is suicide a reasonably foreseeable consequence flowing from injuries or involvement in a motor vehicle accident?
- (2) Even if it is reasonably foreseeable, is suicide a *novus actus interveniens* which severs the chain of causation between the negligence and the death?
- (3) Can a person who has the propensity to commit suicide because of his inability to cope with the consequences of a serious accident be considered a victim with a "thin skull" in order to invoke the "thin skull rule"?
- (4) For the "thin skull rule" to apply, must the type of injury suffered by the victim have been reasonably foreseeable, even if its severity need not have been?

In *Cotic* a full discussion of these issues was avoided as a result of the Supreme Court's interpretation of the agreement that had been made between the parties that only one question would be put to the jury and that its answer would be conclusive of the case. This question was: "Did the defendant cause or contribute to the death of the late Ned Cotic by the motor vehicle accident in question?" The jury answered "Yes". The plaintiff received judgment at trial and this was confirmed by two appeals.<sup>239</sup>

The question, of course, was deceptively simple. What did the words "cause or contribute to" imply? Was this merely a matter of factual causation or did they encompass proximate cause as well? According

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<sup>236</sup> This judgment also contains a useful discussion of the defence of "custom" and the tort liability of suppliers of dangerous products.

<sup>237</sup> 26 C.C.L.T. 163, 1 D.L.R. (4th) 187 (S.C.C. 1983).

<sup>238</sup> R.S.O. 1970, c. 164 (*repealed by the Family Law Reform Act*, S.O. 1978, c. 2, s. 79).

<sup>239</sup> 33 O.R. (2d) 356, 124 D.L.R. (3d) 641 (C.A. 1981), *aff'd supra* note 237.

to Mr. Justice McIntyre, all issues, including that of foreseeability, had been decided by the parties in the respondent's favour in formulating their question. The only issue remaining was that of causation. This conclusion can fairly be taken to mean that only the issue of factual cause had been left for the jury to consider. Such being the case, *Cotic* is of no precedental value in relation to the suicide and remoteness issue.<sup>240</sup>

### 3. *Novus Actus Interveniens*

The question of whether negligent medical treatment which aggravates an injury initially caused by another person's negligence is a *novus actus interveniens*, severing the chain of causation between the original negligent act and the exacerbated injuries, has recently been re-examined by the Ontario Court of Appeal in *Katzman v. Yaek*.<sup>241</sup> This question had apparently been decided in the earlier case of *Mercer v. Gray*,<sup>242</sup> subsequently followed by *David v. Toronto Transit Commission*.<sup>243</sup> In these cases, it had been held that medical treatment which is so negligent as to be actionable, as opposed to mere medical complications, misadventure or *bona fide* medical error, is a *novus actus interveniens*. In *Katzman*<sup>244</sup> a defendant who was sued for injuries suffered by the plaintiff in a motor vehicle accident issued a third party notice against a dentist claiming that the latter's negligence had worsened the plaintiff's original injury. The defendant was seeking indemnity for any damages that might be awarded against him in favour of the plaintiff, resulting from the third party's negligence. At trial,<sup>245</sup> on a motion to strike out the third party claim, Mr. Justice Griffiths, following the earlier authorities, felt bound to allow the motion. The Court of Appeal, however, reversed Mr. Justice Griffiths' order. Mr. Justice Goodman stated:

[T]he law is far from clear with respect to this matter in so far as it relates to a fact situation such as exists in this case. It is a matter of relatively

<sup>240</sup> The Court of Appeal judgment, *id.*, contained a useful discussion of the issues involved in this problem. Mr. Justice Lacourciere examined the relationship between the reasonable foreseeability principle and the thin skull rule. Madame Justice Wilson (as she then was) stated that the foreseeability principle is inapplicable to the thin skull rule and, therefore, if the victim has a thin skull, foreseeability is irrelevant. In the Supreme Court, Mr. Justice McIntyre agreed with the respondent that while the issue was interesting, it was not properly before the courts, given the parties' agreement. Nevertheless, even though it was *obiter*, the Court of Appeal judgment supports the proposition that suicide is either reasonably foreseeable or if not, is a thin skull condition. This conclusion would permit the victim's relatives to recover damages from the original tortfeasor.

<sup>241</sup> 37 O.R. (2d) 500, 136 D.L.R. (3d) 536 (C.A. 1982).

<sup>242</sup> [1941] O.R. 127, [1941] 3 D.L.R. 564 (C.A.).

<sup>243</sup> 16 O.R. (2d) 248, 77 D.L.R. (3d) 717 (H.C. 1976).

<sup>244</sup> *Supra* note 241.

<sup>245</sup> 33 O.R. (2d) 597, 125 D.L.R. (3d) 270 (H.C. 1981).

frequent occurrence and of substantial importance. In our view, we should not express an opinion on this matter in interlocutory proceedings of this nature and we decline to do so. It is our view that this issue is one for the trial judge to decide in the course of the trial, after having heard all of the relevant evidence adduced by the parties.<sup>246</sup>

The inescapable conclusion that one must draw from the Court of Appeal's judgment is that negligent medical treatment is not, as a matter of law, a *novus actus interveniens*; otherwise, sending the matter to trial would have been a needless exercise. It remains to be seen what "relevant evidence" will be adduced at trial to determine whether this medical treatment, if negligent, ought to be treated as a *novus actus interveniens*. This issue is essentially one of policy and not of fact. It is difficult to deny that as a matter of fact, negligent treatment is reasonably foreseeable, in view of the numerous cases of negligent medical treatment. Whether the burden of this negligent treatment should be shared by the original defendant is a question of policy. As a practical matter, it may not in many cases be a significant issue. If the third party doctor's conduct was merely a *bona fide* error of judgment, or non-actionable medical misadventure, then it will not be a *novus actus interveniens* and the original defendant will be fully liable. No action by the plaintiff against the doctor, or by the defendant for contribution, could, in this case, succeed. On the other hand, if the third party's conduct is so negligent as to be actionable, then whether or not it is treated as a *novus actus interveniens* should not ultimately matter. If it is a *novus actus interveniens*, then the original defendant should be held liable only for the damages he caused, discounting the doctor's negligence. The doctor should be found liable to the plaintiff for the aggravated injuries. If it is not a *novus actus interveniens*, although the original defendant should be initially liable to the plaintiff for the full injuries, he should be able to receive contribution from the doctor for the aggravated injuries. Thus, the burden of the plaintiff's injuries will in either case be shared in the same way.

Three other *novus actus* cases are worthy of mention. In *Spagnolo v. Margesson's Sports Ltd.*<sup>247</sup> and *Attorney General of Canada v. LaFlamme*<sup>248</sup> defendants who were allegedly negligent in allowing motor vehicles to be stolen were not held responsible for subsequent damage caused by the thieves. In *Spagnolo* statistical evidence was introduced at trial to show that accidents caused after cars have been stolen are foreseeable in view of their high frequency. This evidence was sufficient to convince the trial judge<sup>249</sup> that the parking lot operators, whose inadequate security measures failed to prevent the theft, should be held

<sup>246</sup> *Supra* note 241, at 505, 136 D.L.R. (3d) at 541.

<sup>247</sup> 41 O.R. (2d) 65, 145 D.L.R. (3d) 381 (C.A. 1983).

<sup>248</sup> 44 B.C.L.R. 45, [1983] 3 W.W.R. 350 (Cty. Ct. 1982).

<sup>249</sup> 127 D.L.R. (3d) 339 (Ont. Cty. Ct. 1981).

responsible for a car accident which occurred six days after the theft. The Court of Appeal<sup>250</sup> disagreed and held that considering the time frame, the accident was not reasonably foreseeable. In *LaFlamme* the defendant had left the key in the ignition of his unlocked car, contrary to a provision of the *Motor Vehicle Act*.<sup>251</sup> The car was stolen. An R.C.M.P. vehicle pursued the stolen car and was damaged when purposely driven into the stolen car to force it off of the road. The Small Claims Court judge held that the car's owner was solely liable for the damage to the police vehicle. This decision was reversed by the County Court: one reason for the reversal was the Court's finding that this type of police activity could not be reasonably foreseen by the ordinary person.

Finally, in *Beutler v. Beutler*<sup>252</sup> a negligent driver drove into a gas meter, allowing gas to escape. The driver was held liable for a subsequent explosion despite the negligence of the gas company in failing to deal more appropriately with the emergency prior to the explosion.

#### 4. Recovery for Nervous Shock

Although the test for the recovery of damages for nervous shock is based on "the foreseeability of nervous shock",<sup>253</sup> courts have restricted the application of this test to situations where the plaintiff has either been present at the scene of an accident or has come upon it soon afterwards and has suffered nervous shock as a result of having witnessed the death or serious injury of a close relative. Various policy reasons have been suggested to explain this somewhat arbitrary restriction. Courts are afraid to allow too many claims for nervous shock as some of them may be fraudulent while others are very difficult to prove or disprove. There has also been concern to limit the potential liability of defendants for financial reasons. As well, one must recall that the common law does not compensate a relative for the natural feelings of grief and distress experienced when a family member is killed or injured, rather it requires that the plaintiff have suffered a true nervous shock — a traumatic experience. One factor which may be of assistance in distinguishing between sorrow and shock is the plaintiff's proximity to the scene of the accident.

In *McLoughlin v. O'Brian*,<sup>254</sup> after hearing about a car accident involving her husband and three children, the plaintiff went to the hospital, saw her injured family members and learned that one of her children had died. The trial Court and the Court of Appeal<sup>255</sup> dismissed the

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<sup>250</sup> *Supra* note 247.

<sup>251</sup> R.S.B.C. 1979, c. 288 (as amended by S.B.C. 1982, c. 36, s. 14).

<sup>252</sup> 26 C.C.L.T. 229 (Ont. H.C. 1983).

<sup>253</sup> See, e.g., *Marshall v. Lionel Enterprises*, [1972] 2 O.R. 177, 25 D.L.R. (3d) 141 (H.C. 1971).

<sup>254</sup> [1982] 2 All E.R. 298 (H.L.).

<sup>255</sup> [1981] 1 All E.R. 809 (C.A. 1980).

plaintiff's claim for damages, either due to lack of foreseeability or, alternatively, on the ground that the law does not allow recovery for nervous shock if the claimant was not physically present at the scene of an accident. In a judgment more interesting because of frank and conflicting discussions concerning the role of public policy in judicial decision-making than because of its discussion concerning recovery for nervous shock, the House of Lords allowed the plaintiff's claim. Although the Lords disagreed over what role public policy should play in the common law, all the Lords agreed that in this case, nervous shock was reasonably foreseeable and recoverable. Lord Wilberforce compared the facts of this case with those cases allowing recovery for nervous shock when the plaintiffs have come upon the aftermath of an accident and witnessed the carnage. In this case, the plaintiff arrived at the hospital within hours of the accident and saw her family members in severe distress. One child was screaming, another crying, their faces cut and dirty. A third lapsed into unconsciousness at the sight of his mother. Her husband was sitting with his head in his hands, his shirt, covered in mud and oil, hanging from him. As stated by Lord Wilberforce "[t]here can be no doubt that these circumstances, witnessed by the appellant, were distressing in the extreme and were capable of producing an effect going well beyond that of grief and sorrow".<sup>256</sup>

*McLoughlin* has taken the law regarding recoverability for nervous shock one step beyond its prior limit. It has not, subject to the judgment of Lord Bridge, removed arbitrary cut-offs to the recoverability of reasonably foreseeable nervous shock. However, *where* the limit will be drawn is now uncertain and will depend upon judicial interpretation of the judgments in *McLoughlin*.

### 5. Recovery for Pure Economic Losses

Unlike recovery for nervous shock, there is no generally accepted principle for the recovery of pure economic losses. For most judges and commentators,<sup>257</sup> the application of a simple foreseeability test would expose defendants "to a liability in an indeterminate amount for an indeterminate time to an indeterminate class".<sup>258</sup> Economic loss cases have been decided on an *ad hoc* basis with no obvious unifying principle. It has been argued that no one principle is desirable: cases should be grouped into categories and different principles applied to each group.<sup>259</sup> Courts have been willing to allow recovery for pure economic losses in cases where the facts do not suggest problems of extended liability

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<sup>256</sup> *Supra* note 254, at 301.

<sup>257</sup> Recent articles and books include B. FELDTHUSEN, *supra* note 4; J. SMITH, *supra* note 5; Smillie, *supra* note 194.

<sup>258</sup> *Ultramarine Corp v. Touche*, 255 N.Y. 170, at 179 (1931) (Cardozo C.J.).

<sup>259</sup> See B. FELDTHUSEN, *supra* note 4.

for the defendants. However, this approach overlooks two concerns. The first problem is that indeterminate liability is not the only issue in cases involving economic losses. Before a court decides to impose liability on a defendant for a plaintiff's economic losses, it must satisfy itself that the benefits of this loss-shifting outweigh its costs. The second problem relates to the gradual accumulation of cases and increased litigation. Even though an individual case may not involve a crushing burden for that particular defendant, the adoption of any principle allowing recovery may open the "floodgates" to countless analogous cases.

The most significant recent Commonwealth decision regarding economic loss recovery is *Junior Books Ltd. v. Veitchi Co.*<sup>260</sup> This case has received wide comment and will, accordingly, be only briefly discussed here.<sup>261</sup> The plaintiffs entered into a contract with principal contractors for the construction of a warehouse. The principal contractors sub-contracted for the laying of the warehouse floor. The floor was defective, resulting in economic losses to the plaintiff. These losses consisted of the costs incurred to re-lay the floor and the profits lost during the time of repairs. The plaintiffs sued not the principal contractors but the sub-contractors. On the question of whether this claim was actionable, the House of Lords, with one dissent, allowed the claim. The Lords accepted as fact that the defective floor neither caused property damage nor posed any risk of injury to persons or property. In allowing the claim, the Lords emphasized the close proximity of the parties to minimize any fear of "indeterminate liability". Lord Fraser, for example, stated:

The proximity between the parties is extremely close, falling only just short of a direct contractual relationship. The injury to the respondents was a direct and foreseeable result of negligence by the appellants. The respondents, or their architects, nominated the appellants as specialist sub-contractors and they must therefore have relied on their skill and knowledge.<sup>262</sup>

Lord Roskill listed several factors<sup>263</sup> to stress the proximity between the parties. These included the fact that the defendants had particular knowledge of the plaintiffs' requirements and had been specifically nominated by the plaintiffs as sub-contractors. Lord Brandon, in a strong dissent,<sup>264</sup> stated that a positive judgment would represent a radical

<sup>260</sup> [1982] 3 All E.R. 201 (H.L.).

<sup>261</sup> See, e.g., Cohen, *Bleeding Hearts and Peeling Floors: Compensation for Economic Loss at the House of Lords*, 18 U.B.C.L. REV. 289 (1984); Holyoak, *Torts and Contract after Junior Books*, 99 L.Q.R. 590 (1983); Smith, *Economic Loss and the Common Law Marriage of Contracts and Torts*, 18 U.B.C.L. REV. 95 (1984); Waddams, *Tort Liability for Economic Loss: Junior Books Ltd. v. Veitchi Co. Ltd.*, 9 CAN. BUS. L.J. 101 (1983-84).

<sup>262</sup> *Supra* note 260, at 204.

<sup>263</sup> *Id.* at 213-14.

<sup>264</sup> *Id.* at 218.

departure from long-established authority and would give rise to serious practical difficulties.

*Junior Books* represents a significant extension of negligence law affecting both the law of tort and contract. It highlights the points made above with respect to the manner in which courts approach economic loss cases. Once satisfied that there is a close proximity between the parties and that there will not be indeterminate liability, courts occasionally allow economic loss recovery without regard to the policies or purposes unique to this type of dispute. In *Junior Books*, for example, one may legitimately question the purpose behind the decision. Why allow a plaintiff who has a contractual recourse against a principal contractor to pursue a tort claim against a sub-contractor? What standard of care or limits of liability will be imposed on the sub-contractor's tort duty? Should it be the standard set in the contract or one suggested by tort law? How will this tort suit affect existing insurance contracts or the future insurability of the sub-contractor?

Canadian tort law has not yet embraced the *Junior Books* solution. In *City of Kamloops v. Nielsen*<sup>265</sup> Madame Justice Wilson reviewed the economic loss debate. Her conclusion was that unlike the English law following *Junior Books*, Canadian law has followed the majority judgment in *Rivtow Marine Ltd. v. Washington Iron Works*.<sup>266</sup> In that case, the majority of the Supreme Court of Canada rejected the plaintiff's claim for reasonably foreseeable economic loss flowing from a defective product, allowing only its claim for those losses resulting from a special duty to warn the plaintiff of the defect. It is illuminating to note that Lord Roskill in *Junior Books* referred approvingly to the dissenting judgment in *Rivtow Marine* which did allow for recovery of economic losses on a wider basis.

In *Attorney General of Ontario v. Fatehi*<sup>267</sup> the Supreme Court, while acknowledging the difficulties involved in the economic loss cases, avoided the entire issue by characterizing the plaintiff's loss as damage to property and not pure economic loss. The plaintiff, the provincial Crown, was the owner of a provincial highway and was responsible for its maintenance. The defendant's negligence resulted in a two-car collision, strewing the highway with gasoline, broken glass and other debris. The highway was cleaned at the Crown's expense and at trial this cost was recovered from the defendant driver. The Ontario Court of Appeal<sup>268</sup> reversed the trial judgment. Madame Justice Wilson, then a member of the Court of Appeal, treated these facts as a case of pure economic loss incurred in order to prevent future physical damage to the highway. Consistent with her later judgment in *Kamloops*, Madame

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<sup>265</sup> *Supra* note 113.

<sup>266</sup> [1974] S.C.R. 1189, 40 D.L.R. (3d) 530.

<sup>267</sup> 31 C.C.L.T. 1, 15 D.L.R. (4th) 132 (S.C.C. 1984).

<sup>268</sup> 34 O.R. (2d) 129, 127 D.L.R. (3d) 603 (C.A. 1981).

Justice Wilson regarded the Canadian case law as being restrictive in its approach to economic loss recovery. However, her judgment in the case was based not on the economic loss issue but on the lack of a duty owed by the defendant driver to the Crown. Mr. Justice Thorson dismissed the plaintiff's claim on the basis of the exclusionary rule for economic losses. Mr. Justice Brooke, in dissent, treated this not as a case of economic loss but of damage to property. It was this dissenting view which was accepted by the Supreme Court of Canada in its decision to restore the trial judgment and allow the Crown's claim. Mr. Justice Estey, in *obiter*, discussed the economic loss issue without offering a resolution.

There have been a few other post-*Junior Books* Canadian decisions. In *Buthmann v. Balzer*<sup>269</sup> plaintiffs who purchased a defective house from builders were not permitted to succeed in tort in order to avoid contractual terms excluding representations and warranties. Although *Junior Books* was discussed and expressly not followed, it hardly seems applicable in any event in view of the express contractual terms. Two other judgments allowed economic loss recovery on rather wide grounds without reference to either *Junior Books* or the larger debate. In *Gold v. DeHavilland Aircraft Ltd.*<sup>270</sup> and *Interocean Shipping Co. v. M/V Atlantic Splendour*<sup>271</sup> the Courts allowed recovery for economic losses based on the tests of "directness" and "foreseeability". In *Gold* this approach resulted in a successful suit by an airline against a company that manufactured an airplane leased by the airline. The airplane crashed and the plaintiff claimed that although it had suffered no property loss, there was a decline in customer confidence and resultant economic losses. In *Interocean Shipping*, shipowners, whose ships had been delayed from loading cargo by the defendant's negligence, were permitted to sue for economic losses. With respect, the test of directness employed in these judgments seems inadequate to resolve the policy problems inherent in the economic loss cases.

One area of economic loss recovery with a long history is the action *per quod servitium amisit*. The Supreme Court of Canada's decision in *R v. Buchinsky*<sup>272</sup> has reaffirmed the continued existence of this tort, which provides employers with compensation for damages suffered as a result of personal injuries sustained by their employees. Although *Buchinsky* specifically upheld the right of the Crown to sue when members of the Canadian Armed Forces have been injured, it also, as I have argued elsewhere,<sup>273</sup> implicitly recognized that the tort is not to be confined to situations where menial servants have been injured. The

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<sup>269</sup> 25 C.C.L.T. 273, [1983] 4 W.W.R. 695 (Alta. Q.B.).

<sup>270</sup> 25 C.C.L.T. 180, [1983] 6 W.W.R. 229 (B.C.S.C.).

<sup>271</sup> 26 C.C.L.T. 189 (F.C. Trial D. 1983).

<sup>272</sup> 22 Man. R. (2d) 121, 145 D.L.R. (3d) 1 (S.C.C. 1983).

<sup>273</sup> Klar, *supra* note 127.

case is also of note in view of the *dicta* by Dickson J. (as he then was) which questioned the continued usefulness of the action *per quod* in today's society.<sup>274</sup>

#### F. Conduct of the Plaintiff

##### 1. Contributory Negligence

###### (a) Failure to Wear a Seat Belt

Despite some judicial resistance,<sup>275</sup> a plaintiff, whose injuries have been worsened as a result of his failure to wear a seat belt or some other safety device, is generally held to have been contributorily negligent. Over the past several years, the number of reported cases in which plaintiffs' damages have been reduced for this reason outnumber those cases where the seat belt defence has been rejected.<sup>276</sup> The reduction in the plaintiffs' awards have fluctuated between ten and twenty-five percent. The theoretical basis for the reduction and its size are interesting matters. In *Chamberland v. Fleming*<sup>277</sup> a canoeist drowned when his canoe was overturned by the bow wave of the defendant's motorboat. The canoeist was not wearing a life jacket and the Court found that had he been, he probably would not have drowned. In these circumstances, the Court decided to reduce the damages awarded under the *Fatal Accidents Act*<sup>278</sup> by twenty-five percent. Girgulis J. suggested that the courts adopt, as a matter of policy, a limit of a twenty-five percent reduction for these types of cases. This recommendation was based on the reasoning that it was the defendant's negligence alone which caused the accident, the plaintiff's fault only affecting the loss which he suffered. Under contributory negligence legislation all that is required is that the parties' respective faults contributed to the damage or loss. Apportionment will be based on the respective degree of fault and, if it is not possible to differentiate between the parties in this respect, the apportionment shall be equal. In arriving at its apportionment

<sup>274</sup> Other recent *per quod* cases are *Davidson v. Pun*, 21 C.C.L.T. 1, 137 D.L.R. (3d) 181 (B.C.S.C. 1982); *Everett v. King*, 34 B.C.L.R. 27, 20 C.C.L.T. 1 (S.C. 1981).

<sup>275</sup> See, e.g., *Genik v. Ewanylo*, 3 Man. R. 317, 12 C.C.L.T. 121 (C.A. 1980).

<sup>276</sup> The plaintiffs' damages were reduced in *Stamp v. The Queen*, 47 O.R. (2d) 214, 10 D.L.R. (4th) 687 (C.A. 1984); *Berge v. Langlois*, 5 C.C.L.I. 204, 6 D.L.R. (4th) 766 (Ont. C.A. 1984); *Ducharme v. Davies*, 29 Sask. R. 54, [1984] 1 W.W.R. 699 (C.A.); *Shaw v. Roemer*, 51 N.S.R. (2d) 229, 134 D.L.R. (3d) 590 (C.A. 1982); *Chamberland v. Fleming*, 54 A.R. 291, 29 C.C.L.T. 213 (Q.B. 1984); *Schmidt v. Sharpe*, *supra* note 146. They were not reduced in *Holohan v. Dunfield*, 38 N.B.R. (2d) 431, 138 D.L.R. (3d) 267 (Q.B. 1982); *Colborne v. Llewellyn*, 133 D.L.R. (3d) 284 (N.S.S.C. 1982).

<sup>277</sup> *Supra* note 276.

<sup>278</sup> R.S.A. 1980, c. F-5.

decision, all that ought to concern the court is the extent of the blameworthiness of the parties, with no regard being paid to any artificial attempt to assess degrees of causation. The question is not which party's conduct caused more of the injury — causation in this sense being absolute and not a matter of degree — but which party departed more significantly from the standard of care required. In other words, is it a greater departure from the standard of care expected of a reasonable person not to wear a seat belt or to drive a car without due caution? I think that most would agree that a failure to wear a seat belt is not as blameworthy as a failure to drive reasonably and hence that a greater share of the blame would be placed on the shoulders of the negligent motorist. In my respectful opinion, adoption of a fixed upper limit would not be a helpful step. Although it may be true for the seat belt cases that the plaintiff's fault in contributing to his loss is outweighed by the defendant's fault in causing the accident, there may be other situations in which the reverse is true. The courts should retain the flexibility to apportion fault as they deem just and equitable, without being hindered by an arbitrary upper limit.

*Ducharme v. Davies*<sup>279</sup> presented an unusual seat belt issue. The plaintiffs were injured in a motor vehicle accident caused by the defendant driver's negligence. The driver of the plaintiffs' vehicle and her mother, one of the passengers, were found contributorily negligent for failing to use their seat belts and their damages were reduced by fifteen percent. The other injured passenger was the driver's three-year-old daughter who, at the time of the accident, was lying unrestricted on top of a picnic cooler in the back seat of the car. The defendants argued that the mother's failure to ensure that her daughter was properly fastened by a seat belt had contributed to her daughter's injuries. The infant plaintiff could not, of course, be held contributorily negligent due to her young age; however, could her mother's negligence be imputed to her so as to reduce her damages? The Saskatchewan Court of Appeal, *per* Cameron J.A., correctly held that a mother's negligence cannot be imputed to her child so as to reduce the latter's damages. A parent can, however, be considered a concurrent wrongdoer where her negligence, in conjunction with the negligence of other wrongdoers, has contributed to her child's injuries. In such circumstances, the child can add the parent as a defendant or even if he does not, one of the other wrongdoers can claim contribution from the parent for the parent's share of the child's damages. Normally, this situation would result in the child being able to collect full damages from any of the wrongdoers, without concern with the problem of contribution between the wrongdoers.<sup>280</sup> However, where there is "guest passenger" legislation, as in Saskatchewan, an added complication presents itself. If the host driver's

<sup>279</sup> *Supra* note 276.

<sup>280</sup> See discussion on multiple causes *supra*.

negligence cannot be considered to amount to "wilful and wanton misconduct",<sup>281</sup> a guest passenger cannot recover damages from the host driver. Similarly, in such a case, the guest passenger is identified with the host driver and the former's recovery is reduced by the extent of the latter's negligence.<sup>282</sup> As a result, the other wrongdoers are entitled to a reduction of the passenger's damages in proportion to the driver's negligence. The Saskatchewan Court of Appeal in *Ducharme* decided that this possibility had not been considered by the parties at trial and, therefore, it could not be successfully raised on appeal.<sup>283</sup> Mr. Justice Brownridge, in dissent, held that the pleadings did not preclude this approach and while he conceded that it had not been argued, His Lordship was prepared to allow the defendants such relief.

## 2. *Volenti Non Fit Injuria*

There have not been any new developments with respect to the *volenti* defence. The defence continues to be restrictively applied by the courts<sup>284</sup> and only rarely succeeds. Even though the *volenti* defence in Canada requires at least an implied agreement between the parties that the victim would, in the event of injury, waive his right of action against the defendant,<sup>285</sup> it is interesting to note that the courts have occasionally refused to give effect to even express agreements of this sort. In *Crocker v. Sundance Northwest Resorts Ltd.*<sup>286</sup> an exemption clause that was considered to be broad enough to release the defendant from liability was not given effect because the plaintiff had not read it, did not know of its existence and it had not been brought to his attention. In *Delaney v. Cascade River Holidays*<sup>287</sup> an exemption clause was upheld; however, there was a strong dissent by Nemetz C.J.B.C. who, for reasons similar to those advanced in *Crocker* would not give effect to the exemption clause.<sup>288</sup>

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<sup>281</sup> *The Vehicles Act*, R.S.S. 1978, c. V-3 (replaced by S.S. 1983, c. V-3.1).

<sup>282</sup> *Contributory Negligence Act*, R.S.S. 1978, c. C-31, s. 8.

<sup>283</sup> If the issue had been raised, the Court would have been faced with an interesting question. The guest passenger section applies between the driver and the passenger. The mother's fault in this case, however, can be seen to relate more to her duty as a parent than as a driver. There is, therefore, strong support for the argument that the guest passenger section would not apply and that the mother could be held liable on the basis of ordinary rather than gross negligence.

<sup>284</sup> See, e.g., *Schmidt v. Sharpe*, *supra* note 146.

<sup>285</sup> The leading case is *Car & Gen. Ins. Corp. v. Seymour*, [1956] S.C.R. 322, 2 D.L.R. (2d) 369.

<sup>286</sup> *Supra* note 144.

<sup>287</sup> *Supra* note 213.

<sup>288</sup> See also *Dyck v. Manitoba Snowmobile Assn.*, 15 Man. R. (2d) 404, 136 D.L.R. (3d) 11 (C.A. 1982), *aff'd* (not yet reported, S.C.C., 23 May 1985); *Wurban v. Lipak*, 40 A.R. 1, 23 C.C.L.T. 37 (Q.B. 1982).

### 3. *Ex Turpi Causa*

Although rarely successful, the defence of *ex turpi causa* is available to defendants in tort actions. It tends to arise in the same circumstances that would support a successful *volenti* defence and accordingly its importance is diminished. It was recently raised with success in *Mack v. Enns*.<sup>289</sup> It was discussed, although rejected on the facts, by Mr. Justice Estey in *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*<sup>290</sup> Mr. Justice Estey did state that “[i]f the loss suffered by the respondent was occasioned by his voluntary participation in an illegal transaction, the Courts should not come to his assistance”.<sup>291</sup> The facts of *Canada Cement LeFarge* did not lend themselves to a full discussion of the scope of this defence so it remains unclear whether the Supreme Court would prefer a broad or narrow view of its application.

## IV. STRICT LIABILITY

### A. *Rylands v. Fletcher*

A more liberal approach to negligence law has resulted in declining interest in torts based on strict liability. As well, disputes which might be resolved by the principle of *Rylands v. Fletcher*<sup>292</sup> can often be dealt with by the expanding law of nuisance or even by the law of trespass. It is, therefore, not surprising that surveys of tort law have little to say concerning developments in the area of strict liability.

However, there have been a few recent cases based on *Rylands v. Fletcher*. In *Chu v. District of North Vancouver*<sup>293</sup> the defendant had a house and swimming pool constructed on his ravine lot. The earth removed from the ground during the construction was deposited within the boundaries of his lot, over the tip of the ravine. As a result of torrential rains the fill became saturated and slipped down the ravine, demolishing homes lower down the slope. The trial judge stated that neither negligence nor nuisance could be proved in this case as there was neither unreasonable care nor foreseeability of any danger. Meredith J. did, however, allow the owners of the demolished homes to succeed in an action based on *Rylands v. Fletcher*. He stated that although the use

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<sup>289</sup> 44 B.C.L.R. 145, 25 C.C.L.T. 134 (C.A. 1983), *modifying* 30 B.C.L.R. 337, 17 C.C.L.T. 291 (S.C. 1981). The trial judgment contains an extensive discussion of the policy underlying the defence.

<sup>290</sup> 24 C.C.L.T. 111, 145 D.L.R. (3d) 385 (S.C.C. 1983).

<sup>291</sup> *Id.* at 131, 145 D.L.R. (3d) at 404.

<sup>292</sup> L.R. 3 H.L. 330 (1868).

<sup>293</sup> 39 B.C.L.R. 112, 139 D.L.R. (3d) 201 (S.C. 1982), *modified* [1985] 2 W.W.R. 349 (B.C.C.A. 1984).

of the lot in this case was an "ordinary" use, it did result in an increased danger to others and was accordingly "non-natural". The interesting aspect of this case is the fact that the fill which escaped was not brought to the land by the defendant but was there naturally, a part of the land itself! Blackburn J.'s original judgment in *Rylands v. Fletcher* spoke of something which has been brought to, kept and collected on land and all of his examples were of such things.<sup>294</sup> Lord Cairns' judgment spoke of "introducing" something onto the land which was not naturally there.<sup>295</sup> In *Chu* Meredith J. concluded that the fill was non-natural because it "was not as found in nature" and it had been "redistributed".<sup>296</sup> This approach, if not an extension of *Rylands v. Fletcher*, is certainly a novel interpretation of it, although similar situations are unlikely to arise.

In *Wei's Western Wear Ltd. v. Yui Holdings Ltd.*<sup>297</sup> water which escaped from the line servicing the defendant's restaurant, into the plaintiff's premises was considered to be a non-natural use of land and actionable under *Rylands v. Fletcher*. The trial judge distinguished between water used in a residence and water used for a business in arriving at his decision.<sup>298</sup> Finally, in *Beutler v. Beutler*<sup>299</sup> escaping natural gas was held to fall under the principle of *Rylands v. Fletcher*. However, the independent act of a third party that caused the gas to escape provided a defence to the strict liability action. The gas company was also held not to have been negligent in failing to foresee or guard against the escape, although it was found negligent for failing to take adequate precautions after the escape had occurred.

### B. Strict Liability for Dangerous Things

In *Beaudry v. Tollman*<sup>300</sup> the defendant's loaded rifle accidentally discharged, injuring the plaintiff. The plaintiff argued that the defendant was strictly liable for any damages caused, as the rifle was a "dangerous chattel". The Court rejected this argument, finding that Canadian law does not recognize a dangerous, non-dangerous dichotomy in relation to chattels.

<sup>294</sup> L.R. 1 Ex. 265, at 279-80 (1868).

<sup>295</sup> *Supra* note 292, at 339.

<sup>296</sup> *Supra* note 293, at 119, 139 D.L.R. (3d) at 207.

<sup>297</sup> 50 A.R. 152, 5 D.L.R. (4th) 681 (Q.B. 1983).

<sup>298</sup> See also *Lyon v. Village of Shelburne*, 130 D.L.R. (3d) 307 (Ont. Cty. Ct. 1981), where strict liability was applied to sewage.

<sup>299</sup> *Supra* note 252.

<sup>300</sup> 48 A.R. 43, [1983] 6 W.W.R. 660 (Q.B.).

### C. Strict Liability for Animals

Strict liability applies to injuries caused by wild animals or by domesticated animals with known vicious propensities. Encounters with wild animals are relatively rare, generally occurring either in zoos and game farms or in national or provincial parks. The Crown, as an owner of wild animals in the latter settings, has an immunity from suit and hence there are no cases resulting from injuries caused in such situations.<sup>301</sup> Injuries caused by domestic animals are quite common but these cases are generally dealt with by ordinary negligence law, assisted by additional legislative provisions.

*Lewis v. Oeming*<sup>302</sup> is an interesting recent wild animal case. The plaintiff, an employee of the defendant's game farm, was mauled by a Siberian tiger. The plaintiff had gone into the tiger's cage to retrieve his girlfriend's cap that had been thrown into the cage by another employee. Although the tiger had been raised in captivity and was apparently usually friendly, Mr. Justice Miller categorized it as an inherently dangerous or wild animal, which would ordinarily fall under the principle of strict liability. His Lordship dismissed the plaintiff's action, however, because the animal had not escaped from the custody and control of its owner. Such an escape was viewed as a necessary requirement of the tort. In a very interesting annotation to *Lewis*, Professor Irvine reviewed the escape requirement for the application of strict liability in the context of wild animals.<sup>303</sup> As noted by Irvine, the "failure to control" requirement had not, until *Lewis*, been seen as a prerequisite to the action; it appeared clear that an actual physical escape, as in *Rylands v. Fletcher*, was not required in wild animal cases. According to *Lewis*, however, there must have been if not an escape from custody, at least an escape from control. Professor Irvine's analysis resulted in the conclusion that control, in this context, means "that degree of control as seems reasonably necessary to protect from harm any foreseeable victim of the animal".<sup>304</sup> In other words, was the manner of confinement or custody of the wild animal adequate to protect visitors from physical harm? As conceded by Professor Irvine, this rationale introduces fault into what is supposedly a tort of strict liability and if accepted, will inevitably lead to "the demise of strict liability in this context".<sup>305</sup> An alternative approach would be to argue that escape from custody and control ought not to be a requirement of strict liability for wild animals. An injured plaintiff need only prove that the defendant was the animal's

<sup>301</sup> See, e.g., *Wildlife Act*, R.S.B.C. 1979, c. 433, discussed in *Diversified Holdings Ltd. v. The Queen*, *supra* note 169.

<sup>302</sup> 42 A.R. 58, 24 C.C.L.T. 81 (Q.B. 1983).

<sup>303</sup> Irvine, *Annot.*, 24 C.C.L.T. 82 (1983).

<sup>304</sup> *Id.* at 85.

<sup>305</sup> *Supra* note 303, at 87.

owner or keeper and that it was wild. However, where the plaintiff's injury was caused by his own fault, as in *Lewis*, the courts might prevent the plaintiff from obtaining relief, as they did in *Rylands*. Such an approach would result in the plaintiff's action becoming one of negligence with the onus on the defendant to prove that he had taken reasonable steps to foresee and forestall the plaintiff's act.

#### D. Vicarious Liability

Whether a professional employed by another person is to be treated as an independent contractor or an employee for the purposes of the doctrine of *respondent superior* is still a troublesome issue. In *Wilson v. Vancouver Hockey Club*<sup>306</sup> a doctor employed by a hockey team to treat its players was held negligent for failing to inform a player immediately of a suspected cancerous growth. An action against the employer hockey team was dismissed, however, on the basis, *inter alia*, that the team did not exercise "control" over the doctor and that he was accordingly acting not as an employee but as an independent contractor. This decision can usefully be compared with *Robitaille v. Vancouver Hockey Club Ltd.*<sup>307</sup> where the same team was held vicariously liable for the negligence of team doctors. The Court in *Wilson* distinguished *Robitaille* on the basis of the different measure of control exercised by the employer over the doctors in the two cases.

### V. NUISANCE

#### A. Public Nuisance

Public nuisance, either as a crime<sup>308</sup> or as a tort, has uncertain limits. Its vague nature, enforceable by the use of the injunction, provides governments with an effective and potentially dangerous weapon that can be used to stop activities considered to be undesirable though not necessarily illegal. The *Attorney-General of British Columbia v. Couillard*<sup>309</sup> provides an excellent illustration. The Attorney General of British Columbia applied for an injunction to stop the defendants and *anyone else having knowledge of the injunction* from engaging in prostitution and a wide range of other activities including loitering, littering, fighting, screaming, shouting and swearing, in a geographically defined West End area of Vancouver. In a very strongly worded judgment,

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<sup>306</sup> 5 D.L.R. (4th) 282 (B.C.S.C. 1983).

<sup>307</sup> 30 B.C.L.R. 286, 124 D.L.R. (3d) 228 (C.A. 1981).

<sup>308</sup> *Criminal Code*, R.S.C. 1970, c. C-34, s. 176.

<sup>309</sup> 11 D.L.R. (4th) 567 (B.C.S.C. 1984).

concealing no lack of disdain for the defendants, McEachern C.J.S.C. granted the injunction and imposed a far-reaching order. Although the basis of the action was public nuisance, the judgment contained little discussion of what constituted a public nuisance either generally or specifically in this case. McEachern C.J.S.C. implied that what had occurred was a series of private nuisances that, taken together, constituted a public nuisance.

What was evident, however, from the authorities cited by the trial judge, was that the test for nuisance is difficult to articulate precisely. Quoting from *Sedleigh-Denfield v. O'Callaghan*,<sup>310</sup> McEachern C.J.S.C. stated:

It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living together in society, or, more correctly, in a particular society. The forms which nuisance may take are protean.<sup>311</sup>

It is of course for this reason that courts ought to proceed cautiously in this area lest, in an effort to protect the rights of some, the rights of others and ultimately all, are diminished. When the courts are requested to enjoin the future activities of persons, some of whom have not even been named in the action, regard must be paid to the important question of individual rights. One can judge whether the order in *Couillard* was adequate in this respect by noting its sweeping terms. The parties were restrained from:

1. engaging in any public conduct or activity apparently for the purposes of male or female prostitution, or any public conduct or activity which is calculated by itself or in conjunction with any conduct or activity by another person or persons to cause or contribute to a nuisance;
2. publicly offering themselves or publicly appearing to offer themselves directly or indirectly for the purposes of male or female prostitution by words or without words, or by actions, gestures, loitering or otherwise;
3. using or trespassing upon any public property including streets, lanes, sidewalks, boulevards, parks or school properties for the purposes of male or female prostitution;
4. trespassing upon any private property for the purposes of male or female prostitution;
5. engaging in any other conduct, including:
  - (i) loitering, littering, fighting, screaming, shouting or swearing;
  - (ii) using insulting, abusive, suggestive or obscene language or gestures;
  - (iii) assaulting, harassing, impeding, obstructing, threatening with violence or otherwise intimidating any person or child;
  - (iv) defecating, urinating or any form of carnal copulation including *fellatio* and sodomy;

so as to constitute or cause a nuisance.<sup>312</sup>

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<sup>310</sup> [1940] 3 All E.R. 349 (H.L.).

<sup>311</sup> *Id.* at 364.

<sup>312</sup> *Supra* note 309, at 575.

In addition, the Court expressed its willingness to extend the order beyond the geographical area requested "to large geographic areas of the city as may be required or threatened".<sup>313</sup>

*Stein v. Gonzales*<sup>314</sup> is an interesting sequel to *Couillard*. The prostitutes, apparently dissuaded from practising in the West End as a result of the injunction granted in *Couillard*, moved to the downtown area of Vancouver. The plaintiffs, who owned businesses in the area, sought a court injunction to stop the defendants from using public property in the vicinity of their businesses for the purpose of prostitution. In a more temperate judgment, McLachlin J. stated that the plaintiffs could not succeed in private nuisance as the use and enjoyment of their properties had not been interfered with.<sup>315</sup> On the matter of public nuisance, the trial judge emphasized the special or particular damage requirement of this tort that is necessary for a private individual's cause of action. On this ground, the plaintiffs failed. McLachlin J. stated that the plaintiff's damages were the same as those suffered by all the other businesses in the area. The financial losses which resulted from the deterioration of the neighbourhood were not unique to them. However, had access to their businesses been physically blocked off or otherwise impeded by the defendants' activities, the situation would have been different. McLachlin J. also made reference to some of the policy issues involved. She stated:

[T]he granting of an injunction to enjoin conduct which is within the purview of the Criminal Code, R.S.C. 1970, c. C-34, but not expressly prohibited by the Code is a serious step; it is appropriate that such an incursion into the public domain be supported by the Attorney General who is entrusted and charged with the duty of enforcing public rights. . . . it is doubtful whether this problem — essentially a public one — is best regulated by a series of private civil suits. The result of granting applications by private citizens to ban activities associated with prostitution in their particular neighbourhood might be to extend the protected area piecemeal without regard to larger policy considerations which may be apparent to those charged with the duty of maintaining the public peace and enforcing public rights.<sup>316</sup>

One might also add that as with all nuisance disputes, the critical issue is to balance the rights of the "offender" with the rights of the "offended".

There have been several other, less controversial, public nuisance cases. In *Attorney General of Manitoba v. Adventure Flight Centres Ltd.*<sup>317</sup> the operation of an airfield for ultra-light aircraft was deemed to constitute a public nuisance. Although the neighbours made several

<sup>313</sup> *Id.* at 576.

<sup>314</sup> 58 B.C.L.R. 110, [1984] 6 W.W.R. 428 (S.C.).

<sup>315</sup> It is interesting to note that in *Couillard* McEachern C.J.S.C. felt that private nuisances had been committed. One wonders why the fact that one case involved residences and the other businesses should matter in this respect.

<sup>316</sup> *Supra* note 314, at 115-16, [1984] 6 W.W.R. at 434.

<sup>317</sup> 22 Man. R. (2d) 142, 25 C.C.L.T. 295 (Q.B. 1983).

complaints concerning the defendant's activity, the most serious one, which eventually convinced the Court, dealt with the noise generated by the aircraft. The plaintiffs to this action were the Attorney General of Manitoba, on the relation of the municipality and a resident of the municipality who brought an action on behalf of himself and several other residents. The Attorney General was seeking an injunction and the residents were seeking damages. The Court, citing *Chiswell v. Charleswood*, awarded the injunction but refused damages, partly because the plaintiff resident could not show that either he, or the others whom he represented, suffered "particular, direct and substantial and special damage above that sustained by the public at large".<sup>318</sup> Assuming that the plaintiff residents were able to prove that they had suffered damage, it is interesting to question whether these damages might have been recoverable under private nuisance. Clearly, as residents and neighbours of the offending activity, it could have been argued that the use and enjoyment of their homes had been substantially interfered with by the noise. Does the fact that an activity is so offensive that it detrimentally affects a large class of persons deprive individuals within that class from suing for private nuisance? On principle, it appears that an activity can constitute both a private and public nuisance and that merely because it is a public nuisance does not deprive those with sufficient property interests from suing for private nuisance as well.<sup>319</sup>

Another case which raised the issue of the appropriate remedy was *Attorney General of Manitoba v. Campbell*.<sup>320</sup> The defendant owned a farm adjacent to an airport. Unhappy with the airport's noise and the municipality's refusal to buy his farm, the defendant constructed a steel tower on the corner of his farm directly in line with the airport's main runway. The structure prevented the use of the airport for night-time flights. The Attorney General of Manitoba, upon the relation of various municipalities and organizations, sought an interim injunction to compel the dismantling of the tower. What was the appropriate cause of action? The Court noted that the defendant had not breached any by-laws in building his tower. Scollin J. decided that the common law of nuisance applied and ordered the defendant to dismantle his tower. As the trial

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<sup>318</sup> *Id.* at 152, 25 C.C.L.T. at 311.

<sup>319</sup> See, e.g., *R. v. The Sun Diamond*, 25 C.C.L.T. 19 (F.C. Trial D. 1983), in which fuel oil had polluted the Port of Vancouver. The Crown was allowed to sue both in public nuisance and, to the extent that its own property was damaged, in private nuisance as well. See also *Soucy v. Breau*, 52 N.B.R. (2d) 44, 27 C.C.L.T. 168 (C.A. 1983). In that case, a pig farm which polluted a lake and the air, was held to constitute a private nuisance to owners of certain properties around the lake. See also *Irvine, Annot.*, 25 C.C.L.T. 296 (1983). Professor Irvine suggests that the plaintiffs in *Adventure Flight Centres* might have recovered damages either under the *Privacy Act*, C.C.S.M., c. P-125, or in trespass. *Id.* at 297.

<sup>320</sup> 24 Man. R. (2d) 70, 26 C.C.L.T. 168 (Q.B. 1983).

judge referred to the safety of the public, one can assume that the law of public nuisance was held to apply.<sup>321</sup>

### B. Private Nuisance

There are several factors which make nuisance a useful action for plaintiffs. It is a cause of action that cannot be narrowly defined. As stated by Mr. Justice Robins in *Nor-Video Services Ltd. v. Ontario Hydro*:<sup>322</sup>

The notion of nuisance is a broad and comprehensive one which has been held to encompass a wide variety of interferences considered harmful and actionable because of their infringement upon or diminution of an occupier's interest in the undisturbed enjoyment of his property. . . . The category of interests covered by the tort of nuisance ought not to be and need not be closed . . . to new or changing developments associated from time to time with normal usage and enjoyment of land.<sup>323</sup>

Where a plaintiff suffered substantial property damage or personal injury, damages and, in many instances, injunctions are available.<sup>324</sup> Negligence of the defendant is not required and defences such as the community benefit or the character of the neighbourhood are not available in such instances.<sup>325</sup> What few defences there are, such as statutory authority, are strictly construed.<sup>326</sup>

Rather than affecting any changes, the recent nuisance cases have affirmed these basic principles. Various types of activities and injuries have been classified as nuisances. Sewage back-up or seepage has been a frequent complaint and has given rise to at least three successful judgments.<sup>327</sup> Although the defence of statutory authority has often been

<sup>321</sup> See McLaren, Case Comment, 26 C.C.L.T. 326 (1983-84). Another public nuisance case reported recently is *Chessie v. J.D. Irving Ltd.*, 42 N.B.R. (2d) 192, 140 D.L.R. (3d) 501 (C.A. 1982). It was held in that case that a wharf which extended into a river was not a substantial and unreasonable interference with the rights of others so as to constitute a public nuisance.

<sup>322</sup> 19 O.R. (2d) 107, 84 D.L.R. (3d) 221 (H.C. 1978). This case was discussed in the last tort survey, *supra* note 68.

<sup>323</sup> *Supra* note 322, at 117, 84 D.L.R. (3d) at 231-32. Mr. Justice Robins' judgment provided a clear exposition of the issues in nuisance law. See also Mr. Justice Robins' more recent judgment in *Schenk v. The Queen*, 34 O.R. (2d) 595, 131 D.L.R. (3d) 310 (H.C. 1981). In Girard, *An Expedition to the Frontiers of Nuisance*, 25 MCGILL L.J. 565 (1979-80), the author suggests that the basis of nuisance law is changing from a "property" view to a "tort" view.

<sup>324</sup> This issue was discussed in *Miller v. Jackson*, [1977] 3 All E.R. 338 (C.A.).

<sup>325</sup> See, e.g., *Russell Transp. Ltd. v. Ontario Malleable Iron Co.*, [1952] O.R. 621, [1952] 4 D.L.R. 719 (H.C.).

<sup>326</sup> See, e.g., *Schenk v. The Queen*, *supra* note 323.

<sup>327</sup> *Buyssse v. Town of Shelburne*, 2 O.A.C. 366, 6 D.L.R. (4th) 734 (Div. Ct. 1984); *Von Thurn Und Taxis v. City of Edmonton*, [1982] 4 W.W.R. 457, 135 D.L.R. (3d) 434 (Alta. Q.B.); *Lyon v. Village of Shelburne*, *supra* note 298.

raised with respect to nuisances caused by municipal works, it has been consistently rejected. In one of these cases, *Von Thurn Und Taxis v. City of Edmonton*,<sup>328</sup> a nuisance claim was allowed despite the fact that the *Municipal Government Act*<sup>329</sup> expressly provided that compensation was to be paid to those persons detrimentally affected by municipal works. The Act specifically provided that the amount of compensation was to be ascertained, in cases of disagreement, by the Land Compensation Board. Other successful nuisance actions included a claim by farmers against the Minister of Transport for damage caused to fruit trees by salt used as a de-icing agent for the highways,<sup>330</sup> a claim for damage caused by encroaching tree roots<sup>331</sup> and a claim for damage caused by flooding waters from a drainage ditch.<sup>332</sup>

*Palmer v. Nova Scotia Forest Industries*<sup>333</sup> was a highly publicized and complex nuisance case. The plaintiffs sought an injunction to restrain the defendant company, which was engaged in the forest industry, from spraying certain areas in Nova Scotia with phenoxy herbicides. The injunction's purpose was to restrain future spraying programs for which the defendant was intending to apply for a licence. The plaintiffs, owners and residents of property, contended that the spray was toxic to humans and would cause serious health hazards. The action was a class action, with individual plaintiffs suing on their own behalf and on behalf of other residents in their respective areas. The trial judge allowed the class action procedure to be used, in itself an important aspect of the judgment. The cause of action upon which an injunction could be founded was a second matter of importance. The trial judge stated that the intended spraying, depending on its consequences, could be viewed as giving rise to a private nuisance, a trespass to land or a *Rylands v. Fletcher* claim. The plaintiffs' major difficulty was to prove, with a "sufficient degree of probability" that the spraying would create a serious risk to health (in order to support a private nuisance claim) or would result in a trespass or an "escape" of herbicide. The plaintiffs failed in their action. The trial judge held that there was no nuisance proved, either "real or probable", nor was there a probable trespass or a *Rylands v. Fletcher* claim.

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<sup>328</sup> *Supra* note 327.

<sup>329</sup> R.S.A. 1980, c. M-26, s. 307.

<sup>330</sup> *Schenck v. The Queen*, *supra* note 323.

<sup>331</sup> *Black v. Zager*, 18 Man. R. (2d) 22, 22 C.C.L.T. 231 (Q.B. 1982).

<sup>332</sup> *Koch Indus. Ltd. v. City of Vancouver*, [1982] 4 W.W.R. 92, 17 M.P.L.R. 303 (B.C.S.C.).

<sup>333</sup> *Supra* note 138.

## VI. PRODUCTS LIABILITY

Although the products liability tort is, in theory, governed by ordinary negligence law principles, there have been three developments in this area that have assisted plaintiffs in their actions against manufacturers of defective or dangerous products. The first concerns the manufacturer's duty to warn, the second, the manufacturer's liability for design defects and the third, the higher standard of care and reverse onus applicable in certain instances.

The duty to warn has taken on particular importance in products liability litigation. As with medical negligence litigation, it has provided a claimant with an additional basis upon which to seek compensation, unrelated to the question of negligence in the performance of the defendant's principle obligation. A reasonably designed or manufactured product which produces an injury in circumstances that would not ordinarily amount to actionable negligence may lead to a successful products liability claim if adequate warnings concerning the safe use or inherent risks of the product have not been communicated to the consumer. One of the more important recent cases on this issue is *Buchan v. Ortho Pharmaceutical (Canada) Ltd.*<sup>334</sup> The plaintiff, a twenty-three-year-old woman, suffered a stroke. She alleged that the stroke was caused by the contraceptive pills which had been manufactured by the defendant and which she had been taking for a little over a month before she became ill. There was a greater risk of stroke to women using the contraceptive pill than to those who did not use it, although the risk of stroke was quite small. The evidence, as accepted by the Court, established that the contraceptive pill had in this case caused or contributed to the plaintiff's stroke. The tort liability of the manufacturer of the pill was based not on its negligence in the manufacture or design of the drug but on its failure to (a) warn the plaintiff indirectly, by warning her prescribing doctor of the risks associated with the pill and (b) warn the consumer directly, by means of a package insert, of these risks. Although, as in the medical negligence cases, the defendant's duty to warn is viewed as part of its larger duty to take reasonable care and therefore part of negligence law, as a practical matter it appears that the defendant is *strictly liable* for his failure to give the required warning. There have not been any cases that have stated that the duty is to take reasonable care to warn, or that have relieved a defendant from his duty to warn on the basis of a lack of negligence. An important aspect of the defendant's duty in *Buchan* was the decision that this duty cannot be satisfied by warning the "learned intermediary", here, the doctor. As stated above, the defendant has two distinct duties in this respect, the duty to warn the doctor and the duty to warn the

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<sup>334</sup> 46 O.R. (2d) 113, 28 C.C.L.T. 233 (H.C. 1984).

consumer.<sup>335</sup> As with the duty to warn in the medical negligence cases, the manufacturer's breach of its duty must be shown to have been causally related to the consumer's injury. Would the consumer have used the product had she been warned of its risks? Modifying somewhat the objective test of causation in *Reibl v. Hughes*,<sup>336</sup> Mr. Justice Holland stated that the test of causation is the following: "[O]n a balance of probabilities, was there a reasonable likelihood that a reasonable person in the plaintiff's particular position, if fully informed, would not have taken the drug".<sup>337</sup> Applying this test, the trial judge stated that the plaintiff would not have taken the drug and accordingly, causation was established. The trial judge further found that the second duty to warn, the duty to warn the doctor, was also breached and was causative of the plaintiff's damages.<sup>338</sup>

The manufacturer's liability for design defects was discussed in *Gallant v. Beitz*.<sup>339</sup> A third party notice was issued against a manufacturer of a truck alleging a failure to "design a crashworthy vehicle". The tire iron bar was placed in a position behind the driver's seat which, arguably, constituted a danger to occupants of the vehicle in the event of a crash. Mr. Justice Linden stated:

It is clear . . . that a manufacturer is liable not only for products which are negligently made, but also for products which are negligently designed.

...

[O]ne must use care to design vehicles properly and one must also use care to minimize the harm that may result from accidents. . . . Since motor vehicle manufacturers know or should know that many of their vehicles will be involved in collisions and that many people will be injured in those crashes, they must turn their minds to this matter during the process of planning the designs of their vehicles and they must employ reasonable efforts to reduce any risk to life or limb that may be inherent in the design of their products.<sup>340</sup>

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<sup>335</sup> The manufacturer's duty to warn the doctor does not, of course, diminish the doctor's duty to warn the patient. Neither party can rely on the breach of the other party's duty to relieve itself of liability.

<sup>336</sup> *Supra* note 2.

<sup>337</sup> *Supra* note 334, at 147, 28 C.C.L.T. at 274.

<sup>338</sup> If the doctor knew or ought to have known of the risks himself without being warned by the manufacturer, then the manufacturer could not be held liable for failing to warn the consumer indirectly by warning the doctor. The defendant manufacturer could, however, still be held liable for not warning the patient directly by means of a package insert. If the consumer had already been warned of the risks by her doctor and decided to take the pill anyway, I would argue that this would defeat the contention that the manufacturer's duty to warn the consumer directly was causative of her damages. For other "failure to warn" cases, see *Setrakov Constr. Ltd. v. Winder's Storage & Distrib. Ltd.*, 11 Sask. R. 286, 128 D.L.R. (3d) 301 (C.A. 1981); *Holt v. P.P.G. Indus. Canada Ltd.*, 25 C.C.L.T. 253 (Alta. Q.B. 1983); *Cominco Ltd. v. Westinghouse Canada Ltd.*, 45 B.C.L.R. 26, 127 D.L.R. (3d) 544 (S.C. 1981); *Davidson v. Connaught Laboratories*, 14 C.C.L.T. 251 (Ont. H.C. 1980).

<sup>339</sup> *Supra* note 229.

<sup>340</sup> *Id.* at 89-90, 148 D.L.R. (3d) at 524-25.

The ability to argue a "design defect" greatly extends the consumer's chances of success in a products liability suit. The manufacturer is no longer necessarily exonerated simply because it is able to show that the product which it produced and which caused the injury was competently manufactured according to plan. If the design of the product line *itself* created unreasonable risks of injury, liability can be imposed.<sup>341</sup>

Certain products liability cases have imposed a high standard of care on the manufacturer and have even resulted in a shift of the burden of disproving negligence. In *Brunski v. Dominion Stores Ltd.*<sup>342</sup> the plaintiff suffered a serious eye injury as a result of an exploding Coca-Cola bottle. Mr. Justice Linden imposed a very high standard of care on the manufacturer of the bottle as well as the bottler, on the basis that such a standard was demanded of food producers and distributors. As well, Mr. Justice Linden stated that "bottlers of soft drinks labour under the onus of disproving negligence when something goes wrong with their products".<sup>343</sup> The same principle was applied to the manufacturer of the bottle and both were held liable for the plaintiff's injuries.<sup>344</sup>

## VII. OCCUPIER'S LIABILITY

Statutory enactments have gradually replaced the common law of occupier's liability and simplified litigation in this area. Four provinces now have statutes: Alberta,<sup>345</sup> British Columbia,<sup>346</sup> Ontario<sup>347</sup> and Manitoba.<sup>348</sup> Except for a limited number of special circumstances, liability for injuries suffered by a visitor on one's premises, as a result of the condition of the premises or activities conducted on the premises, is determined by the application of an ordinary standard of reasonable care. Perhaps as evidence that the statutory reform has accomplished its objective, there have not been many important cases decided pursuant to these statutes. In terms of the common law, there have been several recent judgments but these have merely applied fairly well-established principles and no important changes have been made.

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<sup>341</sup> On this question see Lemer, *Strict Products Liability: The Problem of Improperly Designed Products*, 20 OSGOODE HALL L.J. 250 (1982).

<sup>342</sup> 20 C.C.L.T. 14 (Ont. H.C. 1981).

<sup>343</sup> *Id.* at 21.

<sup>344</sup> Other products liability cases decided recently are *Chabot v. Ford Motor Co.*, *supra* note 125; *Junior Books v. Veitchi Co.*, *supra* note 260. *Junior Books* differs from the other cases discussed in this section as it involved economic losses suffered as a result of the replacement of a defective product rather than injuries caused by a defective product.

<sup>345</sup> *Occupiers' Liability Act*, R.S.A. 1980, c. O-3.

<sup>346</sup> *Occupiers' Liability Act*, R.S.B.C. 1979, c. 303.

<sup>347</sup> *Occupiers' Liability Act*, R.S.O. 1980, c. 322.

<sup>348</sup> *The Occupiers' Liability Act*, S.M. 1982-83-84, c. 29.

*Allison v. Rank City Wall Canada Ltd.*<sup>349</sup> is a judgment decided pursuant to Ontario's new legislation. The plaintiff, a single woman, was a resident of the defendant's apartment complex. She was brutally attacked by a person unconnected with the defendant while parking her car in the underground garage adjacent to the premises. The parking facilities were rented from the defendant and were part of the complex. The lease exempted the landlord from responsibility for personal injuries suffered by tenants on the premises. The trial judge applied the *Occupiers' Liability Act*<sup>350</sup> provisions and held that the occupier's duty "to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises . . . are reasonably safe"<sup>351</sup> had not been met. Smith J. held that the assault was reasonably foreseeable, that the defendant had been made aware of the plaintiff's concerns for security, that the defendant *had represented that the apartment complex was secure* and that effective security had not been provided. The trial judge further found that although the Act allowed an occupier to restrict, modify or exclude his duty of care, the exemption clause in the lease was not adequate as it was not specifically directed toward the negligence of the defendant. It is of importance to note that the trial judge was prepared to base the defendant's liability in tort, in contract or under the statutory provisions. The Ontario Act provides, however, that its provisions "apply in place of the rules of the common law that determine the care that the occupier of premises at common law is required to show for the purpose of determining his liability in law in respect of dangers to persons entering on the premises . . ."<sup>352</sup> These provisions can be displaced only where there would be, but for the Act, a higher standard of care imposed on the occupier.<sup>353</sup> It is therefore questionable whether, in this case, there could have been liability in tort apart from the provisions of the legislation.<sup>354</sup>

An interesting issue arose in *Turner v. City of Windsor*.<sup>355</sup> Does a by-law passed pursuant to the *Municipal Act*,<sup>356</sup> requiring an owner of a building to keep the public sidewalk in front of its building clear of snow and ice, make that person an "occupier" of the sidewalk for the purposes of the Ontario *Occupiers' Liability Act*? The Court decided that it did not. The by-law did not impose civil liability on the owner for his failure to clear the sidewalk. Therefore, that person could not

<sup>349</sup> 45 O.R. (2d) 141, 6 D.L.R. (4th) 144 (H.C. 1984).

<sup>350</sup> *Occupiers' Liability Act*, R.S.O. 1980, c. 322.

<sup>351</sup> S. 3.

<sup>352</sup> S. 2.

<sup>353</sup> S. 9.

<sup>354</sup> It is not unusual for courts to view occupier's liability legislation as supplementing, as opposed to supplanting, the common law. This position, in my view, is erroneous.

<sup>355</sup> 46 O.R. (2d) 174, 9 D.L.R. (4th) 123 (Cty. Ct. 1984).

<sup>356</sup> R.S.O. 1980, c. 302.

be considered an occupier of the sidewalk, that is, a person who had "responsibility for and control over" it.

A questionable judgment, decided pursuant to the Alberta *Occupiers' Liability Act*,<sup>357</sup> is *Houle v. City of Calgary*.<sup>358</sup> The plaintiff, a young boy, was seriously injured when he climbed over the wooden barricade surrounding an electrical substation and came into contact with a live power line. The substation was constructed and controlled by the City of Calgary although it was located on land owned by Canada Safeway Limited, the co-defendant. The defendants argued that the boy was a trespasser, a category maintained by the Alberta legislation (although abolished in the other provincial statutes) and that, accordingly, the duty which was owed was a duty not to wilfully or recklessly injure him.<sup>359</sup> The trial judge decided that this fact situation was subject not to the provisions of the legislation but to principles of ordinary negligence law. As I have argued elsewhere,<sup>360</sup> the definition section of the Alberta *Occupiers' Liability Act* clearly seems to have applied to these facts,<sup>361</sup> casting doubt on the trial judge's decision not to apply it. The Court found the City of Calgary liable, although the owner of the land was exonerated.

A recent judgment decided pursuant to the British Columbia Act<sup>362</sup> is *Crerar v. Dover*.<sup>363</sup> The plaintiff fell on the landing of a set of stairs at the defendant's beach resort. The Court decided that the defendant had breached his duty to take reasonable care pursuant to section 3 of the Act and apportioned liability between the parties. Although the trial judge stated that subsection 3(1) of the Act was "comprehensive in that it fully and clearly imposes a duty on an occupier and defines the standard of care necessary to that duty",<sup>364</sup> it is interesting to note that Lander J. described the danger posed by the design of the stairs as an "unusual" danger. There is nothing in the British Columbia Act which defines the duty to take reasonable care in terms of the previous common law requirement of "unusual" dangers although, on occasion, courts have had resort to this notion in defining the legislative standard of care.<sup>365</sup>

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<sup>357</sup> R.S.A. 1980, c. O-3.

<sup>358</sup> 44 A.R. 271, 24 C.C.L.T. 275 (Q.B. 1983).

<sup>359</sup> *Occupiers' Liability Act*, R.S.A. 1980, c. O-3, s. 12.

<sup>360</sup> Klar, *Annot.*, 24 C.C.L.T. 276 (1983).

<sup>361</sup> Paragraph 1(d)(ii) states that the definition of "premises" includes "poles, standards, pylons and wires used for the purposes of transmission of electric power or communications . . .".

<sup>362</sup> *Occupiers' Liability Act*, R.S.B.C. 1979, c. 303.

<sup>363</sup> [1984] 3 W.W.R. 236 (B.C.S.C.).

<sup>364</sup> *Id.* at 242.

<sup>365</sup> A few common law occupier's liability cases have been decided recently. *See, e.g.*, *Lavoie v. L'Exposition Regionale du Madawaska*, 44 N.B.R. (2d) 573, 145 D.L.R. (3d) 158 (C.A. 1983); *A.G. Can. v. Ahenakew*, 32 Sask. R. 161, [1984] 3 W.W.R. 442 (Q.B.); *Lanteigne v. Gallien*, 27 C.C.L.T. 232 (N.B.Q.B. 1984); *Parisian v. C.P.*

## VIII. BUSINESS TORTS

Although the use of the "business torts" is still relatively limited, recent cases demonstrate an increased awareness of the possible remedies they provide and the courts' more liberal interpretation of their provisions. While business disputes are more likely to be settled by the law of contract, labour law or legislation, tort law has a valuable residual role to play.

#### A. *Deceit or Fraud*

Two recent judgments have allowed plaintiffs who were induced into inadequate contracts by fraudulent misrepresentations to recover damages. In *Francis v. Dingman*<sup>366</sup> the plaintiffs, shareholders in a family-owned newspaper, sold their shares to their cousin, the defendant. The agreement stipulated that if the defendant resold the shares for a higher value within ten years of the sale, the plaintiffs would be entitled to a portion of the increase. Three years after this agreement, the defendant entered into negotiations with Thomson Newspapers Limited for the sale of the shares of the newspaper. The defendant sought a release from his obligations to the plaintiffs under the original agreement. He refused to tell the plaintiffs what offer had been made for his shares but suggested that the terms which he was offering to the plaintiffs for the release were fair in view of Thomson's offer. He also represented that if he divulged Thomson's offer, Thomson would not proceed with the purchase. The plaintiffs agreed to the defendant's offer and signed the release. They later discovered that the amount which they had accepted was far less than what they would have been entitled to receive under the terms of the original agreement. The Court held that the defendant's representations concerning both the "fairness" of his offer and Thomson's terms of disclosure were fraudulent. These representations were found to be untrue and made with the defendant's knowledge for the purpose of inducing the plaintiffs to sign the release. Furthermore, the plaintiffs had acted upon these representations to their detriment.<sup>367</sup> The tort of deceit had been established and the plaintiffs were entitled to damages.

In *C.R.F. Holdings v. Fundy Chemicals International Ltd.*<sup>368</sup> the defendant sold the plaintiff land on which "slag" was piled. The defendant stated that the slag would make excellent fill, omitting to mention that

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Ltd., 25 C.C.L.T. 105 (Sask. Q.B. 1983); *Wessel v. Kinsmen Club Inc.*, 37 O.R. (2d) 451, 21 C.C.L.T. 10 (H.C. 1982).

<sup>366</sup> 43 O.R. (2d) 641, 2 D.L.R. (4th) 244 (C.A. 1983).

<sup>367</sup> *Id.* at 658, 2 D.L.R. (4th) at 261.

<sup>368</sup> 33 B.C.L.R. 291, 19 C.C.L.T. 263 (C.A. 1981).

it was radioactive and that the possession of slag required a licence. The Atomic Energy Control Board discovered the presence of the material but concluded that it did not present a health hazard. The plaintiff complained, however, that the adverse publicity had greatly diminished the value of his property. The defendant was held liable for the tort of deceit. Unlike the defendant in *Francis*, the defendant had not expressly stated an untruth as the slag did, in fact, make excellent fill. However, it had failed to reveal the slag's unfavourable aspects. As stated by Mr. Justice Anderson, "to knowingly represent only favourable aspects without disclosing the fact that those favourable aspects are substantially qualified by restrictions and unfavourable aspects, known to the person making the representation, amounts to fraud".<sup>369</sup> The Court also found an alternative basis of liability in fraud:

The vendor of land on which is situate an inherently dangerous substance is guilty of fraud if he sells such land to a purchaser, without warning the purchaser that if the dangerous substance is not used or disposed of in a specified manner, or in the manner prescribed by statute, the purchaser and/or strangers to the contract may suffer a serious risk of injury.<sup>370</sup>

### B. *Inducing Breach of Contract*

The tort of inducing breach of contract has traditionally been applied where "a person without lawful justification knowingly and intentionally procures the breach by a party to a contract which is valid and enforceable and thereby causes damage to another party to the contract".<sup>371</sup> Two recent cases are noteworthy because they deviate from this principle. In *Unident Ltd. v. DeLong*<sup>372</sup> the defendant, an employee of the plaintiff dental equipment company, took an order for the sale of equipment to a dentist. The defendant left the plaintiff's employ before the order had been delivered and began working for a competitor. He then induced the dentist to cancel his order with the plaintiff and re-order the equipment from his new employer. In an action for inducing breach of contract, the Court found that although there had been a contract between the plaintiff and the dentist, it was unenforceable as it failed to meet the requirements of the *Sale of Goods Act*.<sup>373</sup> The issue for the Court was an interesting one. Can a defendant induce the "breach" of an unenforceable contract? As noted above, it is generally held that the contract breached must have been "valid and enforceable" in order for the tort claim to succeed. However, Mr. Justice Hallett allowed the

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<sup>369</sup> *Id.* at 321, 19 C.C.L.T. at 303.

<sup>370</sup> *Id.* at 323, 19 C.C.L.T. at 309-10.

<sup>371</sup> *Posluns v. Toronto Stock Exchange*, [1964] 2 O.R. 547, at 598, 46 D.L.R. (2d) 210, at 261 (H.C.).

<sup>372</sup> 50 N.S.R. (2d) 1, 131 D.L.R. (3d) 225 (S.C. 1981).

<sup>373</sup> R.S.N.S. 1967, c. 274, sub. 6(1).

plaintiff's action in this case and distinguished between a contract which is good in substance but unenforceable due to a technical defect and a contract which is voidable. The plaintiff's contract with the potential buyer was deemed to be valid, though technically unenforceable and the trial judge stated that there was no reason why the scope of the tort should not be extended to this situation. This approach gives rise to a curious situation, however, in that it places the person who induced the breach in a worse legal position than the party who actually committed it.

A more significant departure from the traditional formulation of the tort of inducing breach of contract occurred in *Nicholls v. Township of Richmond*.<sup>374</sup> The plaintiff, a salaried solicitor employed by the municipality, was dismissed from his job. This dismissal resulted in several alleged causes of action including wrongful dismissal, conspiracy and negligently inducing breach of contract. The plaintiff alleged that the negligence of several of the municipality's employees, including the mayor, seven aldermen and other administrators, led to his dismissal by the municipality. Is there a tort of "negligently inducing breach of contract"? Hitherto, the basis of the tort has always required an intentional or deliberate act by the defendant to induce the breach of contract. On a motion to strike out the allegations of conspiracy and negligence, the Court of Appeal, *per* Lambert J.A., held that:

[I]n appropriate circumstances an action may be sustained by a former employee against another employee of his employer, or against a corporate or municipal officer, based on an act, omission or misstatement, in breach of a duty of care, that results in economic loss to the former employee through discharge from employment.<sup>375</sup>

Mr. Justice Lambert described the law of negligence as a law of general application and not a law of "specific instances". The boundaries of the law are defined by the principle of foreseeability in conjunction with practical policy decisions which might limit liability. Lambert J.A.'s statements support the impression that courts are allowing the law of negligence to expand in such a fashion as to obscure the boundaries not only of tort and contract but of the individual torts themselves. It is potentially more advantageous for plaintiffs to avoid the individual torts with their defined elements and to plead their cause in negligence. Although the Court of Appeal refused to strike out the plaintiff's statement of claim, it should be noted that at trial, on the merits, the plaintiff's action for inducing breach of contract failed.<sup>376</sup> McLachlin J. found that the municipality and its employees had acted lawfully in terminating the plaintiff's employment and had lawfully exercised

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<sup>374</sup> 43 B.C.L.R. 162, 145 D.L.R. (3d) 362 (C.A. 1983).

<sup>375</sup> *Id.* at 167-68, 145 D.L.R. (3d) at 368.

<sup>376</sup> [1984] 3 W.W.R. 719 (B.C.S.C.).

their rights and duties, taking reasonable care to ensure that the plaintiff's rights were not violated. The plaintiff's dismissal was held not to have been wrongful, although he was entitled to damages because of the employer's failure to give him reasonable notice or payment in lieu of notice.

### C. *Intimidation*

*J.C. Kerkhoff & Sons Contracting Ltd. v. XL Ironworks Co.*<sup>377</sup> was an action for the tort of "three-party" intimidation. This tort has been defined as follows:

A commits a tort if he delivers a threat to B that he will commit an act or use means *unlawful as against B*, as a result of which B does or refrains from doing some act *which he is entitled to do*, thereby causing damage either to himself or to C.<sup>378</sup>

Where the damage is a damage to B, it is a two-party intimidation; where the damage is a damage to C caused by B (the intermediary) because of a threat made to B by A, it is a three-party intimidation.

In *Kerkhoff* the defendant trade union Local (A) threatened to withhold its labour from a construction site if a specific sub-contractor (B) agreed to work on the project for a non-union general contractor (C). As a result of this threat and despite the fact that the sub-contractor had previously agreed to work for the general contractor, the sub-contractor withdrew from the project. The general contractor sued the sub-contractor for breach of contract and sued the union for intimidation.

Was the threat unlawful? The Court held that it was. Pursuant to the collective agreement the union had no right to refuse to work on the project. According to *Rookes v. Barnard*,<sup>379</sup> a similar type of case, the plaintiff ought to have succeeded. Mr. Justice Dohm, however,

*Potash Co. v. Government of Saskatchewan.*<sup>380</sup> He held that as the union reasonably believed that its threat was lawful, that is, that it had a right to refuse to work, the plaintiff's case failed. In *Central Canada Potash* Martland J. stated:

[T]he tort of intimidation is not committed if a party to a contract asserts what he reasonably considers to be his contractual right and the other party, rather than electing to contest that right, follows a course of conduct on the assumption that the assertion of right can be maintained.<sup>381</sup>

As recognized by Mr. Justice Dohm, however, *Central Canada Potash*

<sup>377</sup> 26 C.C.L.T. 1 (B.C.S.C. 1983).

<sup>378</sup> CLERK & LINDSELL ON TORTS 729 (15th ed. Dias 1975).

<sup>379</sup> [1964] A.C. 1129 (H.L.).

<sup>380</sup> [1979] 1 S.C.R. 42, 88 D.L.R. (3d) 609 (1978).

<sup>381</sup> *Id.* at 87-88, 88 D.L.R. (3d) at 640.

involved not three-party but two-party intimidation. Mr. Justice Dohm held that this difference was of no relevance and that Martland J.'s qualification applied to either tort. There is, however, a practical distinction between the two types of intimidation that might have a bearing on this issue. In a two-party tort, where a defendant makes a threat which he reasonably believes is lawful, it is open to the plaintiff to resist the threat. The plaintiff can then recover damages if the threat is carried out and proves to have been unlawful. In a three-party tort, the situation is different. If the defendant threatens the intermediary with an act which he believes is lawful, unless the intermediary acts against the interests of the plaintiff (which he has a right to do) and the intermediary yields to the threat, applying Mr. Justice Dohm's approach, the plaintiff will be without recourse. The plaintiff will not be able to sue either the intermediary or the intimidator. As a matter of equity, a party injured as a result of an unlawful threat made to another person ought to have some remedy, whether or not the intimidator reasonably believed that the threat made was lawful.

#### D. *Conspiracy*

The tort of civil conspiracy involves an activity carried out by two or more persons which is tortious because of the involvement of more than one person. *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*<sup>382</sup> is a recent Supreme Court of Canada case that has shed considerable light on the nature of this tort. The plaintiff, a producer of lightweight aggregate for use in the production of concrete products, claimed that the defendants, companies which manufactured and supplied cement and concrete products, had conspired to commit an unlawful act resulting in the plaintiff's financial demise. The defendants had been charged with and pled guilty to offences under the *Combines Investigation Act*.<sup>383</sup> The tort of civil conspiracy can be committed in two ways. The first occurs where two or more persons combine for the *predominant purpose* of injuring the plaintiff. Such a claim is difficult to make. A combination entered into to further the self-interests of the "conspirators" will not be actionable, even though it may injure the plaintiff's interests, if the conduct of the parties was lawful. The claim failed in *Canada Cement LaFarge*. The second type of conspiracy, the one primarily in issue in this case, occurs when two or more persons combine to perform an unlawful act and this unlawful act results in injury to the plaintiff. This type of conspiracy has recently been abolished in England.<sup>384</sup> In *Canada Cement LaFarge* the parties

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<sup>382</sup> *Supra* note 290. See Klar, *supra* note 127.

<sup>383</sup> R.S.C. 1970, c. C-23, s. 31.1.

<sup>384</sup> *Lonrho v. Shell Petroleum Co.*, [1982] A.C. 173 (H.L. 1981).

had combined to commit an unlawful act, namely, an act in breach of the *Combines Investigation Act*. The trial Court and Court of Appeal<sup>385</sup> had both held that this resulted in the plaintiff's economic losses and allowed the plaintiff's claim. The Supreme Court, in addition to disputing this conclusion on the facts, stated that it was not enough to prove that damages resulted from the combination to commit the unlawful act but that it was also necessary to show that the unlawful conduct was "directed towards the plaintiff" and that "the defendants should know in the circumstances that injury to the plaintiff is *likely to* and does result".<sup>386</sup> According to the Court, these facts were not established and the plaintiff's action was dismissed.<sup>387</sup>

#### E. Action on the Case

In *Canada Safeway Ltd. v. Manitoba Food & Commercial Workers, Local 832*<sup>388</sup> the Manitoba Court of Appeal granted an injunction to Canada Safeway to restrain the publication, by the defendant, of a pamphlet containing the plaintiff's insignia, a specially designed "S". Although the Court conceded that there was no defamation, passing-off or infringement of trademark involved in the insignia's use, it held that there was an "appropriation of property" which should be enjoinable. For want of an alternative basis of liability, the Court considered that the "action on the case" applied and granted the injunction.

## IX. DEFAMATION

As with negligence law, the principles of Canadian defamation law are fairly broad. The substance of the case law deals with the application of these principles to a variety of interesting factual settings, often involving well-known political figures and other "celebrities". To this student of Canadian defamation law, it appears that Canadians are particularly "thin-skinned" and too often the preservation of reputations takes precedence over freedom of speech and expression. Recent defamation case law indicates mixed success for plaintiffs.

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<sup>385</sup> Unreported, B.C.C.A., 6 Mar. 1981.

<sup>386</sup> *Supra* note 290, at 126, 145 D.L.R. (3d) at 399 (emphasis added).

<sup>387</sup> Other "conspiracy" cases decided recently are *Maguire v. City of Calgary*, 43 A.R. 268, 146 D.L.R. (3d) 350 (C.A. 1983); *St. Anne-Nackawic Pulp & Paper Ltd. v. Canadian Paper Workers Union, Local 219*, 44 N.B.R. (2d) 10, 142 D.L.R. (3d) 678 (C.A. 1982).

<sup>388</sup> 22 Man. R. (2d) 12, 25 C.C.L.T. 1 (C.A. 1983). For a critique of this case, see Vincent, *Everything You Want in a Tort — and a Little Bit More*, 25 C.C.L.T. 10 (1983).

### A. *Elements of the Action*

#### 1. *What is Defamatory?*

Material which lowers a person's reputation in the eyes of right-thinking members of society is defamatory. For example, to suggest that an importer was selling canning lids which could cause death,<sup>389</sup> that an injured worker had exaggerated her injury and could have made greater efforts to secure re-employment,<sup>390</sup> that a policeman takes payoffs,<sup>391</sup> that a Cabinet Minister made use of confidential information for his own profits,<sup>392</sup> that a Deputy Attorney General sought to influence the course of justice to protect his friends,<sup>393</sup> that Planned Parenthood provided sex education films for teenagers that were pornographic and caused a steep rise in the illegitimacy and abortion rate for teenagers<sup>394</sup> or that a police officer was rude, officious, a moron and acted as if he were in the Nazi Secret Service,<sup>395</sup> is defamatory. In fact, a defamation action rarely fails on the ground that the impugned words are not defamatory. Critical comment, by definition, lowers a person's reputation, at least somewhat, in the eyes of others.

#### 2. *Publication*

In order to be actionable the defamatory material must be communicated to at least one person other than the defamed. Is the original publisher of a libel responsible for its re-publication by others? In *Basse v. Toronto Star Newspapers Ltd.*<sup>396</sup> allegedly defamatory material published about the plaintiff by the defendant newspaper was re-published by other media throughout the country. The Court held that the repetition of the words "was not a natural and probable consequence of the initial publication" and that "[t]here is no liability upon the original publisher of the libel when the repetition is the voluntary act of a free agent, over whom the original publisher had no control and for whose acts he is not responsible".<sup>397</sup> The Court further stated that "[a] jury should not take into account in assessing damages against the original publisher any damage done to the plaintiff by any defamatory matter for which the original publisher was not responsible".<sup>398</sup>

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<sup>389</sup> *Camporese v. Parton*, 47 B.C.L.R. 78, 150 D.L.R. (3d) 208 (S.C. 1983).

<sup>390</sup> *Wooding v. Little*, 24 C.C.L.T. 37 (B.C.S.C. 1982).

<sup>391</sup> *Booth v. B.C.T.V. Broadcasting Sys.*, 139 D.L.R. (3d) 88 (B.C.C.A. 1982).

<sup>392</sup> *Munro v. Toronto Sun Publishing Corp.*, 39 O.R. (2d) 100, 21 C.C.L.T. 261 (H.C. 1982).

<sup>393</sup> *Vogel v. C.B.C.*, 35 B.C.L.R. 17, 21 C.C.L.T. 105 (S.C. 1981).

<sup>394</sup> *Planned Parenthood v. Fedorik*, 135 D.L.R. (3d) 714 (Nfld. S.C. 1982).

<sup>395</sup> *Boyachyk v. Dukes*, 37 A.R. 199, 136 D.L.R. (3d) 28 (Q.B. 1982).

<sup>396</sup> 44 O.R. (2d) 164, 4 D.L.R. (4th) 381 (H.C. 1983).

<sup>397</sup> *Id.* at 165-66, 4 D.L.R. (4th) at 383.

<sup>398</sup> *Id.* at 166, 4 D.L.R. (4th) at 383.

### 3. Reference to the Plaintiff

In *Booth v. B.C.T.V. Broadcasting Systems*<sup>399</sup> the defendant broadcast an interview with a prostitute in which she said that two members of the Narcotics Squad "that are high up — right up on top", took payoffs. All eleven members of the squad sued for defamation. The trial judge allowed the claims of only the two senior officers, holding that the statements were capable of referring only to these two officers, not to junior members of the squad.

## B. Defences

### 1. Truth

Truth or justification is an absolute defence to an action for defamation. It was held in *Elliott v. Freisen*<sup>400</sup> that a statement does not have to be false to be defamatory; rather, the falsity of the statement is presumed, subject to the truth of the statement being proven by the defendant. This issue was important in *Elliott* to determine whether the plaintiff had given the defendant newspaper timely notice of his intention to sue and had commenced his suit in the appropriate time. The plaintiff had become aware of the defamatory material some time before he discovered that it was false. The Court held that the limitation period began when the plaintiff had knowledge of the libel, notwithstanding that at that time he was unaware of the falsity of the material.

### 2. Absolute Privilege

The defence of absolute privilege protects publishers of defamatory and false statements from legal liability even though the material may be maliciously motivated and irrelevant. It is for this reason that the defence ought to be restrictively limited. One can justifiably question whether the interest of "free and unfettered" speech, even in judicial or legislative proceedings, requires this immunity.

In *Boyachyk v. Dukes Ltd.*<sup>401</sup> the defendant wrote a letter of complaint concerning the plaintiff to the Chief of Police. The letter was very abusive and, according to the facts of the case, apparently totally unwarranted. The Court held that this was an occasion of absolute privilege. The *Police Act*<sup>402</sup> provided for a complaint procedure that the Court decided was a "judicial proceeding in its broadest sense". Undoubtedly, had

<sup>399</sup> *Supra* note 391.

<sup>400</sup> 1 O.A.C. 376, 6 D.L.R. (4th) 338 (C.A. 1984).

<sup>401</sup> *Supra* note 395.

<sup>402</sup> R.S.A. 1980, c. P-12.

the occasion not been one of absolute privilege, a qualified privilege would have applied. In view of the extreme nature of the defence of absolute privilege, it may be considered inappropriate for it to have been applied to this type of occasion.

### 3. Qualified Privilege

The widest defence to a defamation action is that of qualified privilege. Various types of occasions give rise to a qualified privilege, the qualification consisting of a lack of malice on the defendant's part. While it is clear that a newspaper cannot claim this defence on the grounds that it has a "duty" to provide information to the public,<sup>403</sup> there can be situations apart from the special provisions of defamation acts,<sup>404</sup> which do entitle newspapers to this defence. In *Camporese v. Parton*<sup>405</sup> a consumer article in a newspaper stated that an importer of canning lids was risking the public's health. This article was held to be protected by the defence of qualified privilege on the grounds that there was a duty on the part of the author and her publisher to communicate this fact to their readers who had a legitimate interest in receiving the information. It must be noted, however, that this finding was based on the particular facts of the case and ought not to be viewed as a modification of the Supreme Court of Canada's decision in *Banks v. Globe and Mail*.<sup>406</sup> In *Camporese* the column had previously commended the plaintiff's product to the readers and had dealt with aspects of the canning controversy. This situation gave rise to a "special duty" on the part of the defendants to communicate this new information to the public.

In *Wooding v. Little*<sup>407</sup> a newspaper published an article that was very critical of the British Columbia Workers' Compensation Board. The chairman of the Board wrote a letter to the editor defending the Board and commenting on four alleged cases of abuse discussed in the original article. The Court held that the chairman's letter was written in defence of his own and the Board's interest and was protected by a qualified privilege. In *Planned Parenthood v. Fedorik*<sup>408</sup> defamatory statements made by a member of a pro-life movement about the Planned Parenthood Federation were not protected by qualified privilege. The Court, citing *Stuart v. Bell*, held that the defendant did not have a moral or social duty to make her comments and applied the following test:

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<sup>403</sup> *Globe & Mail Ltd. v. Boland*, [1960] S.C.R. 203, 23 D.L.R. (2d) 277; *Banks v. Globe & Mail Ltd.*, [1961] S.C.R. 474, 28 D.L.R. (2d) 343.

<sup>404</sup> These provisions also apply to court and parliamentary proceedings.

<sup>405</sup> *Supra* note 389.

<sup>406</sup> *Supra* note 403.

<sup>407</sup> *Supra* note 390.

<sup>408</sup> *Supra* note 394.

“[Would] the great mass of right-minded men in the position of the defendant have considered it their duty, under the circumstances [to make the communication]?”<sup>409</sup>

#### 4. Fair Comment

To succeed with the defence of fair comment, the impugned material must be comment rather than fact, based on facts truly stated, dealing with a matter of public interest, objectively fair and not actuated by malice. The defence failed in *Planned Parenthood*<sup>410</sup> and *Vogel v. C.B.C.*<sup>411</sup> In the latter case, statements alleging that the Deputy Attorney General had interfered with the judicial system were held to be fact and not comment and even if comment, based on untrue facts and made in bad faith.

### C. Damages

*Munro v. Toronto Sun Publishing Corp.*<sup>412</sup> dealt with various aspects of the damage assessment process in defamation actions. Holland J. stated that the function of damages in libel actions is to compensate the plaintiff, although punitive damages can also be awarded as a deterrent. In addition, compensatory damages can be “aggravated” by the defendant’s conduct, both before and after the libel. An apology can be taken into consideration in mitigation of damages, either pursuant to a specific statutory provision<sup>413</sup> or at common law. The Supreme Court of Canada’s rough upper limit for non-pecuniary damages<sup>414</sup> is not restricted to personal injury actions but is applicable to all assessments of non-pecuniary damages, including defamation actions. Having set out these precedents, the Court awarded the plaintiff \$25,000.00 in compensatory damages against all defendants, an additional \$25,000 in aggravated damages against those defendants whose conduct had indicated malice or gross negligence and an additional \$25,000.00 in punitive damages against those who deliberately intended to harm the plaintiff. In terms of both the aggravated and punitive damages, the employer of the defendants was held to be vicariously liable. Professor Irvine has written an instructive and critical annotation commenting on these findings.<sup>415</sup>

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<sup>409</sup> *Id.* at 722.

<sup>410</sup> *Supra* note 394.

<sup>411</sup> *Supra* note 393.

<sup>412</sup> *Supra* note 392. See Irvine, *Annot.*, 21 C.C.L.T. 264 (1982).

<sup>413</sup> *Libel and Slander Act*, R.S.O. 1980, c. 237.

<sup>414</sup> See section on damages, *infra*.

<sup>415</sup> Irvine, *supra* note 412.

#### D. *Injurious Falsehood*

The tort of injurious falsehood was dealt with in one recent case. In *Frank Flaman Wholesale Ltd. v. Firman*<sup>416</sup> the defendants published a chart showing the superiority of their product to that of the plaintiff's. The plaintiff claimed that the chart "falsely, fraudulently and with intent to mislead" contained false information and representations with respect to the comparative performances of the two products. The plaintiff sought and obtained an interlocutory injunction enjoining the defendants from distributing this chart. The trial judge described the requirements of the tort as follows:

An action such as this lies when one "maliciously" publishes, orally or in writing, a false statement in disparagement of another's goods and causes the other special damage. The plaintiff must allege (i) the making of the statement; (ii) its falsity; (iii) that it was published maliciously in the sense of without lawful justification or excuse or with a dishonest or improper motive, and (iv) that he had suffered special damage thereby.<sup>417</sup>

The Court held that a "general loss of custom or business, as distinct from loss of specific customers" was sufficient special damage to sustain the action.<sup>418</sup>

#### X. ASSESSMENT OF DAMAGES

The assessment of damages, especially in complex personal injury cases, remains the most difficult and unsatisfying aspect of tort law. The Supreme Court of Canada's trilogy,<sup>419</sup> discussed in the last tort law survey,<sup>420</sup> has been somewhat helpful in establishing some basic "ground rules".<sup>421</sup> However, the major difficulty remains; courts are required to gaze far into the future and to anticipate unpredictable circumstances. In *MacDonald v. Alderson*<sup>422</sup> Mr. Justice Hall referred to the process in the following terms:

[I]n my opinion, it makes no sense at all to have in place a modest and predictable system of compensation for injured workers and victims of crime while, at the same time, tolerate a risky, difficult and wholly irrational system of Court sponsored assessments for persons injured by reason of a motor vehicle upon a highway. It is all the more nonsensical when such persons

<sup>416</sup> 20 C.C.L.T. 246 (Sask. Q.B. 1982).

<sup>417</sup> *Id.* at 257.

<sup>418</sup> For a comment on this case, see *Irvine, Annot.*, 20 C.C.L.T. 247 (1982).

<sup>419</sup> *Supra* note 1.

<sup>420</sup> *Supra* note 68.

<sup>421</sup> Some judges seem to feel that the pre-trilogy situation was somewhat less complex than the post-trilogy period. *See, e.g.*, *MacDonald v. Alderson*, 15 Man. R. (2d) 35, 20 C.C.L.T. 64 (C.A. 1982) (O'Sullivan J.A.).

<sup>422</sup> *Id.*

may receive no compensation at all or compensation away [sic] out of proportion to that received by injured workers and victims of crime. In addition, there is in place in each province universal health care services and welfare plans.<sup>423</sup>

As almost every tort law judgment contains a damage assessment portion, it would be too lengthy a process to review them all. This section, therefore, will briefly review the main heads of damage with reference to recent judgments in each area.

#### A. *Special Damages*

The assessment of special damages, that is, pre-trial pecuniary losses, is generally an uncontroversial matter. There can be some difficulties with the reasonableness of the plaintiff's claims or with respect to some of the more technical, legal rules.<sup>424</sup>

#### B. *The Jury*

In *Howes v. Crosby*<sup>425</sup> the Ontario Court of Appeal re-affirmed that it is improper for a judge to give guidance to the jury on an appropriate range of damages to be assessed. At trial, Mr. Justice Linden had given the jury "guideposts", noting upper and lower limits, but also advising the jury that they were free to totally ignore everything that he had said. MacKinnon A.J.C.O. stated:

[S]o long as we accept the jury as part of the trial system and the trier of fact in this area of law, they should be left free from the "guidance"

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<sup>423</sup> *Id.* at 40-41, 20 C.C.L.T. at 70.

<sup>424</sup> *Baart v. Kumar*, 45 B.C.L.R. 17, 146 D.L.R. (3d) 764 (S.C. 1983), held that pre-trial losses were special and not general damages. *Dziver v. Smith*, 41 O.R. (2d) 385, 146 D.L.R. (3d) 314 (C.A. 1983), held that extraordinary nursing and domestic services rendered to the plaintiff by a relative can be claimed by the plaintiff if there was either a contractual or moral obligation to repay the relatives for these services. The claim can be made at common law despite a remedy provided to the relatives in the *Family Law Reform Act*, S.O. 1978, c. 2, s. 60. *Fraser v. Ross*, 59 N.S.R. (2d) 254, 4 D.L.R. (4th) 22 (S.C. 1983), held that a claim for non-contractual services can only be made by the injured party and not by those who provided these services. *Marriott v. Carson's Constr. Ltd.*, 56 N.S.R. (2d) 665, 146 D.L.R. (3d) 126 (S.C. 1983), held that, in special circumstances, a plaintiff's failure to mitigate his losses due to his impecuniosity, should not disentitle him from recovering the resulting damages. In *Murray Harbour Seafoods Inc. v. The Queen*, 136 D.L.R. (3d) 367 (F.C. Trial D. 1982), the plaintiff's damages were reduced due to his failure to mitigate. In *Toronto Transit Commission v. Orfanois*, 27 C.C.L.T. 132 (Ont. H.C. 1983), the plaintiff was allowed to recover for the loss of the use of a bus, despite the fact that it kept extra buses in reserve to replace those which had to be withdrawn from service.

<sup>425</sup> 29 C.C.L.T. 60, 6 D.L.R. (4th) 698 (Ont. C.A. 1984).

of the opinion of the particular Judge as to the appropriate range for their awards, even though he makes it clear his opinion is not binding on them.<sup>426</sup>

The Court of Appeal was also critical of the trial judge's comment to the jury that "most judges" would find that the plaintiff's contributory negligence had been relatively minor and not equal to the defendant's negligence. The judgment indicates that juries are very much "on their own" in arriving at damage assessments and cannot be guided by the trial judge or by counsel. The Court of Appeal did state, however, that it would not be in error for a trial judge to instruct the jury as to the Supreme Court of Canada's rough upper limit for the assessment of non-pecuniary losses.

### C. General Damages

#### 1. *Loss of Future Earnings*

One of the difficult assessments that is required by our lump sum method of compensation is the plaintiff's pre-accident and post-accident prospects. In the best of cases it is a speculative venture; in cases involving infants or others with no working pattern, it becomes fanciful.

In *Houle v. City of Calgary*<sup>427</sup> the plaintiff was eight years old at the time of his accident. He lost an arm and was assessed as having a fifty to sixty percent total disability. The Court considered evidence presented by two economists and a specialist in rehabilitation medicine on the issue of the child's pre-accident and post-accident employment prospects. There was a wide variance in the assessments of the child's loss, one prediction even suggesting that the child's injury would lead to increased motivation and hence an income gain. The trial judge held that the plaintiff would probably have amounted to no more than an unskilled labourer and assessed his damages on this basis. In a critical comment to this case,<sup>428</sup> I suggested that it does not seem fair to predict that a child of normal intelligence, but from an unfortunate social background, would be no more successful than an unskilled labourer. Instead, in such cases the plaintiff's prospects should be related to the national average income for Canadians in full employment.<sup>429</sup> In a rejoinder, Professor Bruce argued that to ignore family background or other factors could itself be considered unfair and that I overstated my case by suggesting that evidence predicting the future employment prospects of young people is not sufficiently reliable.<sup>430</sup> Without now

<sup>426</sup> *Id.* at 75, 6 D.L.R. (4th) at 710.

<sup>427</sup> *Supra* note 358.

<sup>428</sup> Klar, *supra* note 360.

<sup>429</sup> See Gibson, *Repairing the Law of Damages*, 8 MAN. L.J. 637 (1983).

<sup>430</sup> Bruce, *The Calculation of an Infant's Lost Earnings: Houle v. Calgary*, 21 ALTA. L. REV. 291 (1984).

engaging in a full debate on this interesting issue, I would like to express two concerns that I have with respect to this issue. The first concerns the reliability of the evidence. As a non-expert I would certainly defer to Professor Bruce and others, however, it does appear from the judgment in *Houle* that despite expert testimony there was an unacceptably wide range of opinion concerning young Houle's loss (or gain) of earnings. Secondly, I would emphasize the role of ideology and values in the damage assessment process, as a counter-weight to the value of scientific data. Tort law essentially reflects society's values, one of which is that all children have equal opportunity for advancement. This view ought to be considered by the courts in assessing damages, even if it may occasionally result in overcompensating plaintiffs.<sup>431</sup>

It is not necessary for a plaintiff to prove his pre-accident employment prospects on a balance of probabilities in order for him to recover some damages. In *Hearndon v. Rondeau*<sup>432</sup> the plaintiff's ambition had been to become a helicopter pilot. He was twenty-four years old when he was injured and had only taken the training for his pilot's licence. The Court of Appeal conceded that it was more than likely that the plaintiff would never become a pilot but nevertheless awarded the plaintiff damages for the loss of a reasonable chance to have done so.<sup>433</sup>

## 2. Contingencies

To choose an entirely speculative amount for loss of future earnings and to then reduce it by another arbitrary figure representing "contingencies" is, in many cases, absurd. Courts are occasionally expressing their unhappiness with the conventional contingencies deduction of approximately ten to twenty percent. In *Blackstock v. Patterson*<sup>434</sup> Mr. Justice Anderson, citing Mr. Justice Dickson (as he then was) in *Andrews v. Grand & Toy Alberta Ltd.*, regarded reducing the loss of future earnings by a contingency deduction as follows:

First, in many respects, these contingencies [that is, matters such as unemployment, illness, accidents and business depression that can affect future

<sup>431</sup> The problem of calculating the loss of future earnings arises in every serious personal injury case. In cases involving young children courts arbitrarily choose amounts, usually quite moderate in size. *See, e.g.*, *Wipfli v. Britten*, 22 C.C.L.T. 104 (B.C.S.C. 1982), *modified* 29 C.C.L.T. 240, [1984] 5 W.W.R. 385 (B.C.C.A.), where the child was injured during birth. He was totally and permanently incapacitated. The Court calculated his future loss of earnings at \$10,000.00 per annum for no apparent reason.

<sup>432</sup> 54 B.C.L.R. 145, 29 C.C.L.T. 149 (C.A. 1984).

<sup>433</sup> *See also* *Freitag v. Davis*, [1984] 6 W.W.R. 188 (B.C.C.A.), where the plaintiff received damages for the loss of the opportunity of returning to commercial fishing, which the Court did not consider to have been a likely possibility.

<sup>434</sup> 35 B.C.L.R. 231, [1982] 4 W.W.R. 519 (C.A.).

earnings] implicitly are already contained in an assessment of the projected average level of earnings of the injured person, for one must assume that this figure is a projection with respect to the real world of work, vicissitudes and all. Second, not all contingencies are adverse, as the above list would appear to indicate. As is said in *Bresatz v. Przibilla* (1962), 108 C.L.R. 541, in the Australian High Court, at p. 544: "Why count the possible buffets and ignore the rewards of fortune?" Finally, in modern society there are many public and private schemes which cushion the individual against adverse contingencies. Clearly, the percentage deduction which is proper will depend on the facts of the individual case, particularly the nature of the plaintiff's occupation, but generally it will be small. . . .<sup>435</sup>

### 3. Cost of Future Care

In serious personal injury cases, the costs of future care are often the largest items of damages. In *Andrews*<sup>436</sup> Mr. Justice Dickson (as he then was) insisted that the plaintiff had a right to his own private home, despite the increased cost to the defendant, if that was what was most suitable. The judgment in no way set a precedent for all seriously disabled plaintiffs in terms of an automatic right to an individual home. The reasonableness and practicality of such a decision must be proved on the evidence. In *MacDonald v. Alderson*<sup>437</sup> the British Columbia Court of Appeal was critical of the trial judge's decision to award the plaintiff the costs required to maintain an individual home, an automobile and other costly items. The Court of Appeal found that the evidence indicated that the plaintiff would be best served in a type of private group-home and significantly reduced the trial judge's assessment.

### 4. Non-pecuniary Damages

The assessment of non-pecuniary losses is the most unsatisfying aspect of the assessment process and is one area in which I believe that the trilogy has created considerable difficulty. As this issue has been addressed elsewhere,<sup>438</sup> I will only briefly review it here. I must emphasize, however, that it has created difficulty in almost every serious personal injury case.

In the trilogy, the Supreme Court reviewed three theoretical bases for assessing damages for non-pecuniary losses: the conceptual, the personal and the functional approach. Ultimately, the Court accepted

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<sup>435</sup> *Id.* at 243-44, [1982] 4 W.W.R. at 533. See also Mr. Justice Anderson's useful comments in *Penso v. Solowan*, 35 B.C.L.R. 250, [1982] 4 W.W.R. 385 (C.A.).

<sup>436</sup> *Supra* note 1.

<sup>437</sup> *Supra* note 421.

<sup>438</sup> Klar, *Developments in Tort Law: The 1981-82 Term*, 5 SUP. CT. L. REV. 273 (1983); Klar, *The Assessment of Damages for Non-pecuniary Losses*, 5 C.C.L.T. 262 (1979); McClachlin, *What Price Disability? A Perspective on the Law of Damages for Personal Injury*, 59 CAN. B. REV. 1 (1981); Osborne, *Annot.*, 19 C.C.L.T. 3 (1982).

the functional approach: "Money is awarded because it will serve a *useful function* in making up for what has been lost in the only way possible, accepting that what has been lost is incapable of being replaced in any direct way."<sup>439</sup> Each of the three plaintiffs — two quadriplegics and a brain-damaged child — was awarded \$100,000 for their non-pecuniary losses. The Court described this amount as the "rough, upper limit" for the most seriously injured plaintiffs. In arriving at this figure no overt attention was paid to any "functional" considerations. After the trilogy, lower courts began to pay lip service to the functional approach but, in fact, assessed damages by taking \$100,000 as the benchmark for the most seriously injured and comparing that to the injuries of individual plaintiffs.

The Supreme Court decided *Lindal v. Lindal*<sup>440</sup> in order to correct an erroneous award of \$135,000 made at trial and to re-affirm its commitment to the functional approach. The Court clarified certain points;<sup>441</sup> for example, the Court held that the award must be moderate, should not exceed the upper limit except in exceptional circumstances and should be awarded if it could serve a useful function. However, there was nothing in the judgment that assisted courts in arriving at the assessment. I have suggested elsewhere<sup>442</sup> that a functional approach could be adopted and have noted what types of factors the courts might consider. It appears, however, that for reasons of impracticality or undesirability, courts do not feel comfortable with a functional approach and would like to simplify the assessment in some way.

Two recent judgments have brought the issue into focus. In *Knutson v. Farr*<sup>443</sup> the plaintiff was in a "vegetative" state. No amount of money could provide solace or substitute activities for all those amenities of life lost to this plaintiff. Does the functional approach apply and does it demand a "nil" award for non-pecuniary losses? The trial judge<sup>444</sup> held that the Supreme Court's functional approach was not directed towards the "unconscious" plaintiff and that *R. v. Jennings*<sup>445</sup> was still good law on this point. *Jennings* was taken as authority for the principle that an award for loss of amenities should be made even if the money will not provide solace to the victim. The Court of Appeal, in a two-one decision, took the functional approach to its logical conclusion and held that *Jennings* had been implicitly overruled by the trilogy decisions.

<sup>439</sup> *Andrews v. Grand & Toy Alberta Ltd.*, *supra* note 1, at 262, 83 D.L.R. (3d) at 476 (emphasis added).

<sup>440</sup> [1981] 2 S.C.R. 629, 129 D.L.R. (3d) 263.

<sup>441</sup> For example, the Court held that the award must be moderate, should not exceed the upper "limit" except in exceptional circumstances and should be awarded if it could serve a useful function.

<sup>442</sup> Klar, *Developments in Tort Law*, *supra* note 438, at 284-85.

<sup>443</sup> 55 B.C.L.R. 145, 30 C.C.L.T. 8 (C.A. 1984).

<sup>444</sup> 38 B.C.L.R. 291, [1982] 5 W.W.R. 114 (S.C.).

<sup>445</sup> [1966] S.C.R. 532, 57 D.L.R. (2d) 644.

The majority awarded the plaintiff \$15,000 based on the possibility that his condition might improve sufficiently in the future so as to permit him to enjoy some type of solace. Mr. Justice Esson, in a very thorough dissent,<sup>446</sup> concluded that the assessment was not governed by a strict functional theory and that there ought to be a "modest conventional award" of approximately \$25,000 in the case of the "unaware" plaintiff. This modest award was subject to being increased, however, by reference to the degree of unconsciousness, the prospect for improvement and the plaintiff's life expectancy.

Based on a logical application of a functional approach, the majority's judgment must be correct. Although it is difficult to be satisfied with a state of affairs in which a terribly injured person is not awarded damages for loss of amenities because he cannot appreciate life, we must resort to the primary goal of tort law damages — to compensate the plaintiff and not to punish the defendant. Presumably, a seriously injured plaintiff will receive full compensation for his pecuniary losses so that he will be taken care of for the remainder of his life with no financial burden to his relatives. An award for non-pecuniary losses over and above this amount can, in the case of a totally unaware plaintiff, provide extra funds for the victim's relatives or his eventual estate. Although one might feel that relatives should be compensated in this way, an ideal system would do this directly and candidly.

*Reynard v. Carr*<sup>447</sup> is a provocatively interesting judgment. The plaintiff was neither in a vegetative state nor totally disabled. His injuries were serious, had caused and would continue to cause him great pain and had greatly disrupted his life. Mr. Justice Bouck interpreted the trilogy in a way which restricted the functional approach and the rough upper limit to cases involving completely disabled plaintiffs who are adequately provided for by an award that would cover day-to-day costs of their future care. Plaintiffs who are not completely disabled are entitled to receive damages based on the personal approach for pain, injury, suffering and loss of enjoyment of life. The plaintiff's award in this case was in excess of \$400,000.

With respect, I do not think that the judgment has correctly interpreted the trilogy. It does not seem clear to me that the Supreme Court's desire for uniformity, moderation and a practical reason to award damages for non-pecuniary losses was restricted to totally disabled plaintiffs. It would even be difficult to decide who would qualify as being totally disabled in this respect. *Reynard* will not likely stand the test of time.<sup>448</sup>

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<sup>446</sup> *Supra* note 443, at 156, 30 C.C.L.T. at 21.

<sup>447</sup> 50 B.C.L.R. 166, 30 C.C.L.T. 42 (S.C. 1983).

<sup>448</sup> Other recent judgments which have dealt with non-pecuniary loss assessment are: *Wipfli v. Britten*, *supra* note 431; *Hohol v. Pickering*, [1984] 3 W.W.R. 673, 30 Alta. L.R. (2d) 333 (C.A.); *Crocker v. Sundance Northwest Resorts*, *supra* note 144;

#### D. Collateral Sources

The question of which of a plaintiff's non-tort benefits are collateral sources that must be deducted from the judgment is still relatively controversial. It is an issue which has been discussed in numerous recent judgments.<sup>449</sup> A useful summary of many of the recent cases is contained in *Wipfli v. Britten*.<sup>450</sup>

#### E. Fatal Accidents

Damages awarded to an estate of a deceased person are restrictively limited by provincial legislation to the pecuniary losses suffered by the deceased's estate as a result of his death.

The more important and hence more controversial damages which result from death are those suffered by the deceased's dependants. Provincial legislation with respect to these claims differs, although Ontario's *Family Law Reform Act*<sup>451</sup> contains the most detailed treatment of these damages. Ontario's legislation is not restricted to the rights of dependants in cases of fatal injury only but applies as well in cases of any injury to a "breadwinner".<sup>452</sup> As this is relatively new legislation, there have been numerous cases interpreting these provisions.<sup>453</sup>

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Bracchi v. Horsland, 44 B.C.L.R. 100, 147 D.L.R. (3d) 182 (C.A. 1983); Schmidt v. Sharpe, *supra* note 146; Beliveau v. Greg Phillips Trucking Ltd., 26 C.C.L.T. 196 (Ont. Ct. Ct. 1983).

<sup>449</sup> *Davidson v. Pun*, *supra* note 274, where a teacher's payments from his employer under the *School Act*, R.S.B.C. 1979, c. 375, were not deducted; *Chan v. Butcher*, 51 B.C.L.R. 337, 11 D.L.R. (4th) 233 (C.A. 1984), where employment disability benefits were taken into account; *Layden v. Cope*, *supra* note 83, where workers' compensation was not considered; *Cowan v. Sugar*, 27 C.C.L.T. 181, [1984] 1 W.W.R. 264 (B.C.S.C. 1983), where sick leave benefits were not deducted; *Greenwood v. Sparkle Janitor Service*, 43 B.C.L.R. 333, 145 D.L.R. (3d) 711 (S.C. 1983), where short term disability benefits were deducted; *Wipfli v. Britten*, *supra* note 431, where a subsidy for future care was not deducted; *Mandas v. Thomschke*, 44 B.C.L.R. 322, 145 D.L.R. (3d) 530 (S.C. 1983), where short term disability benefits were not deducted.

<sup>450</sup> *Supra* note 431.

<sup>451</sup> R.S.O. 1980, c. 152.

<sup>452</sup> One British Columbia case, *Dhaliwal v. Morrisette*, 32 B.C.L.R. 225, [1982] 1 W.W.R. 286 (S.C. 1981), allowed a child to claim for the loss of his mother's care and guidance after she was severely injured in a car accident. No authority was cited for the decision.

<sup>453</sup> See, e.g., *Reidy v. McLeod*, 30 C.C.L.T. 183, 11 D.L.R. (4th) 411 (Ont. H.C. 1984); *Re Butler Trucking Co. and Brydges*, 46 O.R. (2d) 686, 10 D.L.R. (4th) 275 (Div. Ct. 1984); *Seghers v. Double A Farms Ltd.*, 43 C.P.C. 193, 9 D.L.R. (4th) 273 (Ont. H.C. 1984); *Newton v. Serre*, 42 C.P.C. 284, 6 D.L.R. (4th) 320 (Ont. H.C. 1984); *Martin v. Wright*, 45 O.R. (2d) 317, 6 D.L.R. (4th) 335 (H.C. 1984); *Nielsen v. Kaufmann*, 28 C.C.L.T. 54 (Ont. H.C. 1984); *Schmidt v. Sharpe*, *supra* note 141; *Dionisi v. Dionisi*, [1983] I.L.R. 1-1677, 149 D.L.R. (3d) 563 (Ont. H.C.); *Montgomery v. Murphy*, 37 O.R. (2d) 631, 136 D.L.R. (3d) 525 (Ont. H.C. 1982); *Wessel v. Kinsman Club Inc.*, *supra* note 365.

The Supreme Court of Canada's judgment in *Keizer v. Hanna*,<sup>454</sup> decided at the same time as the trilogy, laid out the general principles applicable to fatal accident assessment. Many of the difficulties inherent in the assessment of personal injury damages apply equally to fatal accident assessments; there is the need to predict future events, such as employment prospects of the deceased, prospects of survivors, inflation, interest and life expectancies.<sup>455</sup>

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<sup>454</sup> [1978] 2 S.C.R. 342, 82 D.L.R. (3d) 449.

<sup>455</sup> Some of the more important cases are: *McNichol v. Mardell*, [1984] 5 W.W.R. 177, 32 Alta. L.R. (2d) 82 (C.A. 1983); *Miller v. Riches*, [1984] 2 W.W.R. 726, 5 D.L.R. (4th) 698 (Alta. C.A.); *Shaw v. Roemer*, *supra* note 274; *Stonehouse v. Gamble*, 44 B.C.L.R. 375, 24 C.C.L.T. 133 (C.A. 1982) (grandparent's contributions to child not taken into account); *Rose v. Belanger*, 25 Man. R. (2d) 277, [1984] 2 W.W.R. 505 (Q.B. 1983) (rough upper limit of \$100,000 applicable to non-pecuniary loss claim in fatal accident case); *Nichols v. Guiel*, 44 B.C.L.R. 155, 145 D.L.R. (3d) 186 (S.C. 1983) (punitive damages not allowed).

